Basu's

INDIAN PENAL CODE

74 YEARS
1938-2011

Eleventh Edition

ASHOKA LAW HOUSE
NEW DELHI (INDIA)

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N. D. BASU

Commentary on

INDIAN
PENAL
CODE

N. D. BASU

Commentary on
INDIAN PENAL CODE

[Act No. 45 of 1860]

As Amended

Alongwith
Scope, Procedure & Charges
framed under each section

General Editor
Chandrasekhar K
Advocate
(Revising Author of various standard commentaries)

Alongwith
Publishers Editorial Board

11th Edition
In Two Volumes

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A-252, Shivalik,
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Phones : 26689984 & 26684763
Fax : 26689254
E-mail : ashokalawhouse@yahoo.com

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Preface to the Eleventh Edition

We are extremely happy in placing before the legal fraternity Eleventh dition of Basu's Indian Penal Code.

N.D. Basu books are well known in the field of law, this edition of Indian enal Code is in its 74th year of publication, we are proud to be associated ith this book. While revising the book utmost care has been taken to keep he original essence of the Author while incorporating the dynamics of law ith Apex and High Court decisions including latest amendments ronounced.

Promulgation in the British Era, this 1960 Code has stood the test of ime, with constant and dynamic changes by way of Judicial and Executive ynamism, providing this branch of law wide and clear scope for effective mplementation, which is one of the pillars of Indian Legal system. A copius ndex has been added at the end of the book to make it more effective for its usy users to lay their fingers at the desired topic in the commentary ithout spending much time. Quotations from standard writers on riminology have been added. English Law has been given due importance eeping in view that our 'Criminal Justice System' is the product of British urisprudence. An added feature of this magna opus is that each section is acilitated with its procedure and charge.

As this branch of Indian Law holds the maximum case law, but keeping n view the brevity, it has been considered reasonable to give the law of rimes in brief but with all necessary material together with up-to-date case aw. Clarity of thought and lucidity of expression are its special features. otes and Commentaries under various Sections are sufficiently omprehensive, upto-date and to the point, supported by meticulous ollection of the latest case-law. This treatise has been designed to give the eaders a complete grasp and understanding of the general principles and egal provision relating to law of crimes prevalent in India.

It is hoped that the present edition shall like previous editions, receive he same appreciation from the Bench and the Bar and all those concerned ith the administration of Criminal Justice. Suggestions are welcomed so hat future editions may be made much more useful, up-to-date and omprehensive.

Revising Editor
&
Publishers Editorial Board

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Promulgation in the British era, this 1860 Code has stood the test of time, with constant and dynamic changes by way of Judicial and Executive dynamism, providing this branch of law wide and clear scope for effective implementation, which is one of the pillars of Indian legal system. A copious index has been added at the end of the book to make it more effective for its busy users to lay their fingers at the desired topic in the commentary without spending much time. Quotations from standard writers on criminology have been added. English law has been given due importance keeping in view that our Criminal Justice System is the product of British Jurisprudence. An added feature of this magnus opus is that each section is facilitated with its procedure and charge.

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Publishers Note to the Eleventh Edition

We are extremely happy to present this revised eleventh edition of our pride publication.

"INDIAN PENAL CODE" in the hands of our esteemed and respectful readers. Its first edition saw the light of the day in the year 1938 and has been acclaimed as a lucid exposition of the penal law in India. The previous editions of this book having been sold rapidly, the demand and sale pursuaded us to publish this eleventh edition. The text has been thoroughly revised, enlarged and made upto-date. Although this edition retains the features of the original work, yet it comprises of many relevant and the latest decisions of the Supreme Court and various High Courts systematically incorporated under several synopsis. These decisions have been classified under proper headings and sub-headings. Quotations from standard writers on criminology have been added. Latest relevant amendments to the statute have been incorporated at proper place. Index has been prepared with great care to answer quickly the needs of the busiest members of the bar and the bench.

Utmost care has been taken to render this treatise exhaustive and of real and immediate utility. It is hoped that this book will meet the requirements of not only of the bar and the bench, but also of the police, law schools, legal research institutions, prosecution, legal cells and any person deeply concerned with understanding the law of crimes, and especially the Indian Penal Code, 1860.

Publisher is always accountable to its readers to give them accurate, latest and the best. The responsibility is more in case of a Law publisher. He has to keep pace not only with the readers, editors and authors, but also with the time. Every sincere effort has been made to compose this book in a very legible manner on best paper for printing.

We sincerely invite valuable suggestions to improve the quality and utility of the next edition.

Publisher's Note
TO THE TENTH EDITION

In the Indian Courts most of the judgments pronounced are mainly on 'Indian Penal Code'. In view of this a number of writers have attempted to comment on this branch of law but few could reach the top and even lesser who scaled heights could sustain that pressure of expectations.

We are extremely happy in placing before the legal fraternity Tenth Edition of N.D Basu's Indian Penal Code.

We humbly put forward our sustained efforts to deliver as per our readers expectations and in our quest to make them expect more than what we have done in the past.

The purpose of the authors in preparing this commentary is to facilitate the work of busy legal fraternity. The work of this description is to help the judges, lawyers and others concerned with this branch of law to find out the law on any point with minimum of difficulty and fatigue. In view of this we have endeavoured to make the book easily readable and to serve as easy referencer.

Decisions of the Supreme Court and all High Courts, have been classified under proper headings and sub-headings. Quotations from standard writers on criminology have been added. English law has been given due importance keeping in view that our 'Criminal justice System' is the product of British Jurisprudence. In view of our readership throughout the country, all state and High Court amendments including the latest consequential amendments to the statute have been incorporated at proper place.

It is hoped that this edition will be applauded as a worthy successor to its predecessors and that it will deserve the approbation of the Bench and Bar as the previous editions did.

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It is hoped that this edition will be applauded as a worthy successor to its predecessors and that it will deserve the approbation of the Bench and Bar as the previous editions did.

Publisher's Note
TO THE NINTH EDITION

N.D Basu's "Indian Penal Code" was first published in the year 1938 and since then a number of successive edition have been published.

The fact that all the previous editions were rapidly sold out and appreciated utmost, necessitated the present edition.

With the activism of our Apex Court, to make this country a better place to live, various landmarks judgments have been pronounced ranging from social, economic, financial etc. All the concerned decision have been duly highlighted in this book.

While revising the book it is tried with care to include new materials which cropped up, due to other courts decisions and amendment in the Penal Code, at appropriate places. This edition has been made up to date by the information technology Act 2000 and in all respects including other amendments made by the Parliament.

Effects have also been made, to a possible extent to explain the relevant and allied provisions of some other law which have an impact on the law of Crimes. Not only the quality of the book has been maintained in this edition, effects have been made to emphatically bring out the latest judicial trends to counteract and remedy the mischief let loose upon the society.

It is hoped that the present edition shall like previous editions, receive the same appreciation from the Bench and the Bar and all those concerned with the administration of Criminal Justice.

Publisher's Note
TO THE EIGHT EDITION

N.D. Basu's "Indian Penal Code" First saw the light of the day in 1938 and has been acclaimed as a lucid exposition of the law contend in Indian Penal Code, 1860. Successive edition called for, since the publication of the first edition testify to its worth. The edition now being issued is the eighth.

The previous edition of this book having been sold out rapidly. The Publishers assigned to me the pleasant and interesting engagement of revising the book in its Eighth Edition. In complying with their request, I have, with due regard, taken notice of the original Author's plan and method of writing out, this very useful Book to the legal profession. This edition retains the features of the original work. The opportunity has accordance with, and incorporate, decisions up to date and to rewrite and enlarge the matter where ever necessary. The Central and State Amendments has been duly noticed. This index has been prepared with great care to answer quickly the needs of the busiest lawyer.

It is hoped that this edition with be applauded as a worthy successor to its predecessors and that it will deserve the approbation of the Bench and Bar as the previous editions did.

List of Abbreviations

A & E	Adolphus and Elis, 1834-1840; New Series, 1841-1852
AC	Appeal Cases, Law Report, from 1891—
ACJ	Accident Claims Journal
ACrC	Allahabad Criminal Cases
ACrR	Allahabad Criminal Rulings
Agra	Agra High Court Reports, 1866-1868
AIHC	All India High Court Cases
AHCGR (Cr)	Allahabad High Court General Rules (Criminal), 1911
AIR	All India Reporter, from 1914—
AIR SCW	All India Reporter Supreme Court Weekly
All Cr LR	All India Criminal Law Reporter
Alison	Alison's Criminal Law of Scotland
ALJR	Allahabad Law Journal Reports, from 1904—
All	Indian Law Reports, Allahabad Series, from 1876—
All Cr C	Allahabad Criminal Cases
All Cri R	Allahabad Criminal Reporter
All ER	All England Reports, from 1936—
All LJ	Allahabad Law Journal
All LR	Allahabad Law Reports
ALT	Andhra Law Times, from 1954—
ALT (cri)	Andhra Law Times (Criminal)
Andh WR	Andhra Weekly Reporter, from 1955—
Andhra	Indian Law Reports, Andhra Series
AOLO	Adaptation of Laws Order, 1950
APLJ	Andhra Pradesh Law Journal
App Cas	Appeal Cases, Law Reports, 1875-1890
Appx	Appendix
Archbold	Archbold's Criminal Law (35th Edn., 1962)
Ass	Indian Law Reports, Assam Series from 1949—

Assam LR	Assam Law Reports
Austin	Austin's Jurisprudence
AWN	Allahabad Weekly Notes, 1881-1906
B & A	Barnwell and Alderson, 1817-1822, K.B.
B & C	Barnwell and Cresswell, 1822-1830, K.B.
B & S	Best and Smith, 1861-1869, Q.B.
Bac Abr	Bacon's Abridgment of the law
Bacon	Bacon's Abridgment of the Law
Ank Cas	Banking Cases
BCM	Burma Court Manual, 1950
Beav	Beaven's Reports, 1838-1866, Rolls
Beng LR	Bengal Law Reports, 1868-1875
BHC	Bombay High Court, Reports, 1862-1875
Bih LJ	Bihar Law Journal
Bing	Bingham's Cases. 1834-1840, C.P.
Bishop	Bishop's Criminal Law
Blackstone	Blackstone's Commentaries on the Laws of England
BLJ	Burma Law Journal
BLJR	Bihar Law Journal Reports
Bom	Indian Law Reports, Bombay Series, from 1876—
Bom Cr C	Bombay High Court Criminal Cases, 1911—
Bom Cr Manual	Bombay High Court Criminal Manual, 1947
Bom LR	Bombay Law Reporter, from 1899—
Boul	Boulnoi's Law Reports, 1862-1875, Calcutta
Burma LR	Burma Law Reports. 1895-1908
Burr	Burrow's Reports. 1757-1771, K.B.
C & K	Carrington and Kirwan, 1843-1850, N.P.
C & M	Crompton and Meeson, 1832-1834, Exch.
C & P	Carrington and Payne, 1823-1841. N.P.
Cal	Indian Law Reports, Calcutta Series, from 1876—
Cald	Caldecott's Settlement Cases
Camp	Campbell's Reports, 1808-1816, N.P.
Car & M	Carrington and Marshman, 1840-1842. N.P.

CB	✍	Common Bench Reports, 1845-1856, C.P.
CCR	✍	Current Criminal Reports
Chand LR	✍	Chandigarh Law Reports
CHCR & O	✍	Calcutta High Court Criminal Rules and Orders, 1950
Cl & F	✍	Clark and Finnelly, 1831-1846. N.P.
CLJ	✍	Calcutta Law Journal, from 1905
CLR	✍	Calcutta Law Reports, from 1878-1883
Coke	✍	Coke's Reports, 1752-1816
Collect	✍	Collet's Comment on the Indian Penal Code
Comp Cas	✍	Company Cases
Cox	✍	Cox's Criminal Cases, from 1843
CPD	✍	Common Pleas Division,. Law Reports, 1875-1890
CPLR	✍	Central Provinces Law Reports, from 1905-1882
C & J	✍	Compton and Jervis, 1830-1832
Cr App R	✍	Criminal Appeal Reports, from 1908
Cr AR (SC)	✍	Criminal Appeals Reporter (Supreme Court)
Cr C	✍	Criminal Cases, 1929-1936
Cr LR (Mah)	✍	Criminal Law Reporter (Maharashtra)
Cr LR (Raj)	✍	Criminal Law Reporter (Rajasthan)
Cr LR (SC & MP)	✍	Criminal Law Reporter (S.C. & M.P.)
Cr LT	✍	Criminal Law Times
Cr PC	✍	Criminal Procedure Code
Cr R	✍	Criminal Rulings of the Bomaby High Courts, 1862-1910
Carnch	✍	Cranch's Reports, Supreme Court of the United States, 1800-1815
Cri LJ	✍	Criminal Law Journal of India, from 1904
Crimes	✍	Crimes
Cro Car	✍	Croke's Reports in the reign of Charles I
Cro Eliz	✍	Crcke's Reports in the reign of Ellizabeth
Cur LJ	✍	Current Law Journal
Cut CR (Cr)	✍	Cuttack Law Reports (Criminal)
Cut LT	✍	Cuttack Law Times
Cut WR	✍	Cuttack Weekly Reporter

Cutt	✍	Indian Law Reports, Cuttack Series, from 1949
CWN	✍	Calcutta Wekkly Notes, from 1896—
D & B	✍	Dearsley and Bell, 1856-1858 Crown Cases
D & P	✍	Dearsley and Pearces';s Crown Cases
Day EC	✍	Day's Election Cases
Dears	✍	Dearsley's Crown Cases, 1852-1856
Den Cr C	✍	Denison's Crown Cases, 1844
Doug	✍	Douglas Reports, 1778-1858, K.B.
E & B	✍	Ellis and Blackburn, 1853-1858, Q.B.
East	✍	East Reports, 1801-1812, KB
East PC	✍	East's Pleas of the Crown
Esp	✍	Espinasee's Reports, 1793-1797, N.P.
Exch	✍	Law Reports, Exchequer Division, 1875-1890
F & F	✍	Foster and Finlayson, 1858-1867, N.P.
FB	✍	Full Bench
FCR	✍	Federal Court Reports, from 1939-1950
First Report	✍	Law Commissioner's First Report
Foster	✍	Foster's Crown Law
Gaz of Ind	✍	The Gazette of India
GHCR	✍	Gujarat Current Decisions
GHCR	✍	Gujarat High Court Reporter, from 1960—
GLD	✍	Gujarat Law Decisions
GLR	✍	Gujarat Law Reporter, from 1960—
H & C	✍	Hurlstone and Coltmen, 1896-1863, Exch.
Hagg.	✍	Haggard's Reports
Hale PC	✍	Hale's Pleas of the Crown
Hare	✍	Hare's Reports, 1841-1853
Hawk PC	✍	Hawking's Pleas of the Crown
Hay	✍	Hay's Reports, 1862-1863, Calcutta
HL	✍	House of Lords
HLR	✍	Hindu Law Reporter
Hob	✍	Hobbart's Reports
Hyd	✍	Indian Law Reports, Hyderbad Series, from 1951–1956

Hyde ✍ Hyde's Reports, 1863-1864, Calcutta
IA ✍ Indian Appeals, from 1873-1950
Ibid ✍ Same as above
IIAO ✍ Indian Independence Adaptation Order, 1947
Ilbert ✍ Ilbert's Government of India
Ind Jur NS ✍ Indian Jurist, New Series, 1865-1867, Calcutta
Ind Jur OS ✍ Indian Jurist. Old Series, 1862, Calcutta
Infra ✍ Below
IR ✍ Irish Reports, from 1901—
Jab LJ ✍ Jabalpur Law Journal
Jeremy Bentham ✍ Bentham's Works, Vols. I & II
JP ✍ Justice of the Peace, from 1836—
JT ✍ Judgments Today
Kar ✍ Indian Law Reports, Karchi Series, from 1940-1947
Kash LJ ✍ Kashmir Law Joural
KB ✍ Law Report's King's Bench, from 1901—
Keb ✍ Kebble's Reports, 1661-1679, K.B.
Kel ✍ Sir John Kelying's Reports, 1673-1706, K.B.
Kerala ✍ Indian Law Report's, Kerala Series, 1956—
KLJ ✍ Karnataka Law Jurnal
KLR ✍ Kerala Law Reporter
KLT ✍ Kerala Law Times
L & C ✍ Leigh and Cage's Crown Cases, 1861-1865
Lah ✍ Indian Law Reports, Lahore Series, from 1920-1947
Lah ✍ Pakistan Law Reports. Lahore Series, from 1948—
LBR ✍ Lower Burma Rulings, 1901-1922
Ld. Raym ✍ Lord Raymond's Reports, 1964-1734, K.B. & C.P.
Leach ✍ Leach's Crown Cases, 1730-1738
Lee Warner ✍ Lee Warner's Native State of India
Lewin ✍ Lewin Crown Cases, 1882-1883
LHCR & O ✍ Lahore High Court Rules and Orders, 1929, 1942
Livingstone ✍ livingstone's System of Penal Code for Louisiana
LJ CP ✍ Law Journal, common Pleas, from 1822—

LJ Ex	✍	Law Journal, Exchequer
LJ Mat	✍	Law Journal Matrimonial Cases
LJ MC	✍	Law Journal Magistrate's Cases
LJ PM & A	✍	Law Journal Probate, Matrimonial and Admiralty
LJ QB	✍	Law Journal Queen's Bench
LLJ	✍	Lahore Law Journal, 1920-1930
Lof	✍	Lofft's Reports, 1772-1774, K.B.
LR C Cr	✍	Law Reports Crown Cases Reserved
LR CP	✍	Lahore Reports Common Pleas, 1866-1875
LR Ex	✍	Law Reports Exchequer
LR HL	✍	Law Reports House of Lords
LR IA	✍	Law Reports Indian Appeals
LR P	✍	Law Reports Probate
LR QB	✍	Law Reports Queen's Bench
LT	✍	Law Times, 1845-1858
LTNS	✍	Law Times, New Series, from 1859
LUCK	✍	Indian Law Reports, Lucknow Series, from 1926-1945
LW	✍	Law Weekly, Madras, from 1914—
M & M	✍	Morgan and Macpherson's Indian Penal Code
M & Mal	✍	Moody and Mlkin's Reports, 1827-1830
M & R	✍	Moody and Robinson, 1831-1844, N.P.
M & Sel	✍	Maule and Selwyn, 1813-1817, K.B.
M & W	✍	Meeson and Welby, 1836-1847, Exch
M Dig	✍	Morley's Digest, Calcutta
Mad	✍	Indian Law Reports, Madras Series, from 1876—
Mad Jur	✍	Madras Jurist
Mah LJ	✍	Maharashtra Law Journal, 1963—
Marsh	✍	Marshall, 1813-1816, C.P.
Marsh	✍	Marshall, 1862-1863, Calcutta
Maxwell	✍	Maxwell on Interpretation of Statutes, 9th Edn., 1946
Mayne	✍	Mayne's Criminal Law of India
MB	✍	Indian Law Reports, Madhya Bharat Series, from 1952-1956
MBLR	✍	Madhya Bharat Law Reporter

MHC	✍	Madras High Court Reports, 1862-1875
MHCRP	✍	Madras High Court Criminal Rules of Practice and Orders, 1931
MIA	✍	Moore's Indian Appeals, 1836-1873, P.C.
MLJ	✍	Madras Law Journal Reports, from 1891—
Mod	✍	Modern Reports, 1669-1732, K.B.
Mood Cr C	✍	Moody's Crown Cases Reserved 1824-1844
MP	✍	Indian Law Reports, Madhya Pradesh Series, 1956—
MPHCR & O	✍	Madhya Pradesh High Court Rules & Orders (Crl), 1948
MPLJ	✍	Madhya Pradesh Law Journal
MPLT	✍	Madhya Pradesh law Times
MWN	✍	Madras Weekly Notes, from 1910—
Mys	✍	Indian Law Reports, Mysore Series, from 1951—
Mys LJ	✍	Mysore Law Journal
NAC	✍	Nizamut Adawlat Cases, Bengal
Nag	✍	Indian Law Reports, Nagpur Series, from 1937-1958
NAR	✍	Nizamut Adawlat Reports, Bengal
NLJ	✍	Nagpur Law Journal, from 1918-1962
NLR	✍	Nagpur Law Reports, 1906-1936
Note	✍	Notes appended to the Draft Penal Code, 1836
NWP	✍	N.W.P. High Court Reports, 1862-1875
OC	✍	Oudh Cases, 1898-1926
OD	✍	Oudh Decisions
OM & H	✍	O'Nalley & Hardcasle's Election Cases
Orissa LR	✍	Orissa Law Reports
OSD	✍	Oudh Select Cases
OWN	✍	Oudh Weekly Notes, from 1924—
Palm	✍	Palmer's Reports, 1619-1669, K.B.
Parl Rep	✍	Parliamentary Reports
Pat	✍	Indian Law Reports, Patna Series, from 1922—
Paterson	✍	Paterson on the Liberty of the Subject
Patiala	✍	Indian Law Reports, Patiala Series, from 1952-1956
PC	✍	Privy Council

PCR	✍	Punjab chief Court rules and Orders, 1911
PD	✍	Probate division
Perry OC	✍	Perry's Oriental Cases, 1843-1845
Philklimore	✍	Phillimore on the International Law
Phillips	✍	Phillps' Comparative Criminal Jurispudence
PJLB	✍	Printed Judgments of Lower Burma, 1893-1900
PLC	✍	Proceedings of the Legislative Council of the Governor-General of India
PLJ	✍	Patna Law Journal, 1916-1921
PLJR	✍	Patna Law Journal Reports
PLT	✍	Patna Law Times, from 1920—
PR	✍	Punjab Record, 1862-1919
PLR	✍	Punjab Law Reporter, from 1900—
Prince	✍	Prince Reports, 1814-1824, Exch.
Pun	✍	Indian Law Reports, Punjab Series, from 1947—
PWN	✍	Patna Weekly Notes, from 1936—
QB	✍	Law Reports, Queen's Bench, from 1891—
QBD	✍	Queen's Bench Division, Law Reports, 1875-1980
Raj	✍	Indian Law Reports, Rajasthan Series, from 1951—-
Raj Cr C	✍	Rajasthan Criminal Cases
Ran	✍	Indian Law Reports, Rangoon Series, 1923-1936
Ran	✍	Rangoon Law Reports, from 1937—
Rep 1st	✍	first Report on the Penal Code by the Indian Law Commissioners, 1846
Rep 2nd	✍	Second Report on the Penal Code by the Indian Law Commissioners, 1847
RJPN	✍	Revenue, Judicial and Political Journal, Calcutta
RLR	✍	Rajasthan Law Reporter
RLR	✍	Rajdhani Law Reporter
RLW	✍	Rahasthan Law Weekly, from 1950—
Rob	✍	Robert's Reports, 1844-1853
Roscoe	✍	Roscoe's Criminal Evidence (14th Edn. 1921)
Russ & Ry	✍	Rusell and Ryan's Crown Cases, 1799-1823

Salk	✍	Salked's Reports, 1669-1712
Sau LR	✍	Saurashtra Law Reports, from 1948--
SC Cr R	✍	Supreme Court Criminal Reports
SCA	✍	Supreme Court Appeals
SCC	✍	Supreme Court Cases
SCC (Cri)	✍	Supreme Court Cases (Criminal)
SCC (Supp.)	✍	Supreme Court Cases (Supplement)
SCD	✍	Supreme Court Decisions
SCJ	✍	Supreme Court Journal, from 1951—
SCR	✍	Supreme Court Reports, from 1950—
SCWR	✍	Supreme Court Weekly Reports
SDSSC	✍	Selected Decisions of Sind Sadar Court, 1866-1906
Second Report	✍	Law Commissioner's Second Report
Sin LR	✍	Sind Law Reports
SJLB	✍	Select Judgments, Lower Burma 1872-1892
SLC	✍	Simla Law Cases
SLR	✍	Sind Law Reporter, from 1907—
St Tr	✍	State Trials
Step Com	✍	Stephen's Commentaries on the Laws of England
Stephen	✍	Stephen's History of the Criminal Law of England
Stephen Dig Cr	✍	Stephen's Digest of Criminal Law
Stockes	✍	Stocke's Anglo-Indian Codes
Str	✍	Strange's Reports, 1795, K.B.
Sty	✍	Style's Reports, 1645-1646, K.B.
Supreme	✍	Supreme To-day
Sup	✍	Supra, above
Sw & Tr	✍	Swabey and Tristram, 1858-1865
Taunt	✍	Taunton's Reports, 1807-1819, C.P.
TC	✍	Indian Law Reports, Travancore-Cochin Series, from 1951-1955
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Tupper	✍	Tupper's Our Indian Protectorate

Ubi Sup	✍	See above
UBR	✍	Upper Burma Rulings, 1892-1922
UJ (SC)	✍	Unreported Judgements (Supreme Court)
Unrep Cr C	✍	Unreported Criminal Cases of the High Court of Bombay 1862-1898
Vent	✍	Ventries Reports, 1688-1691, K.B. & C.P.
Ves	✍	Vessey's Reports, 1789-1817
Weir	✍	Weir's Law of Offences and Criminal Law (4th Edition. 1905)
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WLN	✍	Weekly Law Notes
WR (Eng)	✍	Weekly Reporter (Eng.) 1882-1906
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WR Cr L	✍	Sutherland's Weekly Reporter, Criminal Letters
Wyin Cr	✍	Wyman's Revenue and Criminal Rulings

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THE INDIAN PENAL CODE

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THE INDIAN PENAL CODE

Volume II

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1. Amendment.—The words in italics were substituted for "transportation for life" by Act 26 of 1955, Sec. 117 and Sch. for "transportation for life" (with effect from 1.1.1956).

Transportation for life.—This punishment should be awarded in cases of tender age. 11 CWN 904.

2. Trial.—The law provides only two possible punishments for murder, *i.e.*, death or transportation for life. It is triable by Courts of Sessions. Where the case is inadvertently transferred to Asst. Sessions Judge, he should return the case at once. AIR 1944 Pat 92 : 45 Cr LJ 409.

Where wife causing death of her husband by administering poison and there are other clinching evidence too. Conviction held, not vitiated due to mere failure of the prosecution to prove possession of poison with the accused. *Nirmala Devi (Smt.) v. State of J&K*, 1994 SCC (Cri) 262 : 1994 (1) SCC 394 : 1994 Cr LJ 599 : AIR 1994 SC 566.

Delay in filing FIR—Delayed dispatch to Magistrate. Whenever there is delay in lodging the FIR and/or there is delay in dispatching the report to the Elaka Magistrate and/or the medical evidence is at some variance with the ocular evidence. The prosecution has to fail in the instant case the combined effect of the three factors leave no manner of doubt that prosecution has failed to establish the accusations. The view taken by the High Court is a possible view and we do not consider this to be a fit case where any interference is called for. *State of Punjab vs. Avtar Singh*, 2009 (10) SCC 800 : 2008 (14) Scale 368 : 2008 (12) JT 309 : 2008 (15) SCR 37 : 2009 (2) SLT 66.

Sufficient explanation for *Delay in lodging*.—Inspector of Police Station received a telephonic message from the Nursing Home. He arrived at the Nursing Home at about 7 O'Clock, recorded the statement of Viswanathan, brother-in-law of the deceased (PW-1). The First Information Report was registered by him after coming back to the Police Station at about 8.30 p.m. He visited the place of occurrence on the next day. By that time, as noticed hereinbefore, the deceased breathed his last.

Some delay might have been caused in lodging of the First Information Report, but, the same has sufficiently.been explained. It is true that PW-7 in his evidence stated that he had sent the information to the Police Station but he also admitted that the same was not recorded in the accident register. PW-7 was examined after a period of more than six years from the date of the incident. At the time of his deposition, he was working in the ESI Hospital, Salem as Medical Officer. The Inspector of Police PW-13 in his evidence categorically stated that he received the telephonic message at about 6 O'Clock in the evening from the Nursing Home and he reached there at about 7 O'Clock. We do not find any reason to disbelieve the said evidence brought on record by the prosecution.

PW-4 Sekaran, son of the deceased in his deposition, who has not been cross-examined, categorically stated that he had been working in a company known as Power Held norporation of India at K.R. Thoppur. He was informed about the incident by his material aunt Chandra (PW-2) when she came in a car and took him to the Shanmugha Nursing Home where the deceased was admitted in its Intensive Care Unit. The fact that he had to be brought to the Nursing Home by PWs is again a pointer to the fact that they were busy in not only making arrangements for proper medical treatment of the deceased but also intimating the son of the deceased (PW-4) and bringing him to the hospital at the earliest possible opportunity. We, therefore, are of the opinion that the delay in lodging the First Information Report has sufficiently been explained. *Padmanaban vs. State*, AIR 2010 (SC) 47 : 2009 (10) JT 172 : 2009 (12) SCR 252 : 2009 (10) Scale 526 : 2009 (6) SLT 751 : 2009 (5) Supreme 763.

Delay in lodging—When not fatal. No doubt lodging of a First Informing Report at the earliest possible opportunity is desirable. But, the Courts cannot also ignore the ground realities that the relatives of the deceased would give priority to the treatment of a severely injured person. All attempts would first be made to save his life. The action on the part of the prosecution witnesses, in our considered opinion, in giving priority to the treatment to the injured was wholly justifiable. *Padmanaban vs. State*, AIR 2010 (SC) 47 : 2009 (10) JT 172 : 2009 (12) SCR 252 : 2009 (10) Scale 526 : 2009 (6) SLT 751 : 2009 (5) Supreme 763.

Where there was 2-1/2 years' delay in lodging the FIR. It was held, fatal to the prosecution case. Under the circumstances of the case, 2-1/2 years delay in lodging the FIR would prove fatal to the prosecution case, as it would lead to the only irresistible conclusion that the victim had suffered injuries due to accidental fall and the possibility of false implication of the accused by Swaran Kaur in consultation with her brother, Sarwan Singh and aforesaid Bhajan Singh cannot be ruled out. If that is so then the order of conviction and sentence of the trial Court being not sustainable is hereby set aside by according the appeal and acquitting the appellant. *Jugraj Singh* v. *State of Punjab*, (1994) 1 CC Cases 437 at p. 441 (P&H).

Where petitioner admittedly being owner of the vehicle—Chief Judicial Magistrate declined to release it on ground that it was case property which will be required during trial of murder case. It is held, that order of CJM should be set aside and vehicle be released in petitioner's favour. *Ram Prakash Prajapati* v. *State of UP*, 1994 ACC 185 : 1994 (23) ALR 430 (All).

Where accused was never produced before trial Court from jail and neither an application was filed for exemption from personal appearance nor the—Evidence of all witnesses recorded in his absence. Hence the conviction and sentence of death of accused was set aside and case was remanded back for retrial. *State of M.P.* v. *Budh Ram Kunku Ram Satnami*, 1995 MPLJ 906 (MP).

3. Commits murder.—A man who strikes another with a knife in the throat must know that the blow is so imminently dangerous that it must in all probability cause death and the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. 8 Pat 911. Where the husband killed his wife's lover while the latter was asleep and it appeared that he had himself placed his wife in a position of temptation by absenting himself for several months. *Held*, that the murder being premeditated and deliberate, capital sentence should be inflicted. 109 Ind Cas 113 : 29 Cr LJ 456 : AIR 1928 Oudh 241. Where a person is attacked and killed it must be decided whether the assailant is guilty of culpable homicide and if so, whether the culpable homicide amounts to murder or not. AIR 1928 Lah 868. Where a blow aimed by a person at his wife did not strike the wife but struck another and killed that other. *Held*, that the accused was guilty of an offence under Section 302, IPC. 107 Ind Cas 764 : 29 Cr LJ 280 : AIR 1928 Lah 344. The mere fact that more prompt or better treatment would have saved the deceased cannot exonerate the accused from liability for the murder of the accused. 108 Ind Cas 164 : 29 Cr LJ 345 : 10 AI Cr R 39.

If one person causes death of another, that if his intention was to cause death or to cause bodily injury sufficient in the ordinary course of nature to cause death, the offence would be murder, even though death resulted in a way different from that expected by assailant. 5 Rang 817 : 29 Cr LJ 280-AIR 1928 Lah 344. The mere fact that more prompt or better treatment would have saved the deceased can not exonerate the accused from liability for the murder of the accused. 108 Ind 164 : 29 Cr LJ 345 : 10 AI Cr R 39. If one person causes death of another then if his intention was to cause death or cause bodily injury sufficient in the ordinary course of nature to cause death the offence would be murder, even though death resulted in a way different from that expected by the assailant. 5 Rang 817 : 109 Ind Cas 215 : 29 Cr LJ 487 : 109 Ind Cas 215 : AIR 1928 Rang 64. In a trial under this section, for murder by firearm, the prosecution has to show not only that the firing was intentional or voluntary but also that the firing was prompted by any such intention or knowledge as is mentioned in Section 300, IP Code. AIR 1949 Lah 85 : 50 Cr LJ 397. If neither ingredient is proved the offence committed is not murder. The initial onus of proving intent is on the prosecution. *Ibid* : *See* also AIR 1948 Lah 74 : 49 Cr LJ 106.

If a man stab another over the heart deliberately with a knife capable of penetrating into the heart, the offence would be murder. 138 Ind Cas 217 : 33 Cr LJ 570 : 33 PLR 287. Where stab wound punctures liver and diaphragm, person inflicting such wound is guilty of murder. AIR 1933 Rang 423. Where accused placed deceased while unconscious on railway line and death was caused, he was guilty of murder. 145 Ind Cas 953 : 1933 Cr C 1400 : 65 MLJ 597 : 1993 MWN 745 : AIR 1933 Mad 798. Where son suddenly and in heat of passion strikes his father and causes his death, offence under Section 304 (2) and not under Section 302 was committed. AIR 1933 Lah 664 : 34 PLR 330 : 1993 Cr C 886. In case of alleged poisoning the two material questions requiring determination are, firstly did the deceased die of poison, and secondly had the poison been administered to the deceased by the accused. 148 Ind Cas 600 : 35 Cr LJ 700 : 11 OWN 312 : AIR 1934 Oudh 180. Where the medical evidence does not support that the deceased met with a violent death no charge of murder can be brought home to any one. 149 Ind Cas 473 : 35 Cr LJ 992 : 11 OWN 722 AIR 1944 Oudh 286 ; *see* also 151 Ind Cas 238 : 35 Cr LJ 1283 : AIR 1934 Lah 368. Where the case is on the border line between murder and culpable homicide not amounting to murder, accused is entitled to benefit of reasonable doubt and can be convicted under Section 304, 150 Ind Cas 599 : 35 Cr LJ 111 : AIR 1934 Rang 110; *see* also 151 Ind Cas 469 : 35 Cr LJ 1319 : 1934 Cr C 554 : AIR 1934 Lah 332. The mere fact that the body of the murdered person has not been found is not a ground for refusing to convict an accused person of murder, 152 Ind Cas 376 : AIR 1934 Sind 139. For conviction Section 302, there must be good and sufficient evidence to support it. That the Session Judge is morally convinced of guilt is not sufficient AIR 1935 Pat 19. Where severe blow on head with deadly weapon causes extensive fracture of skull, the accused in guilty of murder even if victim dies only a month after attack, AIR 1935 Lah 94. The fact that the accused was starving is no justification for committing the brutal and wicked crime under that section. AIR 1935 Rang 49. Where a person was seriously injured by the accused and died subsequently, but in post-mortem examination it was found that the immediate cause of death was gangrene which had set in the right foot and leg as a result of injury. *Held*, that the accused were guilty of an offence under this section. AIR 1938 Lah 31.

In any case where the body has disappeared it must necessarily be very difficult to prove first of all that the supposedly murdered person has actually died, and secondly he died a violent death at the hands of the accused. This is specially so where the disappearance has taken in circumstances where it is not humanly impossible for him to convict the accused 9 Pat LT 449 : 111 Ind Cas 721 : 20 Cr LJ 913 : AIR 1928 Pat 473.

Two girls were quarrelling about a small quantity of gram. During the quarrel the elder girl gave a blow to the younger with a thin *lathi*. The uncle of the younger girl, who then came to the place, gave a blow with a *lathi* on the head of the elder girl and the elder girl at once fell down. After she fell down, he gave two more blows on her thigh. The girl died. *Held* that the accused was guilty of an offence under Section 304, para 2 and not under Section 302. 9 Pat LT 286 : 7 Pat 638 : 106 Ind Cas 433 : 29 Cr LJ 17 : 1 LT 40 Pat 28 : AIR 1928 Pat 169. The mere discovery of a blood stained hatchet in the field belonging to the accused and the unsatisfactory evidence of an expert tracker were insufficient to support a conviction of murder. 29 PLR 388 : 4 Lah LJ 311 : 110 Ind Cas

329 : 29 Cr LJ 1097 : AIR 1928 Lah 724. The mere presence of the accused at the house where the deceased was staying would not by itself be convincing evidence of conspiracy to murder it be shown that they were in some way connected with murder, 32 CWN 783. Where they only evidence against the accused was proof of motive and the production of the corpse of the murdered person, held, that the evidence was not sufficient to sustain a conviction under Section 302, IP Code, but that a conviction under Section 201, IP Code. could not be maintained. 29 PLR 33 : 107 Ind Cas 982 : 29 Cr LJ 252. During the progress of an inquiry into offence of murder of deceased was alleged to have pointed out a heap of *Turi* belonging to some *Zamindar* and from it were recovered *a hatchet and. dang* which were blood-stained and it appeared from the evidence of witness that a *hatchet* and *dang* were used in the murder. *Held*, that the *Turi* heap being available to everybody, it might be that the accused saw some other person placing the articles there and that the mere fact that he gave the information as to discovery did not conclusively establish his guilt. 10 Lah LJ 58 : AIR 1928 Lah 335. *B* and *S* were charged under Section 302, for the murder of *R*, who according to village rumour, was in intrigue with *G*'s wife *M*, sister to *BS* was the brother of *G*. *A* tracker followed the tracks with directions from villagers to the *Ahata of* S and *G*. Shoes of *R* were recovered at the instance of *B*. The tracker found track of *B* and *S* leading to the place where the body was later found buried. Dead body of *R* was found at the instance of the confession made by S. *Held*, that the evidence was not sufficient to establish charge under Section 362 but was ample to establish an offence under Section 201 Penal Code. 112 Ind Cas 347 : AIR 1928, 476.

Where, accused, a young woman of fifteen years of age being roused to frenzy by the ill treatment of her husband who was 40 years of age and whom she did not like, seized a stick lying by and made a murderous attack on her step son in order to avenge herself against her husband and caused the death of the infant son. *Held*, that her intention was to cause death and she was therefore guilty of murder. AIR 1926 Lah 144. When an accused commits an unprovoked and cowardly assault upon the deceased rushing out at him by surprise and striking him one blow only upon the head with a *lathi*; and the blow fractures the skull of the deceased from temple to temple the offence committed by the accused is one of murder. 95 Ind Cas 266 : 27 Cr LJ 766 : 3 OWN 451. Once it is established that a woman with a motive to get rid of her husband has administered in his food a fatal dose of *dhatura*, the conclusion to be drawn is that she committed murder unless her explanation is such as to create some doubt in the mind of the Court. The intention to cause bodily injury is clear and the knowledge of the results of the poison can safely be imputed. AIR 1938 Nag 318 : 174 Ind Cas 886 : 39 Cr LJ 405. A man who delivers two blows in quick succession on or in the neighbourhood of the head with a heavy weapon (rice pounder) must be regarded, in the absence of extenuating circumstances, to intend to cause injury sufficient in the ordinary course of nature to cause death. 1935 Cr C 1201 : AIR 1935 Rang 42 ; *see* also AIR 1935 Lah 94 16 Lah 589 : 158 Ind Cas 336 : 37 PLR 705 ; AIR 1935 Rang 408 : 1935 Cr C 1172.

As per the trial Court judgment the money bag looted from the deceased was recovered from accused, the brother of the appellant and it was established before the trial Court that the appellant had been demanding "Rangdari" from the deceased on telephone. The trial Court believed Ashok Paswan PW. 2 and Ashok Kumar Verma PW. 5. so far as the conspiracy part is concerned as they had stated that in their presence the appellant had directed his father and brother that if deceased would not pay amount he should be finished. Both the witnesses had given satisfactory explanation for being present in Hazipur Court at the relevant point of time. The documentary evidence had been produced to the satisfaction of the Court to corroborate their evidence that the appellant was present in the Court to appear in Sessions trial. It was also satisfactorily proved that appellant had talked with co-accused, his brother and father in between the place Court Hajat and the Court. The trial Court found no reason to disbelieve the depositions of Ashok Paswan PW. 2 and Ashok Kumar Verma PW. 5. The trial Court came to the conclusion that appellant Sanichar Sahni hatched the conspiracy and directed his brother and father to finish Bhola Chaudhary in case the money was not paid by him and consequently, Bhola Chaudhary was murdered by the co-accused.

In appeal, the High Court dealt with the issue of conspiracy elaborately and found the evidence of Ashok Paswan PW. 2 and Ashok Kumar Verma PW. 5 fully trustworthy and came to the conclusion that Bhola Chaudhary was murdered by the co-accused in conspiracy for non-fulfillment of demand of 'Rangdari". The High Court held that both the said witnesses were present on that date in the Court premises Hazipur and the appellant Sanichar Sahni was also produced in the Court in custody and he met his father and brother and it was in their presence that he had asked the co-accused to finish Bhola Chaudhary if "Rangdari" was not paid.

The above concurrent findings of fact recorded by the Courts below regarding the conspiracy and murder of Bhola Chaudhary by the co-accused do not require to be interfered with as there is nothing on record to show that the said findings are perverse. *Sanichar Sahni vs. State of Bihar*, 2009 (7) SCC 198 : 2009 (13) JT 192 : 2009 (8) Scale 680 : 2009 (10) SCR 112 : 2009 (5) SLT 29.

Where a number of person go armed with deadly, weapons to attack a person or party it may be assumed as matter of common sense that their common intention is at least to cause grievous hurt. If in the course of the commission of that offence death is caused the person so attacking will be guilty of an offence under Section 302, IPC, 1950 ALJ 871 : AIR 1951 All 365.

In case of culpable homicide it is necessary that the person who is alleged to have been killed by the person charged, met with unnatural death caused with the intention or knowledge as mentioned in Section 299 of the Penal Code. 1979 Cr LJ 1290 ; AIR 1972 SC 169 ; AIR 1972 SC 656 (motive to be fully established) ; AIR 1978 SC 383 : AIR 1980 SC 1946 ; AIR 1976 SC 2499 ; AIR 1976 SC 242 : (1976) 3 SC 570 (where there are several accused but some of them are acquitted and the evidence regarding motive was common to all the accused, it was held that appellant was entitled to acquittal).

Motive alone however strong, it might be, cannot be made the basis of conviction of an accused person unless it receives corroboration from other sources. 1979 Cr LJ 236.

Where injury is certain to result in death, in due course of nature, and the assailant has every reason to know of it, from the nature of the wound the part of the body aimed at and the repetition of blows, there can be no doubt that he is guilty under Section 302, IPC. AIR 1983 SC 185 : 1983 Cr LJ 429 ; AIR 1983 SC 284 ; 1983 Cr LJ 346.

Where victim and accused related to each other, fighting due to heated exchange and no intention to cause death proved. No knowledge of such injury to cause death.

held offence of murder is not made out. Hence accused held guilty under Section 300, Part II. *Parashram Bapu Gaikwad* v. *State of Maharashtra*, (1994) 2 Bom CR 272 (Bom).

Where injuries if sufficient in the ordinary course of nature to cause death. It is held, that accused's act, would fall within the ambit of Section 302 and not under Section 304, Part II. *Kamta Prasad* v. *State of U.P.* 1994 SCC (Cri) 290 : 1994 JIC 136 : (1994) 1 East Cr C (NOC) 22 : 1994 Cr LJ 1202 : AIR 1994 SC 1519. : 1993 (5) JT 171 : 1993 –Scale 666 : 1993 (3) Crimes 370.

Where the injuries found on the person of the deceased were intentionally inflicted and were sufficient in ordinary course of nature to cause death according to medical opinion. Hence conviction confirmed. *Ram Swaroop* v. *State of Rajasthan*, 1994 RCC 459 : 1994 Cr LR 596 : 1994 Cr LJ 3382 (Raj).

Where injury being fatal intention was to cause death, Hence, it can be assumed. *Ramkishore* v. *State of Madhya Pradesh*, (1994) 1 CCR 427 (MP) : (1994) 2 EFR 186.

Where the prosecution case that the appellants were keeping an evil eye on the deceased and as stated in the FIR the informant had scolded the accused on several occasions, in these circumstances victim would have been the last person to go to the 'Gault' of the accused. After all she was a married woman and would have never liked any future incident which may bring a blot on her and which might have ruined her entire life. It also does not stand to reason that the two appellants who had a fancy for the deceased would, all of a sudden decide to murder her. By murdering the deceased they were to gain nothing. In the second place, the prosecution case that the two accused were trying to overpower the deceased in broad day light in the family 'Gault' of the informant is highly unnatural. An open piece of land was not at all a suitable place and that too in the heart of the village to make forceful advances towards a young married woman of the village. *Brijendra and another* v. *State*, 1994 All LJ 83 at pp. 88, 89 (All).

Where knife's serious injuries inflicted on vital parts of bodies of two deceased—Murderous assault by accused established—Both deceased were unarmed—Accused not pleading right of private defence—Motive made not relevant, conviction and sentence passed by High Court was justified and appeal was dismissed. *Kuriakose* v. *State of Kerala*, (1994) 1 Crimes 935 : 1994 SCC (Cr) 614 : 1994 (1) CCR 132 (SC) : 1994 (1) JT 268 : 1994 (1) Scale 270 : 1995 Cr. LJ 2687.

When identity of deceased not established and last seen together also not proved. Hence conviction set aside. *Jagroop Singh* v. *State of Rajasthan*, 1994 Cr LR 87 (Raj).

4. Constitutional validity.—Section 302 and Section 354(2) of the Criminal Procedure Code are constitutionally valid. AIR 1980 SC 898 : 1980 Cr LJ 636 : AIR 1973 SC 947 : 1973 Cr LJ 370 (the discretion of the Court to confer punishment without a guideline can not said to be excessive delegation and violative of Article 14 of the Constitution.

5. Principle of awarding punishment.—The framers of the Code have made it discretionary with Judges, to consider mitigating circumstances in awarding punishment, 12 Cr LJ 448. The Code does not, by its definition, distinguish between the different degrees of murder. But the Courts in awarding the punishment of this offence, may discriminate between a wilful, deliberate and premeditated killing, as where the murder is committed by poison or by lying in wait, etc. and murder which is committed with less deliberation or premeditation.—*Morgan and Macpherson*. In cases of murder extreme sentence is normal sentence. Mitigated sentence is an exception. Reason for not awarding extreme sentence must be given. AIR 1935 Oudh 265; AIR 1935 Oudh 110 ; 1944 OWN 419 ; AIR 1944 Lah 206 : 45 Cr LJ 660 ; AIR 1951 Pepsu 73 : 52 Cr LJ 498 (lesser punishment can be awarded when there are extenuating circumstances) ; 1952 MWN 958 : (1952) 2 MLJ 751 ; 1952 Cr LJ 946 : AIR 1952 Bhop 21. Under Section 302 a discretion is vested in Courts either to impose a sentence of death or of transportation for life. The true principle of exercising the direction of imposing either the penalty of death or of transportation for life should be that the sentence of death is awarded in cases in which the act is very brutal and highly repugnant to moral and the sentence of transportation for life is imposed in all other cases. 1953 Cr LJ 580 : ILR (1953) 1 All 608 : AIR 1953 All 220; AIR 1953 Mad 372 : (1952) 2 MLJ 751 : 1953 Cr LJ 651 ; 1953 Cr LJ 1802 : AIR 1953 TC 561 : 1953 Cr LJ 1465 : 1953 SCJ 532 : AIR 1953 SC 364 (There must be strong reasons to entitle the appellate Court to enhance the sentence) ; AIR 1954 Pat 109 ; (1963) 1 Andh WR 18 : 1963 Mad LJ (Cr) 2 : 1963 (I) Cr LJ 733 : AIR 1963 Andh Pra 249. The rule is that primarily the capital sentence is the normal punishment for the offence of murder and the Judge must give reasons for imposing lesser penalty in a case which comes under Section 302. 109 IC 364 : 29 Cr LJ 540. The reason for passing a lesser sentence must be adequate and express. AIR 1945 Oudh 140 ; AIR 1941 Mad 50 : 42 Cr LJ 270 ; AIR 1940 Lah 494 : 42 Cr LJ 156 ; 1 Bur LJ 96 ; AIR 1940 All 480 : 42 Cr LJ 115; AIR 1939 Pesh 47 : 41 Cr LJ 132; AIR 1939 Mad 109 : 40 Cr LJ 1166 ; AIR 1941 Mad 358 : 42 Cr LJ 411.; AIR 1930 Pat 247 ; AIR 1930 Pat 168. Under this section the sentence of transportation for life is minimum. AIR 1933 Oudh 399. A Court may recommend for reduction of sentence. 145 PLR 1902 ; NWP 130. Onus is on the accused to show circumstances for mitigating sentence. AIR 1942 Pat 113 : 43 Cr LJ 90.

It is highly undesirable that the longest term of imprisonment should not be supplemented by an additional sentence of fine. AIR 1960 All 223 : ILR (1959) 2 All 255 : 1960 Cr LJ 427 ; AIR 1957 All 1205 : 1957 Cr LJ 498 : 1958 All Cr LJ 5 ; AIR 1956 Bom 711 : 1956 Cr LJ 1306.

On the question of sentence it would be relevant to take into account the best ground of the incident, the nature and extent of the threat held out by the crowd of villagers the excitement which must have been caused at the incident, 1963 SCD 66 : 1963 (1) Cr LJ 495 : AIR 1963 SC 642 : 1963 All Cr R 170 ; *See* also AIR 1962 Cal 428 : 1962 (2) Cr LJ 179 (inordinate delay in trial if a valid extenuating circumstances) ; AIR 1958 Mys 150 : ILR 1957 Mys 177 : 1958 Cr LJ 1489 ; AIR 1958 AP 203 : 1958 Cr LJ 473.

In a case of murder if the Court is convinced about the truth of the prosecution story conviction has to follow. The question of sentence has to be determined, not with reference to the volume or character of evidence adduced by the prosecution in support of the prosecution case 'but with reference to the fact whether there are any extenuating circumstances which can be said to instigate the enormity of the crime. If the Court is satisfied that there are such mitigating circumstances only then it would be justified in imposing the lesser of the two sentences provided by law, AIR 1957 SC 618 : 1957 SCJ 527 : 1957 SCA 798 : 1957 SCR 981 : 1957 Cr LJ 1000 ; but *see* AIR 1957 All 377 :

1957 Cr LJ 617 : 1957 All LJ 802 (circumstances for awarding lesser sentence not made out) ; AIR 1956 Mad 536 : (1956)2 MLJ 43 : 1956 Cr LJ 1202 (lesser punishment) ; AIR 1956 SC 99 : 1956 Cr LJ 278 : 1956 Ker LT 92 (sentence reduced to one of transportation for life) ; AIR 1955 Andh 118 1955 Cr LJ 917 : 1955 Andh WR 53 : 1955 Cr LJ 917 ; AIR 1955 Andh 24 : 1955 Andh WR 130 : 1955 Cr LJ 329 ; AIR 1954 Mad 723 : 1953 Mad WN 941 : 1954 Cr LJ 672 (no palliative circumstance).

The deprivation of freedom consequent upon an order of conviction and sentence is not a direct and inevitable to the order of conviction and sentence which may or may not come into play, that is to say, which may or may not be passed. Thus Section 302, does not have to stand the test of Article 19 (1) of the Constitution. 1980 Cr LJ 636.

Extreme penalty was not justified in case of failure of the prosecution to prove the alleged motive and the possibility of that the quarrel started over the misbehaviour of the deceased towards the daughters of the appellant a transportation for life would fully meet the ends of justice. 1983 Cr LJ 481 : AIR 1983 SC 361.

6. Age.—Youth alone does not constitute such an extenuating circumstances as would justify the imposition of the lesser penalty prescribed by the law in Section 302, IP Code. 110 Ind Cas 234 : 29 Cr LJ 682 : AIR 1928 Lah 855 ; 107 IC 99 : 29 Cr LJ 211 ; 112 IC 348 : AIR 1928 Lah 581 AIR 1931 Oudh 89 : AIR 1930 Lah 50 : 120 IC 276 ; 188 IC 829 : 1933 Cr C 720 : 34 Cr LJ 835 : AIR 1933 Rang 134 ; AIR 1933 Oudh 52 : 88 Cr LJ 250 ; AIR 1948 Lah 104 : 44 Cr LJ 546 ; AIR 1948 Mad 69 : 44 Cr LJ 299 ; AIR 1940 Mad 710 : 42 Cr LJ 582 ; AIR 1941 Mad 358 : 42 Cr LJ 311 ; AIR 1940 All 48 : 42 Cr LJ 115. But in certain circumstances youth of the accused was taken into consideration in awarding lesser sentence. 36 Cr LJ 313 : AIR 1935 Pesh. 170 : 37 Cr LJ 201; AIR 1935 Rang 46 : 37 Cr LJ 290 : 1937 MWN 1133 ; AIR 1943 Lah 89 : 44 Cr LJ 552 ; AIR 1941 Rang 319 : 88 Cr LJ 544 ; AIR 1942 Pat 425 : 43 Cr LJ 544 ; AIR 1941 Lah 220 : 42 Cr LJ 614 ; AIR 1940 Rang 140 : 41 Cr LJ 706 ; AIR 1938 Lah 200 : 39 Cr LJ 488 ; AIR 1934 All 134 : 35 Cr LJ 448 ; 1934 Lah 786 : 36 PLR 40 : 131 IC 276 : 1931 Cr C 297 : 32 Cr LJ 682 : AIR 1931 Lah 177 ; AIR 1931 Lah 536 : 35 Cr LJ 645 ; AIR 1933 Lah 229 : 54 Cr LJ 375. The extreme youth of the accused who was only 16 years old was held to be a sufficient ground for inflicting a lesser sentence under this section. AIR 1928 Nag 108 : 29 Cr LJ 400 7 NLJ 144; 6 Lah LJ 523 ;1I CWN 904 ; 11 Ind Cas 792 : 12 Cr LJ 449 ; UBR (1892-1896) Vol. 1209 ; AIR 1931 Lah 177 38 Cr LJ 885 : AIR 1933 Rang 134 ; 33 CWN 1226 ; AIR 1929 Lah 64 : 30 Cr LJ 75 : AIR 1937 Rang 121 : 38 Cr LJ 1022 ; but *see* 1 Bur LJ 70 ; 11 Bur LT 100 : 45 Ind Cas 843 : 19 Cr LJ 648 : AIR 1954 Pat 109 ; AIR 1955 TC 402 : 1953 Cr LJ 1613 : ILR 1953 TC 514; 1962 MPLJ 1064 : 1962 Jab LJ 876 : 1963 (1) Cr LJ 433 : AIR 1963 Madh Pra 106 ;1962 Jab LJ 876 : 1962 MPLJ 1064 ; AIR 1960 All 748 : 1960 All Cr R 249 : 1960 Cr LJ 156 ; 1962 Raj IW 434 ; AIR 1960 Mad 462 : 1960 Cr LJ 1840 ; AIR 1960 J & K 116 : 1960 Cr LJ 1208 ; 1960 Raj LW 434 ; AIR 1960 Mad 462 : 1960 Cr LJ 1244 ; AIR 1958 All 514 : 1955 Cr LJ 842 ; AIR 1957 All 809 : 1957 Cr LJ 138 : 1958 All Cr R 165 ; AIR 1956 Pat 10 : 1956 Cr LJ 29 ; AIR 1956 Sau 83 : 1956 Cr LJ 1240 ; AIR 1955 A 118 : 1955 Cr LJ 917.

When the accused was convicted of murdering an old man of 75 years if the ons Judge does not impose the natural sentence provided by law but gives a sentence he should expressly state the circumstance that weighed with him i ng the lesser sentence. AIR 1952 Trip 10 : 1952 Cr LJ 1424. The Penal Code has not made any consideration on account of age or sex for getting exemption from capital punishment AIR 1971 SC 429 ; AIR 1960 SC 748 ; *see* in this connection the observation in AIR 1953 SC 364 ; 1970 SCD 552.

Girl aged 9 years at the time of incident. Her mother killed by her uncle at night at 10 p.m. Kerosene lamp burning at place of incident. Her deposition that her uncle killed her mother with axe can be relied upon as it was also corroborated by other witnesses and medical evidence. *State of Maharashtra* v. *Prabhu Barku Gade*. 1995 Cr LJ 1432 : (1995) 2 Bom CR 188 (1995) 2 Crimes 783 (Bom).

Where appellant being below 16 years of age cannot be sentenced to imprisonment for life and there was nothing against his character. He may be dealt with under Section 33 (e) or (g) of Act of 1952. Hence he be released on probation with sentence of fine. *Munna* v. *State of UP*, (1994) 1 CCR 245 : 1994 JIC 86 : 1994 UP Cr R 328 (All) (DB).

Where the deceased was responsible for vasectomy operation of accused at the age of 14 years and later used to tease him on this account. Hence accused was bound to have sudden and grave provocation. Conviction under Section 302 IPC is set aside and accused appellant is convicted under Section, 304, I and sentence reduced to already undergone. *Deva Ram* v. *State of Rajasthan*, 1994 Cr LR (Raj) 574.

Where the accused pleaded minority on date of commission of offence gave different ages at different stages and School leaving certificate was not controverted. It cannot be said that no questioning about age done by Magistrate. *Amrutlal Someshwar Joshi* v. *State of Maharashtra*, 1995 (2) Bom CR 312 (SC).

Where the findings regarding age of concerned accused on basis of interested evidence without giving any opportunity to accused concerned to lead evidence about his age could hardly be upheld. The finding of the court that there is no need to make order for separate trial of concerned accused in court meant for offenders below 16 years is set aside. *Monoj Soni alias Laloo* v. *State*, (1995) 1 CHN 351 (Cal).

When child witness was found to be incompetent witness—Hence held that if he is competent to know the nature of act he is competent. *Jhuri Lal v. Union Territory. Chandigarh*, (1994) 2 CC Cases 161 (P & H).

Where appellant claimed to be minor as being below 16 years of age. When enquiry about age, was held in Judicial Magistrate indicated accused-appellant as minor, but Sessions Judge not making any enquiry—Age pleaded between 16 to 18 years. It was held that Sessions Judge should have made enquiry. Hence, conviction was maintained but in view of Section 27 of U.P. Children Act, 1952 he cannot be sentenced to imprisonment. Hence directed to be released. *Nanak* v. *State*. 1994 ACC 383 (All).

Where accused being children below 16 years of age when committed offence—Sending them in jail valid. Sending these children in jail after conviction instead of in approved schools under Act 1952, not valid. As they are now more than 30 years old, they should be released forth with while sustaining conviction. *Pradeep Kumar* v. *State of U.P.*, 1994 Cri LJ 148 (SC) : AIR 1994 SC 104 : 1995 Supp(4) SCC 419 : 1995 SCC (Cr) 395.

The counsel for the appellant relied upon *Suresh* v. *State of U.P.* , AIR 1981 SC 1122: (1981) Cri LJ 746, *A. Devendran* v. *State of T. N.*, 1998 SCC (Cri) 1004: (1996 Cri LJ 2307; *Sheikh Abdul Hamid* v. *State of Madhya Pradesh*, AIR 1998 SC 942 : 1998(3)

SCC 188 : 1998(1) JT 377 : 1998(1) Scale 368 : 1998(1) Supreme 425 : 1998(1) Crimes 148 (SC) and *Mukund* alias *Kundu Mishra* v. *State of Madhya Pradesh*, 1997 Cri LJ 3182 : AIR 1997 SC 2622 : 1997(10) SCC 130 : 1997(5) JT 134 : 1997(3) Scale 769 : 1997(3) Crimes 69 (SC) and urged that the accused at the time of commission of the crime was a young man of 20 years of age. He was not hardened criminal. His act could not be said to be one which would show that there was a premeditation to commit the act which he had committed, a young man fealing deprived of the company of his wife had gone to the house of his in-laws in a emotionally enraged condition. Though he had committed the crime but he did not have the credential of a habitual criminal. It was psychological imbalance which truned him in an abnormal personality at the time of commission of the crime. The manner of occurrence also was not grossly diabolical or gruesome. It was an act of enlargement of the feeling and, therefore, the Court after hearing the arguments converted the death sentence into imprisonment for life and a fire of Rs. 500/-. *State of Rajasthan* v. *Baisakha Singh*, 1999 Cri LJ 1399 (Raj).

Where plea that accused petitioner is young boy of 17 or 19 years age. There is no rule that young boy cannot be awarded death sentence. Regarding correct age of accused school leaving certificate showing his age as more than 20 years on incident date which was never in doubt nor questioned on this point. There being no ground to reduce sentence. Petition dismissed. *Amrutlal Someshwar Joshi* v. *State of Maharashtra*, (1994) 3 Crimes 276 (SC), AIR 1994 SC 2516 : 1994(6) SCC 186 : 1994(5) JT 25 : 1994(3) Scale 721.

Considering the overall circumstances and bearing in mind that the incident took place nearly 15 years ago and there is nothing that the accused had any adverse criminal antecedent, a sentence of R.I. for life for the offence under section 302 IPC and 2 years R.I. for that under section 404, IPC would meet the ends of Justice. *State of Maharashtra* v. *Vilas Pandurang Patil*, 1999 Cri L.J. 1062 (Bom).

7. Circumstantial evidence.—The fact that the conviction that the accused is based on circumstantial evidence is no reason for not awarding capital sentence. 42 Cr LJ 770 : AIR 1941 Mad 120 ; AIR 1949 Pat 49 : 81 Cr LJ 132 ; 34 Cr LJ 885. There is no rule of law or practice preventing the Court from sentencing an accused person to death merely on circumstantial evidence for an offence under this section. AIR 1929 Sind 179 ; 109 IC 912 : 29 Cr LJ 640 ; 30 Cr LJ 971 : AIR 1929 Mad 657. The fact that the conviction of the accused is based on circumstantial evidence is no reason for not awarding capital sentence. AIR 1941 Mad 120 : 42 Cr LJ 770; AIR 1939 Pat 49 : 41 Cr LJ 132 ; 34 Cr LJ 395. Capital sentence is not improper even in cases of constructive guilt of murder. AIR 1933 Pat 110 : 34 Cr LJ 427. Reason must be adequate in passing lesser sentence. *Ibid*. The mere fact that the conviction of the accused for murder is based on circumstantial evidence is no ground for passing the lesser sentence of transportation of life. 44 Mad 443 : 22 Cr LJ 396 : 61 IC 525.

Sufficient evidence. The accused did not make an effort to save the deceased but was shown to have been abusing the deceased and his relatives, tried to prove his innocence by manipulating records of a nursing home. The obvious attempt was to show that he could not have looked after the treatment of the wife as he himself was undergoing treatment. Several other factors throw considerable light relating to the absence of any material to show that a stove had burst which resulted in causing injuries on the body of the deceased. Unfortunately, the High Court did not even analyse the circumstances but came to an abrupt conclusion that the circumstances do not constitute a complete chain.

As noted above, the circumstances point to only one conclusion, *i.e.* guilt of the accused. The judgment of the High Court impugned in this appeal is set aside and that of the trial Court is restored. The Respondent No. 1 shall surrender to custody forthwith to serve remainder of sentence if any. *State of West Bengal vs. Dipak Halder*, AIR 2009 SC 1883 : 2009 (2) Crimes 484 (SC) : 2009 (7) SCC 288 : 2009 (7) JT 444 : 2009 (7) Scale 596 : 2009 (8) SCR 530 : 2009 (5) SLT 282.

Where a Sessions Judge finds the accused guilty of a cruel murder under Section 302, there being no extenuating circumstances, he should not refrain from passing a sentence of death, because there was no eye-witness to the murder. LBR (1872-1892) 436. In a case of murder the facts clearly established were that the accused was last seen with the child alleged to have been murdered, on that he stripped her of most of her ornaments and sold them and that her body was next found in a well and the accused disclaimed all knowledge of the matter, though he himself indicated the well. *Held*, that the accused was guilty of a foul murder, which in spite of his youth called for extreme penalty. 16 Cr LJ 167 : 27 IC 551; 157 IC 829 : 36 Cr LJ 1200 : 39 CWN 199 : AIR 1935 Cal 526. In the awarding of capital sentences, the Chief Court does not make any distinction between cases of murder as proved by direct or indirect evidence. 12 PR 1888 Cr ; 13 PR 1869 Cr ; AIR 1930 Sind 225. The fact that the accused was not arrested when actually committing the crime or in the act of escaping from the spot is no reason for not having the sentence of death. 13 PR 1873 Cr. Award of lesser penalty of the imprisonment held proper. AIR 1962 Cal 504 : 1962 (2) Cr LJ 354 ; AIR 1953 SC 364. It is well settled that the prosecution must stand or fall on its own legs. Where various links in a chain are in themselves complete, then a false plea or defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link in the chain it must be proved that all the links in the chain are complete and do not suffer from any infirmity. AIR 1984 SC 1622 (*see* also conditions precedent for conviction or basis of circumstantial evidence).

Where appellant husband killing wife who was deceased. They were married two years ago—Only had circumstantial evidence—Relations between them was not normal—Last seen together before they went to sleep—Next morning wife found dead covered with quilt on bed—No possibility of suicide. The accused was absconding. Hence conviction was upheld. *Kuldip Sharma* v. *State*, (1995) 4 Crimes 225 (SC).

Conviction reliance on *circumstantial evidence*—Validity. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.

Circumstances highlighted by the trial Court and the High Court are as follows :

1. Accused was living with Hunji as a couple before the occurrence.
2. Death of Hunji was committed by strangulation, and dead body was recovered in a trunk at Unjha.
3. Accused was absconding after selling his all belongings *i.e.* cow, buffalo *etc.* Accused disappeared for a long period of 4-5 years.
4. Accused had hired a Jeep on rent in which he loaded all his goods and

had gone to Unjha in which a trunk also contained the dead body of deceased which was recovered from such trunk in Unjha. Identification of such trunk has also been proved by witnesses.

5. Motive of crime has been also proved by evidence of prosecution that he was keen to take other women, and he has killed his wife Hunji for removing him from the scene.

In our considered opinion the circumstances highlighted by the trial Court and the High Court clearly establish the guilt of the accused appellant. *Narayan vs. State of Rajasthan*, 2009 CrLJ 2248 : 2009 (1) Crimes 451 : 2009 (11) SCC 118 : 2009 (3) JT 179 : 2009 (3) Scale 272 : 2009 (2) SCR 1200 : 2009 (2) Supreme 210.

When there was no direct evidence only had circumstantial evidence—Interested witnesses inimical to the appellants—Claim that illicit relation between the appellant provided the motive for offence not believed. There was found no circumstance to connect the appellants with offence. Hence it was held that giving benefit of doubt sentence and conviction against appellants set aside. *Harish Chander* alias *Billa* v. *State*, (1995) 3 Crimes 189 : 1995 Cr LJ 3030 : (1995) 2 CC Cases 503 (Del).

Insufficient lacuna in prosecution case—Circumstantial evidence. Four people had lost their lives and the accused does not seen to be a person of high morals, but that itself would not be a ground to record his conviction in the absence of reliable material and evidence. The circumstances highlighted by the prosecution are as follows :

1. Ilicit relations between deceased Durgabai and accused.
2. Illicit relations between accused and Durgabai's daughter Yogita (15 years old).
3. Complaint made by deceased Durgabai on 20.07.1998 against accused regarding threat to kill.
4. Complaint made by deceased Durgabai one day before the incident regarding threat by accused.
5. Statement of PW-1 Laxman recorded under Sec. 164 of the Code.
6. Beating up of PW-1 Laxman by Prakash Bole to dissuade him from giving evidence in support of prosecution.
7. Police dog traced the scent from the place of incident to the house of the accused thereby connecting the accused to the ghastly murders.
8. Blood stained nail clippings of accused taken upon medical examination immediately upon arrest.
9. Recovery of blood stained jersey of accused from septic tank in the house of the accused and burnt pant at his instance.

It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.

So far as circumstances No. 4 is concerned the trial Court observed that the prosecution failed to produce any evidence about the same. The police dog traced the scent from the place of incident to the house of the accused is really no evidence in the eye of law. So far as the blood stains are concerned medical examination revealed that the ladies had 'B' blood group while boys had 'O' blood group. Merely because blood stains were found on the jersey of the accused from septic tank in the house of the accused and burnt pant, that in inconsequential since as noted above his blood group is also 'B'. The trial Court observed that the weapon used was stone whereas the weapon recovered from the septic tank is stated to be 'Kadbatodi'. Unfortunately, no finger printing was done.

It is noted that though the blood of the accused was collected the same was not sent for chemical analyzer.

In view of the position in law highlighted above it cannot be said to be a case where the prosecution has established a complete chain of circumstances which rules out possibility of the involvement of any other person and unerringly points fingers at the accused to be the author of the crime. *State of Maharashtra vs. Mangilal*, 2009 (3) JT 414 : 2009 (3) Scale 580 : 2009 (4) SCR 49 : 2009 (3) SLT 201.

Where only circumstantial evidence available. Shoes and axe belonging to accused recovered at spot. Witnesses saw accused climbing the roof and also coming down. Chain of circumstances being complete and no other conclusion except guilt of accused. Hence conviction upheld and appeal was dismissed. *Moyan* alias *Mohan* v. *State of M.P.* 1994 Cr LR 313 (MP).

Sufficient evidence—Sentence. It needs no emphasis that while evaluating circumstantial evidence, which of course has to be done carefully, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged and the circumstances so shown by the prosecution are compatible with no other reasonable hypothesis.

PW-4 is the father of victim. PW-2, PW-3 and PW-5 are migrant labourers from Nepal like PW-4. They all were residing in the same compound viz. Rajmahal Hotel Compound. If despite frantic search throughout the day, the girl could not be traced, there was nothing unusual if they were sitting outside the hut of PW-4 in the night with a hope that the girl may return, or somebody may leave her. In the night at about 1.30 A.M., they saw four persons carrying one gunny bag and going towards plot of one Sardarji. They saw those persons throwing a dead body from the gunny bag in that plot. The dead body was of Sushma. They raised alarm and caught hold of the accused persons. They took the accused persons to the Police Station and handed them over to the police. PW-4 lodged FIR and all of them came back to the place near the dead body. Sans insignificant and minor contradictions here and there, all these four witnesses are consistent in their version on material aspects.

That the underwears of the accused were seized on 27.09.2003 when they were in jail and these articles were sent for chemical examination is not in dispute. That the evidence pertaining to chemical examination of underwears shows that those underwears were found stained with human semen and spermatozoa is also not in dispute.

As a matter of fact there is no challenge with regard to proof of the circumstances (ix) and (xvi). The challenge is on relevance of these circumstances on the ground that the accused persons are labourers and they do not change their underwears daily and merely because their underwears were found to have semen stains, that by itself cannot be used as an incriminating circumstance. We find no merit in this contention. In our opinion, the circumstances (ix) and (xvi) do provide link in forming the chain together with other circumstances against the accused persons and do not deserve to be ignored.

In so far as circumstances (xi), (xii) and (xvii) are concerned, the evidence of Dr. K.S. Dhami (PW-1) establishes that victim was subjected to rape and murder. Mr. T.V. George, learned Counsel for A-3, however, sought to urge that the injuries and medical evidence make it highly improbable that four persons raped the minor girl. *Firstly*, no question or suggestion has been put to PW-1 in this regard. *Secondly*, and more importantly, semen stain with spermatozoa were found on the underwears of all the four accused. *Thirdly*, chemical examination of the vaginal smear of the victim has also confirmed presence of human blood, semen and spermatozoa. In view of this evidence, rape of victim by more than one culprit can be safely held to be established. The medical evidence proves beyond reasonable doubt that the victim died of homicidal death and that she was raped before being murdered. Circumstances (xi), (xii) and (xvii) to this extent are clearly proved.

Nothing has been brought on record that PW-2, PW-3, PW-4 and PW-5 had any enmity with A-1, A-2, A-3 and A-4 or had any special relations with the police. That A-1, A-2, A-3 and A-4 were seen throwing the dead body of the victim in the intervening night of 25/26.09.2003 is also established. The circumstances (xiii), (xiv) and (xv), thus, have rightly been held to be proved by the trial Court as well as High Court.

In the light of our discussion aforenoted, we find that the view taken by the High Court is the only possible view on a proper appraisement of evidence and no other view is possible and it has not committed any error in upholding the conviction of the accused persons for the offences punishable under Secs. 302/34; 376 and 201/34 IPC. *Pawan vs. State of Uttaranchal*, 2009 CrLJ 2257 : 2009 (1) Crimes 406 : 2009 (3) JT 87 : 2009 (3) Scale 195 : 2009 (2) Supreme 139 : 2009 (3) SCR 468 : 2009 (2) SLT 407.

Circumstantial evidence—Complete chain—Scope. It is trite law that in a case where there is no direct eye-witness version available and the case is based on circumstantial evidence, the principle which is to be applied by the Court is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. *Jayabalan vs. U.T. of Pondicherry*, 2009 (4) Crimes 172 (SC) : 2010 (1) SCC 199 : 2009 (14) JT 401 : 2009 (13) Scale 614 : 2009 (8) SLT 322.

When prosecution case is based only on circumstantial evidence. Deceased died due to throttling and injuries. Accused and deceased being of same village-Accused under influence of liquor quarrelled with deceased and proclaimed to kill him. He went away but again came in night and killed. Previous quarrel with deceased proved motive—After incident absconding of accused being further circumstance which cannot be ignored—Consistent evidence of witnesses cannot be disbelieved simply because they were interested witnesses and not corroborated by independent witnesses. Hence combined effect of all these circumstances justified conviction. *Kamal Singh* v. *State of H.P.*, (1994) 3 Crimes 134 (HP) (DB).

Conditions precedent need to be established. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established.

They are :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. *Vithal Eknath Adlinge vs. State of Maharashtra*, AIR 2009 SC 2067 : 2009 (11) SCC 637 : 2009 (3) JT 158 : 2009 (3) Scale 327 : 2009 (3) SCR 532.

The conditions precedent in the words of Supreme Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

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(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. *Krishna Ghosh vs. State of West Bengal*, AIR 2009 SC 2279 : 2009 CrLJ 2820 : 2009 (2) Crimes 102 (SC) : 2009 (12) SCC 413 : 2009 (4) JT 658 : 2009 (5) Scale 124 : 2009 (5) SCR 333 : 2009 (3) Supreme 39 : 2009 (2) JCC 1389 [See also *Vithal Eknath Adlinge vs. State of Maharashtra*, AIR 2009 SC 2067 : 2009 (11) SCC 637 : 2009 (3) JT 158 : 2009 (3) Scale 327 : 2009 (3) SCR 532 see also *Ramesh Bhai vs. State of Rajasthan*, 2009 CrLJ 2991 : 2009 (2) Crimes 337(SC) : 2009 (12) SCC 603 : 2009 (7) JT 439 : 2009 (6) Scale 320 : 2009 (6) SCR 949 [See also *Gamparai Hrudayaraju vs. State of Andhra Pradesh*, AIR 2009 SC 2364 : 2009 CrLJ 2845 : 2009 (2) Crimes 259(SC) : 2009 (5) JT 475 : 2009 (5) Scale 595 : 2009 (3) Supreme 447 : 2009 (6) SCR 396.

The injuries on head of deceased who was travelling in a train might have been sustained from a fall from running train. The chain of circumstances have big missing link. Hence conviction and sentence cannot be sustained. *Mohd. Murshid* v. *State of Bihar*, (1995) 1 East Cr C 97 (Pat) (RB).

Where circumstances put together cannot form a chain much less a completed chain for drawing the irresistible inference that the deceased were murdered by the appellant and none else—Paucity of legal evidence to reach exclusive conclusion regarding the guilt of the appellant. Therefore the conviction and sentence were set aside. *Nandanan* v. *State of Kerala*, (1995) 2 CCR 517 ; (1995) 3 Crimes 273 (Ker) (DB).

Sufficiency of circumstantial evidence—Sentence—Scope. Extreme poverty had driven the appellant to commit the gruesome murder of three of his very near and dear family members - his wife, minor son and daughter. There is nothing on record to show that appellant is a habitual offender. He appears to be a peace loving, law abiding citizen but as he was poverty stricken, he thought in his wisdom to completely eliminate him family so that all problems would come to an end. Precisely, this appears to be the reason for him to consume some poisonous substances, after committing the offence of murder. No witness has complained about his bad or intolerable behaviour in the past. Many people had visited his house after the incident is indicative of the fact that he had cordial relations with all. He is now about 35 years of age and there appear to be fairly good chances of the appellant getting reformed and becoming a good citizen.

Thus, looking to the matter from all angles and after giving our serious consideration to the whole matter, we are of the opinion that it is not a fit case where it would fall within the category of "rarest of rare case" and, therefore, death sentence as awarded to him by learned trial Judge and confirmed by High Court deserves to be set aside and quashed and is accordingly done so by us instead he is held guilty of commission of offence under Sec. 302 of the IPC on three counts and is awarded life imprisonment for the same. *Sushil Kumar vs. State of Punjab*, AIR 2010 SC 832 : 2009 (10) SCC 434 : 2009 (3) Crimes 391 (SC) : 2009 (11) JT 368 : 2009 (12) Scale 105 : 2009 (13) SCR 1082 : 2009 (6) Supreme 228 : 2009 (7) SLT 331.

Arrest of accused along with blood stained clothes from Bus Station while leaving the city. Description of the accused given by eye-witnesses tallying with their persons—Refusal of the accused to face identification parade—False implication of the accused not established from evidence on record—Hence conviction was sustainable. *Zaffar* v. *State (Delhi Admn.)*, 1994 SCC (Cri) 295 : (1994) 1 CCR 13 (SC) : 1993 (4) Scale 571 : 1993 (3) Crimes 1096.

When the T. Shirt of the accused was found stained with human blood of AB Group and the same Group of blood was found on *gadda* in which the dead bodies were found wrapped which was blood group of the deceased. All these circumstances are proved and form a chain to establish the crime beyond reasonable doubt. Conviction upheld. *Suresh Kumar* v. *State of Rajasthan*, 1995 Cr LR (Raj) 272 ; 1995 Cr LJ 1853 (Raj).

When circumstantial evidence coupled with admissions excluding confession and recovery of blood stained weapon and clothes at his instance established his guilt. Accused murdered victim before being burnt proved. Motive was also proved. Admissions of accused which are not confessional statement are admissible in evidence even if such statements are made before police officer. Confessional FIR can be used as evidence of conduct. Hence conviction was maintained—Appeal was therefore dismissed. *Mohinder Singh* v. *State (Delhi Administration)*, (1995) 2 CC Cases 110 (Del).

The evidence against accused was not so complete as to forge all links in a chain and not capable of explanation of any other hypothesis than that of guilt of accused. It was neither consistent with the guilt of accused nor inconsistent with ocence. Accused is entitled to benefit of doubt. *Satish Kumar* v. *State*, (1994) 2 Crimes 631 (Bom).

When there was no eye-witness to the occurrence hence to be based on circumstantial evidence. There was recoveries from open place accessible to all and sundry. Prosecution fails to make out case under Section 397—No incriminating circumstances against the appellant/accused. Hence it held that sentence convicting under Section 397 and Section 302, IPC set aside. *Mintu Lal* v. *State of Rajasthan*, 1995 Cr LR (Raj) 396 : (1995) 2 RCD 523 (Raj).

When the prosecution case was based merely on circumstantial evidence which could not be established by prosecution. Facts established cannot be said to be sufficient for conviction of appellant under Sections 302 and 376, IPC save and except under Section 201, IPC. *Laldeep Bhagat* v. *State of Bihar*, (1995) 1 BLJ 395 (Pat).

Circumstances brought on record lead to only conclusion that accused alone committed the murder of deceased and attempted to cause disappearance of evidence by setting fire to body of deceased. Conviction confirmed. But death sentence converted to one of imprisonment for life. *Ramesh* v. *State of Karnataka*, (1995) 1 Andh LT (Cr) 510 (Kant) (DB).

Where wife in company of her husband at time of incident. Husband's guilt clinchingly pointed out by chain of circumstances.—Husband's conviction and sentence upheld by High Court. *Deepak Narayanappa Teware* v. *State of Maharashtra*, (1995) 1 B Cr C 223.

Allegation based circumstantial evidence—No interlink in the chain.—Hence sufficient ground to acquittal. *Gordhan* v. *State of M.P.*, 1995 Cr LJ 8 (MP).

Where the case is based on circumstantial evidence. The recoveries made were not at the instance of accused. Nothing on record to connect the accused with the crime. Hence conviction and sentence passed by. Trial Court cannot be sustained. *Kinu Mahto* v. *State of Bihar* (1994) 2 East Cr C 292 (Pat).

Each circumstance has to be proved by evidence and not by surmises. Strong suspicion cannot substitute the legal proof. *Ramesh Kumar* v. *State of Punjab*, 1994 SCC (Cri) 300 : 1994 Cr LJ 1120 : AIR 1994 SC 945.

Where occular evidence substantiated by the circumstantial evidence. Four sharp edged wounds on the head of the deceased inflicted in the dark hours of night caused death. Conviction was held not to be interfered with. *Pandu* alias *Pandu Kunda* v. *State*, (1995) 1 Crimes 1 (Ori).

Where the case is based on circumstantial evidence. In such cases there should be a chain of evidence so complete as not to leave any reasonable ground for conclusion consistent with innocence of the accused and it must be such as to show that in all human probability the act must have been done by the accused and none else. In instant case the circumstantial evidence relied upon by prosecution is not sufficient to prove beyond reasonable doubt the committal of murder. Conviction set aside. *Subhash Chand* v. *State of Himachal Pradesh*, (1995) 1 Sim LC 274 (HP) : 1995 Cr LJ 3460.

Where the testimony of witness is not consistent and highly discrepant and does not fit in with prosecution story as given in FIR lodged promptly. Hence circumstance has not been proved beyond reasonable doubt. Hence benefit of doubt given. *Ram Prasad Meena* v. *State of Rajasthan*. (1995) 1 CCA 795 (Raj).

Where proof to be beyond all reasonable doubt. not mere conclusive. *Lalu Mia* v. *State of Tripura*. (1995) 2 GLR 145 (Gau).

Where there was direct evidence and conviction was based on circumstantial evidence. From the prosecution evidence adduced none of circumstances held to be proved by trial judge established beyond reasonable doubt. Hence conviction was liable to be set aside. *Mal Singh* v. *State of Rajasthan*, (1995) 2 CCR 635 (Raj) : (1995) 2 Crimes 511 : 1995 Cr LJ 2279 : 1995 R Cr 277 : (Raj).

The conduct of witnesses in not questioning the appellants at the spot and not informing about incident to pradhan on next day and non-mention of fact of murder in FIR lodged by no other person than the village chowkidar creates a grave doubt on prosecution story itself. The prosecution could not make out chain of circumstances that would lead to the only conclusion of guilt of appellants. Hence conviction and sentence set aside. Appeal allowed. *Babu Lal* v. *State of U.P.*, 1995 UP Cr R 5 : 1995 (32) ACC 168 : 1995 Cr LJ 1188 : 1995 ALJ 709 (Alld).

When the eye-witness expired during trial. The conviction was based on circumstantial evidence. Hence, no identification parade was held and accused was identified in Court. There was no evidence connecting accused-appellant with crime, hence conviction was not proper. Therefore he was acquitted. *Devi Lal* v. *State of Rajasthan*, (1995) 2 RCD 80 (Raj).

When the case rests upon circumstantial evidence—The prosecution failed to complete chain of circumstantial evidence. Hence accused is entitled to benefit of doubt—Therefore acquitted. *Sukharajuwa* v. *State of Madhya Pradesh*, (1995) 3 CCR 699 (MP).

When case of circumstantial evidence. Circumstance of last-seen with the deceased. No cogent evidence that accused left after death was caused. No evidence that it was impossible for any one to enter the residential quarters. Possibility of accused being frustrated in marital relationship with his wife and walked away consistent with innocence of accused. Benefit of doubt given to the accused and judgment and order of conviction set aside. *Madan Lal* v. *State of Rajasthan*, (1995) 3 Crimes 112 (Raj) : (1995) 2 RCD 504 : 1995 Cr LR 422 : 1995 R Cr C 321 : (1995) 1 RCD 446 : (1995) 2 RCD 74 : 1995 Cr R 865 (Raj).

Where accused identified by prosecution witnesses.—Recoveries made from possession and at the instance of accused—Accused last seen in company of deceased—Hence there established a complete chain of circumstances against the accused, conviction upheld. *Jangir Singh* v. *State of Rajasthan*, (1995) 2 RCD 133 (Raj).

Where accused not able to give any explanation to the disappearance of deceased after he purportedly left with her from the house of her brother. Evidence of interested witnesses could be called upon if their testimony remain unshaken during cross-examination by defence. Hence it is held that evidence is more than sufficient to establish the guilt of the accused. *R.N. (Loknathan)* v. *State of Goa*, 1995 Cr LR (Mah) 240 (Bom).

Where the circumstances relied by Sessions Court for conviction of accused are not completing the chain so as to lead to conclusion that accused and no other could have been assailant. The evidence relied upon by prosecution falls short of requisite standard. *Salim Khan* v. *State*, (1995) 3 CCR 196 (Bom).

The prosecution has failed to prove any of circumstances against the present appellants. Hence the order of conviction and sentence passed by Trial Court was not at all justified as there is absolutely no evidence against the appellants. Hence order of conviction and sentence set aside. *Sanjeev Puri* v. *State*, (1995) 57 DLT 18 (Del).

Conviction of the accused not sustainable unless the incriminating circumstances appearing against the complainant-party are sufficiently explained by the prosecution. *Jaikaransingh* v. State *of M.P.*, (1994) 1 CCR 32 (MP).

Where delay in lodging FIR justified by the circumstances of the case does not vitiate trial. *State of Karnataka* v. *Ram Reddy*, 1994 SCC (Cri) 42 : (1994) 1 Crimes 571 : (1994) 1 East Cr C 384 (SC) : 1993 (4) JT 350 : 1993 Cr. LJ 3553 : 1993 (3) Scale 234 : 1993 (3) CCR 283 (SC) : 1993 Cr. LR (SC) 511.

In a case of kidnapping with murder, there was no eye-witness of the incident. A ransom note was found pasted on the door of the complainant, father of boy, in the bard writing of the accused. Similar ransom notes were recovered from the possession of the accused when he was arrested. The accused was maintaining a separate establishment in the midst of sugar cane field far away from the village. The dead body of the kidnapped boy was recovered at the instance of accused. The extra-judicial confession made by the accused while he was being taken to the Police Station was proved by the prosecution witnesses of the same village and not related to the complainant. In the cross-examination of the said witnesses there was not even a suggestion that they had any enmity or motive to implicate the accused. The fact that immediately after making extra-judicial confession, the accused pointed to lead the recovery of the dead body which completed the claim of events and gave strength to the evidence, proving extra-judicial confession by the accused. Conviction of accused on the basis of circumstantial evidence and extra judicial confession for offences under Section 302, 364 and 201 was held proper. *Geetam Singh v. Slatig U.P.* 2001 Cri LJ 4791 (All).

When the prosecution was unable to give details of occurrence in which injuries were caused and the manner in which they were caused. No explanation was offered by the accused as to how he came to suffer such injuries. It was held that the mentioning circumstances that injuries may have been sustained in course of same occurrence, by itself did not conclusively prove complicity of accused and the said circumstances had to be considered alongwith other circumstances proved at trial. *Gilbert Pereria* v. *State of Karnataka*, 2004 Cr LJ 4837 : AIR 2004 SC 4454 : 2004(6) Supreme 644 : 2004(4) Crimes 65 : 2004(8) SRJ 220 : 2004(3) JCC 1347.

In a case of alleged demand of dowry, harassment by husband and in-laws, and death of wife, the vital link in chain is possibility of accused husband committing offence, closing door and then sneaking out of room, place of occurrence from one or two possible places was not proved by the prosecution. The cause of death was shrouded in mystery. The benefit of doubt was given to the accused, as in the event of there being two possible views, the one supporting accused should be upheld. *Narendra Nath Singh* v. *State of M.P.*, AIR 2004 SC 3249 : 2004 Cr LJ 2842 : 2004(2) Crimes 260 2004(3) Supreme 304 : 2004(2) JCC 832.

When the accused was last seen with deceased by witnesses having poor eye-sight, the evidence of such witnesses was not relied on. *State of Rajasthan* v. *Khima*, 2004 Cr LJ 4873 : AIR 2004 SC 4677 : 2004(4) Crimes 40 : 2004(4) Rec Cri R 998 : 2004(7) Scale 669(2) : 2004(6) Supreme 587.

In the case of death of wife of accused by strangulation, neighbour of the accused deposed that he saw the accused entering house during night time and also deposed that he saw accused quarrelling with his wife during night time. The said neighbour live 4-5 houses away from accused and it was not possible for him to observe quarrel from his house. No other evidence was produced to establish presence of accused in the house on crucial night. It was held that the fact that accused could not establish by cogent evidence that on that night he remained at house of his parents in another village, did not lead to necessary inference that he was in his own house and, therefore, the benefit of doubt given to the accused could not be interfered with. *Desari Siva Pd. Reddy* v. *Public Prosecutor, High Court of A.P.*, 2004 Cr LJ 4868 : AIR 2004 SC 4383 : 2004(5) SLT 147 (SC) : AIR 2004 SCW 5068 : 2004 ALD (Cri) 677 : 2004(7) Scale 59.

8. Dead body not discovered corpus delicti.—It is not obligatory for proving the death of an individual that his dead body should be discovered. AIR 1950 Mad 452. In a case of murder, once the Court is satisfied that the murder is committed and that the accused party has committed it, the gravity of the offence irrespective of the circumstances whether the body has or has not been recovered, will determine the sentence. AIR 1931 Lah 25 : 32 Cr LJ 493 : 130 IC 331. Sentence must be determined upon gravity of offence irrespective of discovery or non discovery of dead body. AIR 1931 Lah 25; *see* AIR 1957 SC 381 : 1957 Cr LJ 559 (the conviction for an offence does, necessarily depend upon the *corpus delicti* being found) ; *see* 1981 Cr LJ 298 (pray by circumstantial evidence—what kind of proof is required).

Where the dead body was recovered from house in possession of *'A'*. Accused residing in house on day of occurrence fully established by statement of witnesses. The recovery of articles used in murder established. Hence finding recorded by Court was justified and affirmed. *State of UP.* v. *(Smt.) Zubaida Khatoon*, 1995 (32) ACC 194 (All).

Where only accused found responsible to commit murder Disappearance of dead body. He can be convicted and sentenced. *Ashok Gavade* v. *State of Goa*, (1995) 1 B Cr C 41 : (1995) 1 Bom Cr R 363 (Bom).

9. Co-accused's sentence reduced.—Co-accused's sentence of death commuted. by Executive Government is no judicial consideration for not passing death sentence on the accused concerned. AIR 1940 Lah 494 ; (1952) 2 MLJ 735 : 1954 Cr LJ 212 : AIR 1954 Mad 196 ; AIR 1960 Ker 149 : ILR 1960 Ker 66 : 1960 Cr LJ 594 (effect of acquittal of *B* on *A*'s conviction) ; *Held*, that merely because leniency had been shown to some of the appellants.

Where High Court took reasonable view of giving benefit of doubt to three others but it cannot be said that appellants are also entitled to be acquitted. The prosecution has proved the case against beyond all reasonable doubts. Hence appeal fails and dismissed. *Awadhesh* v. *State of Uttar Pradesh*, (1995) CCR 16 (SC) : 1995 AIR (SC) 375 : 1999 (Supp (3) SCC 151 : 1994 (5) JT 617 : 1994 (3) Scale 914 : 1994 (2) UJ 524 1994 (3) Crimes 283 : 1994 SCC (Cr) 1676.

Involvement of co-accused—Determination of. According to PW-6 initially five persons had come running. He has specifically named the persons. He has further stated that the deceased being afraid jumped out of the motor cycle and ran away. The witness has further stated that the deceased ran for some distance and entered into the house of one Bagdiram and closed the door from inside. Thus at that time nine persons including the present appellants came running and they were armed. It has further been stated by him that the deceased opened the door and started running away and was attacked with sword. In the cross examination he had admitted that the deceased was attacked by Kamal, Ansar, Inayat and Mohabbat inside the house of Bagdiram. Though it was the stand of learned Counsel for the State that in the dying declaration all the accused persons were named, it appears that PWs. 6 and 7 did not state about the dying declaration *vis-à-vis* Israil and Iqbal. PWs. 8 and 9 have also given different names. In view of the aforesaid, it cannot be said that the prosecution has established the accusations so far as accused Iqbal and Israil *i.e.* accused Nos. 7 and 6 are concerned. But the prosecution has clearly established the accusations so far as Mohabbat accused No. 1 is concerned. The appeal filed by accused Mohabbat is dismissed while the appeal filed by Iqbal and Israil is allowed. They be set at liberty forthwith unless required to be in custody in any other case, if any. *Mohabbat vs. State of Madhya Pradesh*, AIR 2009 SC 1893 : 2009 CrLJ 1752 : 2009 (2) JT 169 : 2009 (2) Scale 133 : 2009 (1) Supreme 747 : 2009 (1) SCR 883.

Three persons from side of complainants and three from side of accused sustained injuries. Case of mutual free fight. Right of private defence not available. Everybody is responsible for his own acts. Hence accused *'P'* alone held guilty under Section 302, IPC but accused *'M'* held guilty under Section ' 324, IPC. Life sentence of '*P*' maintained and that of *'M'* reduced. *Pushpa Raj and Mahesh* v. *State of Rajasthan*, (1995) 1 WLC 600 (Raj).

There were no convincing evidence that co-accused caught hold of deceased when injuries were caused with *ballam*. The injuries traversed through the important parts of the body (chest and lungs) of victim proved fatal. There were no evidence to establish that the co-accused who were unarmed to have aided the accused in causing fatal injuries to victim. Hence co-accused entitled to benefit of doubt. *Jai Singh* v. *State of Haryana*, (1995) 1 CC Cases 325 (P & H) : 1996 Cr. LJ 1859 : 1996(1) Crimes 170 : 1996 (1) All Cr LR 310.

Determination of Co-accused—Similarity of cases. The High Court did not accept the stand of the prosecution regarding applicability of Sec. 304 Part II read with Sec. 149 IPC. It was held that in respect of the respective acts committed by each one of them the matter is required to be considered. From the post mortem certificate it was noticed that the first injury was caused by A-1 with aruval on the neck and the corresponding injury caused the death. At the same time, A-2, A-4, A-5 and A-6 were armed with aruval, A-7 with knife and A-3 with iron rod and they have attacked the deceased and contributed corresponding injuries. Therefore, it was held that A-1 had to be convicted in terms of Sec. 302 IPC. So far as others are concerned the acts attracted Sec. 304 Part II IPC.

Learned Counsel for the appellant has submitted that while others were convicted for offence punishable under Sec. 304 Part II, IPC he alone has been convicted under Sec. 302 IPC. According to him, there is a parity between the co-accused persons. The

High Court has indicated the reasons for which the appellant's case was treated differently. The trial Court and the High Court have noted that the appellant had given a fatal blow on the neck with aruval and the injury caused by such act proved fatal. Therefore, there is no substance in the plea of the appellant that he stood on similar footing as that of co-accused persons. *Jagebar Ali vs. State of Tamil Nadu*, AIR 2009 SC 1774 . 2009 CrLJ 1711 : 2009 (1) Crimes 237 (SC) : 2009 (11) SCC 108 : 2009 (2) JT 17 : 2009 (1) Scale 674 : 2009 (1) SCR 407.

10. Different intention.—Lesser sentence should be awarded where it is proved that the accused had no real intention to kill the deceased. AIR 1931 Mad 420 : 32 Cr LJ 623 : *see* also (1937) MWN 723. Where different intention is not proved all the accused should be punished similarly. AIR 1935 All 362 : 37 Cr LJ 32 : 159 IC 155.

11. Common Intention.—It is well-settled that where eyewitnesses account of the witnesses produced in Court is found acceptable and when the same has withstood the test of cross-examination, non-examination of other witnesses would pale into insignificance. Therefore, non-examination of teachers or other members of staff of college as witnesses cannot be considered fatal to the prosecution case as it stand fully supported by acceptable eyewitness account. The real question for determination in such cases are not as to what is the effect of non-examination of certain witnesses and the question will be whether the witnesses examined at the trial is found reliable and trustworthy the non-examination of other witnesses will not affect the credibility of the witnesses. *Ashani Vashist and another v. State of U.P.*, 2002 Cri LJ R-D undergo six months. In the opinion of the doctor 12, can. E.O examination the prosecutor surface on left verticle at its upper part. In the opion of the doctor death was caused due to shock and harmoniums surface of niddle on left ventricle at its upper part. *Ashwani Vahisht and Other v. State of U.P.* 2002 Cr LJ 619 : 2001 All LJ 2683 : 2001(43) All CriC 7047 : 2001(3) All Cri R 2000.

Absence of common intention. Prosecution has not brought on records any evidence to show that the accused persons had a common intention to commit the murder of deceased. It has not been shown that even otherwise they were bearing any common grudge against the deceased. Evidently, both the accused No. 1 and the deceased were customers of the said Wine shop. They might have picked up some quarrel. At the time when the occurrence took place, appellant being an employee of the said shop the question of his coming to the place of occurrence together with the other accused did not arise. The evidence of prosecution witnesses, particulary P.Ws. 1 and 2, on which both the Courts below have relied upon, even if taken at their face value, would merely show that it was the accused No. 1 who had assaulted the deceased with an iron rod; appellant was said to have only kicked the deceased.

A general statement was made that about a month prior to the incident, when the deceased had gone to Nandi Wine shop, quarrel between him and the accused persons took place. According to PW. 1, at that point of time, accused persons had threatened the deceased. From whom he had heard thereabout has not been disclosed.

Indisputably, P.W. 1's house was situated at about one furlong from the place of occurrence. He came to the place of occurrence in search of his brother. He failed to bring any material on record as to on what basis he arrived at the conclusion that accused persons had formed a common intention.

Ms. Shenoy may also not be correct in contending that all the accused persons ran away together. PW. 2 deposed that they went in different directions. Appellant, according to PW. 1, ran towards the Wine shop. Thus, it is not a case where all the accused came together and ran away together. A bald statement said to have been made by him that the accused No. 1 while assaulting the deceased had exhorted that they would not leave him till he died, cannot be a ground to hold that the same by itself is demonstrative of the fact that Appellant-accused No. 3 also had a similar intention. Admittedly, no weapon was recovered at the instance of appellant. He was wholly unarmed. On the basis of the voluntary statement made by the Accused No. 1 alone, an iron rod was recovered.

We are not concerned herein as to whether the said iron rod was the weapon of assault. Having regard to the quality of evidence that the prosecution had led, in our opinion, it is difficult to come to the conclusion that all the accused persons had a common intention to commit the murder of the deceased.

The prosecution has failed to establish why and how a quarrel had started. The prosecution even has not proved as to why the Accused No. 1 was carrying the iron rod even before the quarrel with the deceased started or as to whether the appellant was aware of this. It has also not been shown that he along with other accused persons came to assault the deceased. Appellant ordinarily was expected to be at his work place only. His presence at the spot, therefore, has sufficiently been explained.

For the aforementioned reasons, we are of the opinion that appellant cannot be held guilty for commission of offence punishable under Sec. 302 read with Sec. 34 of the IPC. The very fact that the appellant was unarmed and must be presumed to have been performing his duties at his place of employment, it cannot be said that he had formed any kind of common intention at the spot to murder the deceased. Some incident might have taken place and he might have formed a common intention to teach a lesson to the deceased. He might be guilty for commission of offence punishable under Sec. 323 of the IPC and not for commission of offence punishable under Sec. 302 read with Sec. 34 of the IPC. He is sentenced to the period already undergone. *Nagaraja vs. State of Karnataka,* AIR 2009 SC 1522 : 2009 (1) Crimes 278 (SC) : 2009 (1) JT 48 : 2008 (16) Scale 380 : 2008 (17) SCR 1127 : 2009 (1) Supreme 94.

See also *Babu alias Umakanta Nayak v. State of Orissa*, 2005 Cr LJ 865 (Orissa) : 2004(29) OCR 214 : 2004(2) Orissa LR 405.

Common Intention or Unlawful Assembly accused persons having formed an unlawful assembly and in pursuance of common object thereof, committed murder of deceased and injured his brother too. Out of seven accused persons five were acquitted. However, the fact remains that these two appellants were found to have inflicted the injuries with sharp edged weapon, as well as, Lathi. They have also been individually charged with the offence under Section 302, IPC. In that view, they were bound to be convicted for the offence under Section 302 read with Section 34, IPC. They came together on the spot, they also gave abuses to the deceased and thereafter, acted along with each other. Therefore, we have no hesitation in upholding the conviction, but not with the aid of Section 149, IPC, but with the aid of Section 34. Unfortunately, the High Court has not discussed this aspect of the case. *Murli and Anr. vs. State of Rajasthan.* 2010 (2) CrLJ 2228 (SC).

Determination of Common intention. The records clearly show that no charge was framed in terms of Sec. 34 so far as the appellant is concerned. This position is fairly conceded by learned Counsel for the respondent. It is also accepted that except PW-1 who stated that the appellant assaulted the deceased with a stick, the other purported eye witnesses stated that the appellant had given fist blow. Considering the evidence of witnesses as brought on record the appropriate conviction would be in terms of Sec. 325 IPC and not Sec. 302 IPC. *Shaikh Karimullah vs. State of Andhra Pradesh,* AIR 2009 SC 171 : 2009 CrLJ 1551 : 2009 (1) Crimes 313 (SC) : 2009 (11) SCC 371 : 2009 (2) JT 263 : 2009 (1) SCR 953 : 2009 (2) Scale 254.

12. Dacoity and murder.—If murder is committed in committing dacoity every one of the persons concerned in the dacoity is liable to be punished with death. 6 Bom LR 248 : 1 Cr LJ 258 ; UBR 1900 Cr ; 2 Bom LR 325. But if an act by which death is caused, does not itself constitute the crime of murder, it does not constitute murder because it is coupled with dacoity. 1 Ind Jour OS 108.

When FIR was lodged promptly and revolver and stolen articles recovered from appellant, his conviction upheld. *Manmohan Singh* v. *State of Punjab,* 1997 (1) Crimes 114 (S).

13. Drunkenness.—Drunkenness is not an excuse for lesser sentence. AIR 1942 Pat 427 : 43 Cr LJ 544 ; AIR 1941 Lah 454 : 43 Cr LJ 332 ; 7 Lah 50 : 27 PLR 294 : 94 IC 406 : 27 Cr LJ 630 : AIR 1926 Lah 232. (Contra view in 41 IC 980). Where the accused is habitual *ganja* smoker and while under the influence of that drug he dashed a child to the ground and killed it and there was no motive for the offence, the accused must held to have committed the act while he was under some mental derangement and that his case comes under Section 86. 39 Cr LJ 34. The intoxication of the accused, while he was committing murder may be properly taken into consideration on the question whether the act was premeditated or done only from a sudden impulse. But voluntary drunkenness cannot be pleaded as an excuse for a crime. 41 PR 1866 Cr ; LBR (1893-1900) 550 ; 12 Rang 445 : AIR 1934 Rang 361 : 1934 Cr C 1326 : AIR 1934 Rang 10 : 35 Cr LJ 1065 : 149 IC 1176 ; AIR 1936 Rang 477 : 165 IC 762 ; AIR 1938 Rang 209 : 39 Cr LJ 689 ; 1937 MWN 1329. Where there is no clear motive for the murder, drunkenness of the accused at the time of murder affords a sufficient excuse for not extreme penalty of the law. 1952 RLW 145 ; AIR 1954 AP 46 : 1954 Andh LJ (HC) 88 : 1954 Cr LJ 81.

Where the degree of the accused's intoxication falls short of a proved incapacity in the accused to form the necessary intent to constitute murder, the offence is murder. AIR 1960 Ker 120 : 1960 Cr LJ 477. Voluntary drunkenness is not necessarily by itself a sufficient ground for not passing the sentence of death on an accused found guilty of murder particularly when the accused may have consumed liquor to get into proper form to commit murder. AIR 1971 SC 1232 : 1971 Cr LJ 1066 ; *See* also 1982 Cr LJ 1572 : AIR 1982 SC 1217 (accused addicted to heavy drinking).

There was no motive for accused to kill his wife. Further no inference can be drawn that he intended to kill the deceased, in view of his subsequent conduct in putting out the flames and taking her to hospital even in drunken condition. Ex. P-l showed that deceased burnt herself in fit of emotion. Accused cannot be found guilty of the offence under Section 302. IPC conviction and sentence is set aside. *Gunti Yadagiri* v. *State of A.P.,* (1995) 1 ALT (Cr) 302 : (1995) 3 Crimes 366 (AP).

Where FIR containing corroborating version and deceased set on fire by appellant after consumption of liquor. Plea of intoxication not available to the appellant. Therefore conviction was upheld. *Maveri Surya Satyanarayan* v. State *of A.P.*, (1995) 2 Crimes 585 : 1995 Cr LJ 689 : (1995) 2 CCR 84 (AP).

The presence of both eye-witnesses *i.e.*. wife of deceased and one more person was quite doubtful. The medical report showed that deceased was dead-drunk. Ocular testimony that all injuries on deceased were inflicted by single weapon was contradicted to medical evidence. The recovery of blood-stained payjama from person of appellant was doubtful conviction and cannot be sustained. Accused entitle for acquittal. *Dharmender* alias *Chiniya* v. *State of Haryana*, (1995) 3 Crimes 815 : (1995) 2 CC Cases 177 : 1995 Cr LJ 3119 (P&H).

Wife stated that her husband in drunken state came home and started beating her and on the intervention of their son accused twice hurled a stone on him. Her evidence was corroborated by FIR promptly lodged. Her evidence by itself was sufficient for conviction of accused. *Lalya Dharma Khadkya* v. *State of Maharashtra*, 1995 Cr LJ 564 (Bom).

14. Duty of court, when guilt is proved.—A judge is bound to pass a capital sentence to a person found guilty under this section, unless there are substantial reason for not doing so. The reason for passing a lesser sentence must be express and adequate. AIR 1945 Oudh 140 ; AIR 1940 Lah 494 : 42 Cr LJ 156 ; AIR 1940 All 480 : 42 Cr LJ 115 ; AIR 1939 Pesh 47 : 41 Cr LJ 132. In awarding sentence a judge is not to be influenced by public feeling. AIR 1939 Mad 109 : 40 Cr LJ 249. Judges should not shrink from doing their duty, however painful it may be, of passing capital sentence in cases where they are convicted, beyond reasonable doubt, that a deliberate murder has been so committed as to necessitate the award of capital sentence. 3 LBR 163. On a conviction of murder, a sentence of death should ordinarily be passed unless there are extenuating circumstances. In considering whether there are extenuating circumstances, not only the circumstances of the particular case, but the conditions of the country and the habits of people are to be taken into account. 1 LBR 216. Where a quiet, peaceable man, suddenly and without the least motive or provocation runs a mock against all around him, his case is different from an ordinary case of deliberate murder deserving the extreme penalty. 8 WR Cr 58. In case of brutal and premeditated assassination sentence of death is proper. 138 IC 27 : 33 Cr LJ 574 : AIR 1932 Pat 209 : AIR 1933 Lah 998 ; AIR 1933 Lah 956 ; AIR 1933 Lah 623 : 34 Cr LJ 372 ; AIR 1932 Lah 245 : 33 Cr LJ 576 ; 37 Cr LJ 664 : AIR 1934 Oudh 19 ; AIR 1936 Pat 245 : 37 Cr LJ 543. The fact that accused sets up false defence that he never knew deceased even when evidence shows that deceased was last seen alive in his company and his disappearance immediately after murder is sufficient to bring home offence to him. AIR 1930 Lah 265.

15. Interference with sentence.—High Court has power to enhance sentence. AIR 1930 Mad 446. Unless extenuating circumstances can be found, murderer must be sentenced to death. AIR 1930 Pat 252. Where the Lower Court has failed to impose a proper sentence. High Court has power to impose sentence of death. AIR 1941 Mad 120 : ILR 1941 Mad 340 : 42 Cr LJ 770 ; but *see* 1933 MWN 1420 ; 1934 MWM 958 : 1937 MWN 124 ; AIR 1953 SC 364 : 1953 Cr LJ 1465 ; *see* also AIR 1958 All 546 : 1958 Cr LJ 1296 (lesser punishment when can be awarded) ; AIR 1957 SC 469 : 1957 Cr LJ

586. AIR 1975 SC 246 : 1974 Cr LJ 1253 ; AIR 1965 SC 202 : 1965 (1) Cr LJ 226 ; 1981 Cr LJ 163 : AIR 1981 SC 202 (High Court must examine all the material infirmities and must come to an independent conclusion giving reasons for it) AIR 1971 SC 757 : 1971 Cr LJ 649 ; AIR 1981 SC 376 : 1980 Cr LJ 1421 (interference in case of finding out the justness of sentence) AIR 1973 SC 253 : 1973 Cr LJ 1775 ; AIR 1980 SC 1871 : (1981) 4 SCC 596 : AIR 1981 SC 733 : 1981 Cr LJ 483 ; AIR 1982 SC 1224 : 1982 Cr LJ 1577 (High Court not to give importance to one aspect of evidence).

Where though post-mortem report did not indicate cause of death the prosecution was able to establish that accused administered some liquid in the mouth of deceased victim. Hence conviction under Section 302. IPC cannot be sustained. Even if no poison was detected in the post-mortem. examination conviction of accused under Section 328. IPC is confirmed. *Gobind Oraon* v. *State of Bihar*, (1995) 1 PLJR 233.

When the injuries on deceased were inflicted in sudden quarrel. Hence intention to cause death cannot be attributed to appellant-accused. Hence offence falls under Section 325/34. IPC and not under Section 302, IPC. Accused convicted under Section 325/34. IPC. *Siddapuram Siva Reddy of State of A.P.*, (1995) 1 ALT (Cr) 71 (AP).

Where it is found in intrinsically reliable or inherently probable it may be itself sufficient in circumstance of a particular case to base a conviction thereon. Prosecution-succeeds in proving guilt of the appellant for offence under Section 325. IPC instead of Section 302. IPC, 7 years RI instead of imprisonment for life awarded to accused. *Sokokhibam Valma Singh* v. *State of Manipur*, (1995) 2 CCR 437 (Gau) (DB).

When appellant giving iron chain blow to deceased. Injury on eye- witness proves his presence at spot. Parties are known to each other resulting no mistake in identity—There was sufficient light at scene of offence and delay in filing FIR explained. Its contents corroborated by eye-witness. Only one blow on vital part given by iron chain causing injury of small dimension. Intention was not proved. However knowledge attributable to accused regarding likely result of blow. Allegation of theft provoked incident. It was held that accused being young with poor economic condition sentence reduced to one under Section 304, Part II. *Bhamber* v. *State of Punjab*, (1995) 2 CC Cases 314 (P & H).

Where the mother of deceased and one more person eye-witness of the incident. Their evidence was corroborated by medical evidence. Kulhari was recovered at the instance of appellant. Injury caused by Kulhari was opined sufficient in ordinary course of nature to cause death. No interference called for in conviction. *Satpal* v. *State of Punjab*. (1995) 3 Crimes 735 (SC) : 1996 AIR (SC) 201 : 1995 (6) JT 379 : 1995 (5) Scale 235 : 1995 SCC (cr) 1039 : 1995 (4) CCR 110 (SC) : 1996 Cr. LJ 406.

FIR duly supported by the evidence of the eye-witnesses. Medical opinion, expert opinion, seizure memo and FIR all in conformity with the evidence of the eye-witness. There was made no interference with the order of conviction. *Ram Lal* v. *State of Madhya Pradesh*. 1995 Crimes 618 : 1995 Cr LR (MP) 341 (MP).

The main witness became hostile and nothing remains to implicate the accused. The deceased was medical doctor and virgin and may have taken something to terminate her pregnancy. Evidence is not sufficient. Hence no interference. *Mangaldeen Dubey* v. *Naresh Kumar Jain*. 1995 Cr LR 200 (MP).

No interference is warranted in appeal on the ground that statements recorded under Sections 313 and 164, Cr PC differ from each other. *Sohan Singh* v. *State*, (1995) 1 Crimes 486 : 1995 AIJ 1480 (All).

Where two persons died as a result of the firing of accused and witnesses though interested yet their interest and presence both were natural and their statements were duly corroborated by two independent eye witnesses and medical evidence. There was no reason to interfere with the order of conviction and sentence. *Arjun Ram* v. *State of Rajasthan*, (1995) 3 Crimes 130 : 1995 Cr LR 348 : (1995) 2 RCD 507 (Raj) (DB).

Where accused not properly identified in the FIR and prosecution evidence not inspiring any confidence. Acquittal by the trial Court—Appeal against acquittal. Interference in appeal by High Court held not proper. *Chellappan Mohandas* v. *State of Kerala*, 1995 SCC (Cr) 366 (SC) : 1998 AIR (SC) 90 : 1995 Supp (1) SCC 259 : 1994 (6) JT 361 : 1994 (4) Scale 351 : 1994 (2) UJ 614.

16. Interference by Supreme Court.—The Supreme Court will not interfere with sentence when the High Court passes it after full consideration of all the facts and circumstances. AIR 1980 SC 1871 ; AIR 1983 SC 839 : 1983 Cr LJ 1112 ; AIR 1984 SC 1023 : 1984 Cr LJ 832.

Where there was further appeal before the apex Court—Concurrent finding that the evidence of the eye-witnesses was reliable, recorded by the courts below—No interference by the apex court. *Balram* v. *State of UP*, 1994 SCC (Cri) 37.

Conviction upheld by High Court not to be interfered with by Supreme Court as circumstances lead to guilt of accused. *Manmohan Singh* v. *State of Punjab*, 1997 Cri LJ 1632.

In *Subash Chander* v. *Krishan Lal*, 2001 Cri LJ 1825 (SC) the Court observed:—

> "Merely because 8 persons convicted by the trial Court were acquitted by itself cannot be termed to be a justified ground for commuting the death sentence. However as the High Court presumably of general conspectus and upon consideration of facts of the case found that accused persons should not be awarded with death sentence we feel that for interfering with the discretion of the Court further exceptional grounds are required to be made out. When two views are possible about the quantum of sentence a view which favours the grant of life in comparison of death is generally accepted. But for the exercise of the powers by the High Court in commuting the death sentence we had some reservations about the sentence awarded vide the impugned judgement but in view of the exercise of discretion in commuting the death sentence we are not inclined to interfere with the sentence awarded to the accused persons".

17. Excitement.—Where the offence has been committed by the accused under influence of excitement, the appropriate sentence is to be imposed is one for transportation for life and not death. AIR 1947 Nag 287.

There was sudden attack on part of A-1 who snatched the revolver and shot at Police Party. No other accused participated in attack on deceased Nos. 1 and 2 a police constable and sub-Inspector. A-1 was found guilty under Section 302, IPC. However death sentence reduced to imprisonment for life and a fine of Rs. 10,000/- each. *S. K. Ayyub* v. *State of Maharashtra*, (1994) 2 Crimes 312 : (1994) 3 Recent Cr R 112 (SC) :

1994 Supp (2) SCC 269 : 1994 (4) JT 129 : 1994 (2) Scale 859 : 1995 Cr. LJ 420 : 1994 SCC (Cr) 1222.

Where the accused gave single blow with wooden stump which proved fatal. The occurrence took place at the spur of moment without premeditation under grave and sudden provocation. In facts and circumstances of this case, High Court is convinced that the case against accused cannot travel beyond Section 304, Part II, IPC. Conviction altered from Section 302, IPC to Section 304, Part II IPC. Appeal partly allowed. *Madan Lal* v. *State of Rajasthan*, 1994 RCC 451 (Raj).

18. Grace and clemency.—When an offence committed is murder, the fact that the accused is the only serving son of his widowed mother or that he was sincerely penitent and filled with remorse after murder, cannot be taken as a sufficient ground for imposing the lesser sentence. 36 Cr LJ 1254 : 39 CWN 262 : AIR 1935 Cal 591. There may be extenuating circumstances which may have to be laid before a jury for deciding whether the crime is culpable homicide or murder. But where the conviction is for murder, the sentence should be one of death, and any extenuating circumstances justifying a lenient view of the case can only be represented to the Crown with a recommendation for mercy. Rat Un Cr C 852. The Court convicting an accused of murder may recommended to the local Government for clemency in the sentence may under Section 432 Cr P Code be commuted to a lesser punishment. AIR 1977 SC 349 : 1977 Cr LJ 214 : 1952 Cr LJ 998.

19. Heat of passion.—Where the crime is unpremeditated, committed in cold blood and in the course of a dispute, the sentence of death is not called for. AIR 1935 Oudh 295 : AIR 1935 All 332. A lesser sentence is proper when death is caused by a single blow in heat of passion. 1936 OWN 597 ; AIR 1936 Rang 115 : 37 Cr LJ 467. Where the accused acting without premeditation in a moment of anger struck the fatal blow on the deceased after an exchange of abuse and a struggle between them and further more dealt only a single blow, a sentence of transportation for life, instead of extreme penalty, would be a suitable sentence. *Ummilal v. State of M.P.*, 1936 OWN 597 ; AIR 1981 SC 1710 : 1981 Cr LJ 1446 (murder committed in a fit of rage, death sentence commuted to imprisonment for life.

Where incident took place at spur of moment—There were no repeated blow and no pre-meditation whether can be held guilty under Section 304, Part III. Hence it is *held* that there was no intention to cause death or such injury which may likely to cause death. Accused is not guilty under Section 302, IPC but can be held guilty under Section 302-III. *Mustaq All* v. *State of Rajasthan*, (1995) 2 RCD 411 (Raj).

Where only single injury was caused on head a "*Salia*"—There were contradictions between FIR and Panchnama of the dead body but the same was explained properly. It was case of sudden fight on spur of moment and without any meditation. Hence offence altered from Section 302 to 304, Part I, IPC. Appeal party allowed. *Gopol Singh* v. *State of Rajasthan*, 1994 RCC 498 (Raj).

When quarrel took place on trivial matter and appellant caused one stab injury in chest on spur of moment, intention to cause death can not be inferred and hence conviction altered under Section 304, Part II. *Karna Ram* v. *State of Rajasthan*, 1997 (1) Crimes 266 (Raj).

20. Injuries sustained by the accused.—Where the accused is properly convicted of murder and it is found that the attack upon the deceased was deliberate the severe injuries received by the accused himself cannot be considered as a reason for mitigating the punishment. (1940) 2 MLJ 1018 : 52 LW 884 : AIR 1941 Mad 280.

Before adverting to the contentions raised by the parties, we may notice that the lung and heart injuries were caused to the deceased. He died "due to lot of bleeding".

Appellant was inside the house. He admittedly was not a party to the quarrel. So far as he was concerned, neither witness nor the deceased caused any provocation to him. The manner in which the assault had taken place must also be notice inasmuch as he had injured the lung and heart of the deceased. It is also not a case where the lives of the parents were in danger.

The appellant in fact is guilty of commission of an offence under Sec. 302, we, in absence of any appeal having been preferred by the State from the judgment of conviction and sentence passed by the learned trial Judge, are not in a position to arrive at the said conclusion. *Bala Baine Linga Raju vs. State of Andhra Pradesh,* 2009(6) SCC 706 : 2009 CrLJ 3426 : 2009(2) Crimes 394 : 2009(7) Scale 73 : 2009(13) JT 657 : 2009(4) SLT 219 : 2009(7) SCR 595.

Where the accused in committing a deliberate murder receives severe injuries it is not a case for mitigating the punishment. AIR 1981 Cr LJ 1027 ; 1979 Cr LJ 1196 : AIR 1979 SC 1828 ; 1978 Cr LJ (SC) 582.

Merely because some minor were there, it cannot be said that Section 302, IPC is not to be attracted. Though, the number of injuries does not determine the question whether Section 302, IPC is to be attracted, yet the nature of injuries, the weapon used and the place where the injuries exist are relevant factors. *Ganga* v. *State*, 1999 Cri LJ 488 (Orissa).

Injury on one of accused—Effect of. Both the Courts below have relied upon the depositions of Bakhtawar Singh (PW-1) and Mohinder Singh (PW-2). No inconsistency in their statements having been pointed out and even otherwise having regard to the defence raised by the accused, we do not find any reason to differ therewith.

The first informant was a student. He even, as stated by the Investigating Officer, was very perplexed and made his statement when asked to do so very hurriedly. A supplementary statement was also prepared but the same was not signed by him. If, therefore, injuries sustained by Mahabir Singh had not been disclosed, the same in our opinion would not make much difference for the purpose of arriving at a different conclusion. *State of Punjab vs. Gurlabh Singh*, AIR 2009 SC 2469 : 2009 (8) JT 487 : 2009 (7) Scale 601 : 2009 (8) SCR 853 : 2009 (4) SLT 611.

21. Ignorance.—Ignorance of the accused is no excuse. AIR 1941 Sind 129 : 42 Cr LJ 741. But in certain cases it may be taken into account in awarding punishment. AIR 1933 Lah 718 : 34 Cr LJ 1251 ; AIR 1932 Cal 815 : 33 Cr LJ 663.

22. Lapse of time.—Lapse of time between commission of offence and trial of the case is no ground for imposing lesser sentence. 42 Cr LJ 265 : AIR 1941 Mad 258. The sentence of death was substituted by transportation for life having regard to the time that had elapsed since the occurrence and probable motive. 1953 SCJ 444 : 1953 SCR 546 : AIR 1953 SC 131 ; AIR 1958 Raj 338 : ILR 1957 Raj 944 : 1958 Cr LJ 1540 : 1956 Madh BLJ 223 : Madh BLJR 1956 Cr 120. MBLR 1955 Cr 295 : MadhBLJ 1955 HCR 1663.

Delay as a ground affecting sentence cannot be extended where the criminal absconds. AIR 1962 Cal 428 : AIR 1978 SC 1506 (sentence reduced on the ground of delay and other reason) ; AIR 1977 SC 209 : 1977 Cr LJ 1578 ; 1979 Cr LJ 1177 : AIR 1979 SC 1177 (sentence of death to imprisonment of life) ; AIR 1982 SC 1192 : 1982 Cr LJ 1570 (seven years passed since death penalty) : AIR 1979 SC 702 ; AIR 1978 SC 1506 ; AIR 1978 SC 368 ; AIR 1974 SC 1256 : 1974 Cr LJ 887.

23. Insanity.—Although it cannot be said of an accused convicted under this section, that he was insane and did not know the nature of his action, yet it appears that he was in abnormal mood when he committed the offence the extreme penalty of law should not be inflicted. AIR 1936 Rang 113 : 37 Cr LJ 435 ; *see* AIR 1975 SC 762 : 1975 Cr LJ 646 ; AIR 1973 SC 806 : 1973 Cr LJ 583 ; 1983 Cr LJ 819.

Where appellant accused attacking deceased wife with sickle—Accused often used to beat and abuse her—After incident he fled away, on reaching of witnesses, leaving his shoes there. No sign of insanity of accused—Eye-witnesses' versions found reliable and trustworthy. Hence conviction was upheld. *Namdeo Shahuroo Dhanwade* v. *State of Maharashtra*, 1994 B Cr C 160 (Bom).

When the doctor who observed accused was patient and opined that in the accused there was features of unsound mind. The accused was therefore, not able to formulate his defence. Hence finding of trial Court was vitiated. Accused directed to be sent to Mental Hospital and Sessions Judge is hereby directed to hold trial afresh after accused is cured. *Puli Prakasa Rao* v. *S.H.O. Pithapuram P.S.*, 1994 (2) ALT (Cri) 216 (AP) (DB).

24. Joint offence.—Where death is caused by joint acts, there is no plea for lesser sentence. AIR 1943 Mad 315 : 44 Cr LJ 489 ; AIR 1942 Mad 275 : 43 Cr LJ 543 ; AIR 1941 Lah 117 : 42 Cr LJ 475 ; AIR 1939 Lah 429 : 40 Cr LJ 897 ; AIR 1938 Cal 295 : 39 Cr LJ 479. Where several persons join together to murder a single man and do murder him under such circumstances that there can be no doubt that the intention was to cause death, each and every one of them ought to receive the sentence of death unless there is any circumstance to distinguish one case from another. 17 Lah 536 : 38 PLR 909 ; 16 Lah 345 ; 226 IC 84 : 47 Cr LJ 826 : AIR 1946 Lah 298 ; AIR 1940 Mad 43 : 41 Cr LJ 337 ; AIR 1939 Oudh 49 : 40 Cr LJ 187 ; AIR 1938 Pat, 358 : 39 Cr LJ 554.

Where there was involvement of large number of accused persons. Hence it was held that conviction of only those accused whose presence and participation is proved; can be sustained. *Jakir Mian* v. *State of Bihar*, (1995) 2 East Cr C 375 (Pat) (RB).

Where appellant accused firing shots from his rifle resulting in death of the deceased. Testimony of the eye-witness—One eye-witnesses filing report at the earliest with full details showing involvement of appellant in crime. Other eye-witness was also corroborating same. There was no reason to disbelieve evidence of these eye-witnesses. Therefore conviction justified and appeal dismissed PW 2 gave the report at the earliest moment in which he has given all the details of the participation of the appellant in the crime. He has also mentioned as to how many shots he fired and where they hit and unless he was an eye-witness he could not have given all these details in the earliest report which was so promptly given. Having gone through the evidence of PWs 2 and 5 court is fully satisfied that the reasons given by the trial court for disbelieving the evidence of these two witnesses are wholly unsound and perverse. The appellate-court has rightly interfered. Therefore, no merits in this appeal and it is accordingly dismissed. *Ujagar Singh* v. *State of Punjab*, (1994) 1 Crimes 1164 at pp. 11 : 1994 Supp (2) SCC 214 : 1994 (3) JT 167 : 1994 (2) Scale 488 : 1994 (2) C : 1994 () UJ 567 : 1994 JCC 443 : 1994 SCC (Cr) 1470.

When one accused fired pistol shot and three other accused cut deceased with sickles and axe. Evidence of eye-witnesses was rejected by trial court—Trial Court took an erroneous and unrealistic approach in appreciating medical evidence by counting number of entry and exit wounds—Evidence of eye-witnesses who are ladies was natural and their presence cannot be doubted—Nothing to affect veracity of these eye witnesses. High Court justified in accepting their evidence and convicting appellants-accused. Appeal is hence dismissed. *Ramappa Vasappa Badiger* v. *State of Karnataka*, (1994) 1 Crimes 750 (SC) : 1994 (2) JT 91 : 1994 (1) Scale 704 : 1994 (2) CCR 312 (SC) : 1995 (Cr. LJ 1535.

25. Motive.—Absence of an apparent motive is material in awarding sentence. AIR 1941 Mad 326 : 42 Cr. LJ 558 ; AIR 1941 Lah 454 : ILR 1943 Lah 332 : 43 Cr LJ 332 : AIR 1935 Oudh 281 : 36 Cr LJ 534 ; but *see* AIR 1931 Oudh 77 : 32 Cr. LJ 327 ; AIR 1933 Lah 623 : 34 Cr LJ 372.

When motive not established—Dead body of victim found from house of one prosecution-witness Extra-judicial confession allegedly made in question and also some blood-stained clothes recovered, conviction cannot be based merely on such recoveries. Benefit of doubt given to appellant. *Tarseem Kumar* v. *Delhi Administration*, (1994) 3 Crimes 181 (SC) : A1R 1994 SC 2585.

Sufficient proof of motive. The appellant was in dire need of money as established by the testimony of PW-67. The Accused/appellant knew that his visa had come on 23rd December and that a large amount of money was required before 10.01.2001. He had also tried to arrange for loan as per the statement of PW-19. She mentions the amount which he could arrange by 05.01.2001 and a meager amount of 10,000/- was left with him. From the statement of Yohannan (PW-23) and Ramachandra Nair (PW-24), the factum of payment of money amounting to Rs. 35,000/- on 07.01.2001 is clearly proved. The accused/appellant who was in need of money and who did not have money till 05.01.2001, had surplus amount of money to repay his debts and make payments to P.F. Ummar (PW-67) and also to pay for his ticket fare and other expenses. In this context, it will be worth mentioning that PW-23 had not demanded his money, yet the accused-appellant chose to liquidate his debt which clearly shows an intention on the part of the appellant to do away with ill-gotten money.

According to accused in the house of the deceased, a large amount of cash and jewellery was available which could have been taken away by the accused/appellant and that he, as a conscientious man, had taken so that he could repay before his departure. The contention is devoid of any merit and has been found to be incorrect by the Courts below. It would be pertinent to mention here that the trial Court has adverted to the fact that the jewellery and cash were lying in hidden condition and thus knowledge of its existence cannot be attributed to the accused/appellant.

At the stage of recording of statement under Sec. 313 of the Code, the accused had come with another explanation that the deceased Augustine had paid him Rs. 35,000/- at 8.00 p.m. on 06.01.2001. No evidence at all has been adduced to show that he was present in the shop of Augustine and had been given the said amount. Furthermore, even PW-19 wife of the accused/appellant has not stated that she was told at any stage by her husband that he had received an amount of Rs. 35,000/- from the deceased Augustine. The trial Court and the High Court both have disbelieved it.

The analysis of the evidence shows that the accused/appellant was in dire and urgent need of more and he had a motive for getting the said amount of money. *M.A Antony vs. State of Kerala*, AIR 2009 SC 2549 : 2009 (6) SCC 220 : 2009 (7) JT 372 2009 (6) SCR 829 : 2009 (6) Scale 36 : 2009 (8) SLT 255.

Where motive for murder takes a back seat if there are eye-witnesses to the incident. *Kaveri* v. *State*, (1994) 1 CCR 25 (Mad).

Where conviction based on the testimony of "last seen together" justified and motive not proved—Conviction cannot be upheld. *Bhoma Acharya* v. *State of Rajasthan*, 1994 Cr LR (Raj) 132 : 1994 R Cr C 52.

Where in a case when motive alleged against the accused is fully established i provides a foundational material to connect the chain of circumstances. Hence if motiv is proved or established it affords a key or pointer to scan the evidence in the case. Th direct evidence in the case amply corroborated by motive of accused to murder. Th conviction is, therefore justified and maintainable. *Prem Kumar* v. *State of Bihar*, (1995 2 CCR 9 (SC) : (1995) 3 Crimes 133 : JT 1995 (3) SC 12 : (1995) 2 East Cr C 69 : (1995 1 Crimes 889 : (1995) 3 SCC 228 : 1995 AIR SCW 1644 : 1995 SCC (Cr) 445 : 1995 C LJ 2634 (SC).

Where the motive to commit offence is proved. The evidence of the eye-witness t occurrence is cogent, convincing and trustworthy and is supported but medica evidence. Prosecution has established that accused was responsible for murder Conviction and sentence affirmed. *Veerappan* v. *State*, (1995) 1 ALT (Cr) 11 (Mad).

The silver ornaments were not recovered from accused but from open fiel accessible to all : Motive of crime could not be proved. There were no direct evidence prosecution failed to prove murder beyond reasonable doubt Acquittal. *Kamji* v. *State Rajasthan*, (1995) 2 RCD 126 (Raj).

Where the motive is clearly established and FIR was promptly filed. The evidence eye-witnesses was natural and withstood cross-examination and corroborated wit medical opinion. Hence conviction upheld. *Kishan Singh.* v. *State of Rajasthan*, (1995) RCD 38 (Raj).

Motive loses significance when there is credible eye-witnesses's account. *State Maharashtra* v. *Prabhu Barku Gade*, 1995 Cr LJ 1432 : (1995) 2 Bom CR 188 : (1995) Crimes 783 (Bom).

Accused husband alleged to have killed his wife with aid of firearm and homicid death by gunshot injuries was proved. The motive was to get rid of deceased as he ha illicit relationship with another woman and wanted to marry her. Testimony of polic officials was found trustworthy and reliable. Chain of circumstantial evidence pointe towards the guilt of accused and his conviction was held proper. *Ummed Singh* v. *Stat* 2003 Cr LJ 3632 (Raj) : 2003(3) Raj Cri C 1297 : 2003(3) Raj LR 162 : 2003(4) Raj L 2290 : 2003(3) WLC 465.

In a case where there was a quarrel between mother of accused and deceased tw days prior to incident and thereafter accused one day before the incident ha threatened deceased to do away with him. It was held that motive and intention to kill were proved as a heavy stone was thrown on his head. Conviction under Section 302 was upheld. *Jayapal* v. *State*, 2003 Cr LJ (NOC) 258 (Kant) : AIR 2003 Kant HCR 2470.

Where accused inflicting single blow from blunt side of pick-axe. But murder not premeditated. There was no motive to kill. Hence, sentence of death altered to sentence of life-imprisonment. *State of Maharashtra* v. *Prabhu Barku Gade*, 1995 Cr LJ 1432 : (1995) 2 Bom CR 188 : (1995) 2 Crimes 783 (Bom).

The motive of husband to get rid of his wife deceased for lust of 'keep', is established. The medical evidence did not show the case of natural death which was fortified by evidence of PW neighbourer that the husband pushed the deceased on an earlier occasion when she tried to save the deceased. The co-accused being in pregnancy stage at the time of occurrence is given benefit of doubt. *Madan Pal* v. *State of Haryana*, (1995) 1 CC Cases 354 (P & H).

Where commission of offence is concerned, it is to be noted that there is no deep-rooted enmity between the present accused and the deceased. There was no motive on the part of the accused to kill the deceased. Of course, there, may not be intention on the part of the accused persons to kill the person, but with an object of extracting incriminating material from suspected person which may help police in further investigation, accused resorted to third degree treatment which has resulted into tragic death of '*K*'. Therefore, the offence does not fall under Section 302 of the IPC but it falls under Section 304 Part-II of the IPC. Conviction under Section 304, Part-II maintained. *State of Gujarat* v. *Hargovandas Devrajbhai Patel*, 1992 Cr LJ 3598 at 3607 (Guj) (DB).

No motive was established for appellant to commit murder of deceased. Further there was no extra-judicial confession regarding guilt of accused. The prosecution evidence was not scrutinised in the light of materials available on record. Hence the trial court committed illegality of facts and law in convicting appellants. Conviction set aside. *Mal Singh* v. *State of Rajasthan*, (1995) 2 CCR 635 (Raj).

In a case where the motive was that the accused persons had enmity with deceased and because of that murder was committed. It was held that the evidence was reliable and conviction was upheld. *Kalu Singh* v. *State*, 2003 Cr LJ (NOC) 258 (Kant) : AIR 2003 Kant HCR 2470.

Where in a property dispute between father and son the accused son in a fit of anger fired the shot killing the father and a relative and weapon of offence was recovered and motive of crime was established, it was held that conviction for murder was held proper. *State* v. *V.N. Surendra*, 2003 Cr LJ (NOC) 258 (Kant) : AIR 2003 Kant HCR 2470.

Where enmity between accused and deceased and motive to commit murder was established and evidence of eye-witness, son of deceased was corroborated by medical evidence and also by other eye-witness, conviction of accused warranted no interference. *Johar Singh* v. *State*, 2005 Cr LJ 2035 (Jhar) : 2006(54) All Cri C 77 UTR.

When prosecution case is supported by strong evidence motive becomes in consequential. *Rama Shish Rai* v. *Jagdish Singh*, 2005 Cr LJ 669 : AIR 2005 SC 335 : 2005 SCC (Cri) 1611 : 2004(4) Crimes 306 (SC) : 2005(10) SCC (10) 498 : 2004(8) Supreme 54.

In a Supreme Court case the animosity by and between "B" and family of his wife stood fully established. It was also established that the accused together with two co-accused was found missing from the place of his duty at 11 pm where for a report had been entered in the daily register by their superior officers. In view of the above evidence it was held that motive on the part of the accused in commission of the crime task a back seal which was thus not necessary to be proved by motive. *Sarup Singh* v. *State of Punjab*, 2005 Cr LJ 4518 : AIR 2005 SC 4345 : 2005(12) SCC 591 : 2005(4) Crimes 121 (SC) : 2005(6) Supreme 676.

In offence based on circumstantial evidence when no motive proved and alleged recovery of stolen articles belonging to deceased at instance of accused not supported by independent witness, conviction not sustainable. *Ajay Gupta* v. *State*, 1997 (1) Crimes 34 (Del).

Where evidence of eye-witnesses found unreliable, absence of motive may also add against prosecution. *Barikanoo* v. *State of U.P.*, 1997 (1) Crimes 500 (All).

26. Plea of Weak Motive.—Ram Ladete (P.W.2) was illiterate village person. Generally it is the habit of the witness specially the villagers to exaggerate the matter. The villagers have no knowledge about the singular or plural number and generally they use plural number. They also give time of any incident according to their own speculation, irrespective of its exactness. On this ground their testimony cannot be thrown out. Therefore, the manner of incident which took place on the mend of field of the appellant given by the Ram Ladete (P.W.2.) is not such which may believe the evidence of the witness. Non examination of Munna and Balram is also not material because that incident was not main incident and it was simply a cause for subsequent incident in which Ram Avtar deceased lost his life. *Ram Ratan v. State of U.P* 2002. Cri LJ 2688 All. H.C : 2002 (2) Crimes 403 (409, 410) : 2002 (44) ACC 845 : 2002 (1) A Cri R 859 (All) (DB).

Absence of motive. Though, in a case under Section 302, I.P.C., the motive is altogether foreign, but, if the case is based on circumstantial evidence, the motive has some significance. The absence of any motive would be an additional factor in order to hold that the prosecution case based on circumstantial evidence is not proved. *Moha v. State of M.P.*, 2005 CriLJ 79 (MP).

27. Mistaken impression.—Where an accused person was found to have murdere his wife under a mistaken impression that she was unchaste to him, the High Court se aside the sentence of death, and sentenced him to transportation for life. 8 CWN 218 : Cr LJ 62.

28. Obedience to illegal order.—Sentence is to be reduced when offence i committed in obedience to illegal order. AIR 1940 Lah 210 : 41 Cr LJ 639 : AIR 194 Mad 315 : 44 Cr LJ 489 : AIR 1942 Oudh 193 : 43 Cr LJ 243.

29. Part played by the accused.—When the son committed the murder actin under the influence of his father, the death sentence is not called for. 45 Cr LJ 660 AIR 1944 Lah 206 : but *see* AIR 1943 Mad 315 : 45 Cr LJ 489. Where murder has bee committed by several persons, part played by each is to be considered in awardin punishment. AIR 1942 Oudh, 193 : 43 Cr LJ 243 ; AIR 1938 Cal 295 : 39 Cr LJ 479 AIR 1935 Oudh 190 : 153 IC 978 ; AIR 1934 Cal 606 : 35 CWN 345 : 33 Cr LJ 1 ; bu *see* AIR 1941 Lah 117 ; 42 Cr LJ 475 ; AIR 1939 Lah 429 : 40 Cr LJ 897.

When appellant firing shot causing death of child of 9 years—Appellant used to collect tolls illegally relying on muscle power—Eye-witnesses corroborating prosecution case. There was found no enmity between them—Co-accused acquitted on ground of no overt act on his part and His acquittal does not have any effect as appellant was not charged with aid of common intention. *Held*, hence conviction is justified. *Mohan Mahto* v. State *of Bihar*, (1994) 1 Crimes 250 : (1994) 1 BLJ 772 : (1994) 2 East Cr C 348 (Pat).

Where case of free and mutual fight. Both parties armed and inflicted injuries to each other. It was held that accused was guilty of their own acts of commission charged. *Pushpa Raj* v. *State of Rajashan*, (1995) 2 Crimes 412 (Raj).

30. Party fight.—Where a person kills a man by thrusting a knife in the abdomen of another in a party fight in which several men take part and which is not proved to have been started by him ; the lesser punishment of transportation for life should be inflicted. AIR 1933 Lah 434 : 34 Cr LJ 711. Where a man is killed in a sudden quarrel and sudden fight in the heat of passion the case falls under Exception 4 to Section 300. 47 Cr LJ 469 : AIR 1946 All 19. Where the evidence fell short of showing that the two accused had entered into a plan to bring about the murder and it was impossible for the accused *A* to appreciate or realise the weight and magnitude of the strokes which were being inflicted by the other accused *B*, it could not be held that *A* had the intention of committing the murder. 31 Pat 1037 : 1953 Cr LJ 1809 : AIR 1953 Pat 394 : 1963 Jab LJ 117 : 1963 (1) Cr LJ 55 : AIR 1963 MP 29.

31. Murder or Free flight.—Where prosecution case was consistent that after 'M' was injured and he fell down, his pistol was snatched by 'R' and he fired at deceased 'T' causing his death accused 'R' was held liable to be convicted for murder. *Kewal Singh* v. *State of Punjab*, 2004 Cr LJ 31 (SC) : AIR 2004 (SC) 72 : 2003(7) Supreme 468 : 2003(4) Crimes 352 (SC) : 2003(3) JCC 1906.

In a case of free fight between parties, non-explanation of injuries suffered by defence party was held not fatal. *Nagalla Mukhalingam* v. *State of AP*, 2005 Cr LJ 2583 : 2005(11) SCC 242 : AIR 2005 (SC) 2466 : 2005(3) Supreme 624 : 2005(2) Crimes 165 (SC) : 2005(2) JCC 988.

32. Premeditation.—Where the offence of murder was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel while the accused was in a state of intoxication, *held* that a sentence of transportation of life is proper. 8 Pat 911. Where murder is premeditated death sentence is appropriate. AIR 1943 Sind 237 : 45 Cr LJ 138 ; 1953 All LJ 14 : 1953 Cr LJ 68 : AIR 1953 All 536. But where the crime is unpremeditated, committed in cold blood and in the course of a dispute, the sentence of death is not called for. AIR 1935 Oudh 263 ; AIR 1953 All 332 : AIR 1935 Lah 94 : 36 Cr LJ 1935 ; AIR 1935 Rang 408. The more absence of premeditation is not in itself in every case of murder a sufficient ground for imposing the lesser penalty. The sentence should depend on the circumstances of the particular case, 63 IC 149 : 22 Cr LJ 643. Death sentence is the penalty for deliberate fratricide. AIR 1933 Pat 180 : 34 Cr LJ 305. Where murder is premeditated, death sentence is appropriate. AIR 1943 Sind 237 : 45 Cr LJ 138 : AIR 1936 Lah 580. But where offence is not premeditated, lesser sentence is appropriate. AIR 1941 Mad 894 : 43 Cr LJ 56 : AIR 1941 Sind 168 : 42 Cr LJ 850 ; AIR 1940 Pat 605 : 41 Cr LJ 587 ; AIR 1941 Mad 326 : 42 Cr LJ 558 ; 2 All 33 ; 107 PR 1866 Cr : AIR 1936 Rang 28 : 37 Cr LJ 449 : 37

Cr LJ 307 : 160 IC 606 ; 1959 Ker LT 1340 ; AIR 1962 MP 244 ; 1961 Jab LJ 1414 : 1962 (2) Cr LJ 195 ; *see* also AIR 1962 SC 130 : 1962 All Cr R 103 : 1962 (1) Cr LJ 196 : (1954) 1 All ER 373 (PO). There is no law by which premeditation as to be proved by direct evidence or that in the absence of premeditation, death sentence cannot be passed. AIR 1967 Goa 40.

Absence of premeditation taken along with other circumstances, such as provocation, sudden quarrel, sudden impulse, loss of mental balance caused by rage, anger, may justify lesser punishment. *Jagrup SIngh* v. *State of Haryana*, AIR 1975 SC 1703 : 1975 Cr LJ 1494 ; 1982 Cr LJ 1043 : AIR 1983 SC 682 ; AIR 1982 SC 70 : 1982 Cr LJ 396 : 1981 Cr LJ 1136 ; 1977 Cr LJ 795 : AIR 1977 SC 1685 ; AIR 1981 SC 1552.

Where injury on a non-vital part with the knowledge that death may occur. But without premeditation.—Therefore offence, held falls under Section 304, Part II. *Tamil Mani* v. *State*, 1995 MLJ (Cr) 691 (Mad).

Where murder neither premeditated nor cold-blooded. Impugned act of the accused being sudden and impulsive. Hence it was held sufficient to reduce the capital punishment to that of life imprisonment. *Sk. Ayub* v. *State of Maharashtra*, (1995) Cr LJ 420 (SC) : 1994 Supp (2) SSC 269 : 1994 (4) JT 129 : 1994 (2) Crimes 312 : 1994 (2) Scale 859 : 1994 SCC (Cr) 1222.

33. Provocation.—Where in a case of deliberate murder it appeared that the accused had good reason to be angry with the deceased by reason of his conduct relating to abduction, it was held that it was sufficient to sentence the accused to transportation for life, 30 Cr LJ 1126 : AIR 1929 Lah 799. Where it appeared that the deceased who was trusted and treated with hospitality by the accused seduced his wife and persisted in remaining in the accused's house, after he had been requested to leave and the accused killed the deceased. *Held* that the murder was committed on provocation and hence lesser sentence should be awarded. 106 Ind Cas 457 : 29 Cr LJ 41 ; AI 1932 Oudh 382 ; AIR 1932 Oudh 186 : 33 Cr LJ 561 ; AIR 1933 All 533 ; AIR 1938 Lah 556 ; 7 LR 186 Cr. So provocation may be taken into consideration together with other circumstance in passing lesser sentence. ILR (1939) 2 Cal 518 ; AIR 1938 Lah 556 : 39 Cr LJ 769 : 176 IC 666 ; 39 PLR 741 : AIR 1937 Oudh 457 : 38 Cr LJ 938 : AIR 1942 Lah 301 : 44 Cr LJ 117 : AIR 1942 Lah 37 : 43 Cr LJ 370 ; AIR 1942 Sind 1 : 43 Cr LJ 308 ; AIR 1941 Mad 251 : 42 Cr LJ 668 ; AIR 1941 Nag 86 : 42 Cr LJ 390. Where th accused murdered his wife's paramour and when it is proved that the provocation was grave but not sudden, the proper sentence is one of transportation for life and not death. 18 ALJ 851 : 57 IC 176 : 21 Cr LJ 607 ; 17 Cr LJ 190 : 33 IC 830 : 35 PLR 1916 Cr. A person convicted of murder should ordinarily sentenced to death. To justify the passing of a sentence of transportation for life there should be really extenuating circumstances and not merely absence of aggravating circumstances. The fact that the crime was committed without premeditation in the heat of passion upon a sudden quarrel is not an extenuating circumstance. 18 Cr LJ 113 : 37 Ind Cas 465. If for a trivial offence committed by a child *viz.* the mere throwing of a clod of earth, a man violently causes its death it is a clear case of murder for which the proper sentence is death. SC 216 Oudh. Improper overtures by step mother to his step-son do not amount to grave and sudden provocation. Maximum sentence however should not be levied. AIR 1930 Lah 415. Lesser sentence than death should be awarded in case of murder of wife who continues intimacy with paramour in spite of repeated reprimands. AIR 1930 Lah

171. Where murder by juvenile is not wholly deliberate and cold blooded, and there is certain amount of legitimate provocation capital sentence may not be appropriate. AIR 1930 Mad 972. Where it was a casual meeting when the act of the 'noisy spitting' by the accused was taken by the deceased rightly or wrongly as an insult and he was the first to start the quarrel by abusing the accused in vulgar language and by slapping him in his cheek lesser sentence is justified in such a case. ILR (1962) 1 Ker 348 : 1963 (1) Cr LJ 536. Where a husband had knowledge of his wife's infidelity but kept brooding over it, and finally killed both her and that paramour on a day when they had done nothing improper, no question of any grave and sudden provocation arose and crime was taken out of Section 302 though it might be a fit case for awarding the lesser sentence of imprisonment for life. 1961 All LJ 13 : 1961 All WR (HC) 63 : 1961 All Cr R 27 ; AIR 1954 Punj 182 : 1954 Cr LJ 1858 ; AIR 1960 Raj 101 : 1960 Cr LJ 520 ; 1960 All LJ 866 : 1960 All Cr R 12 ; 1959 Ker LR 1457 ; ILR 1956 Hyd 914 ; AIR 1955 Punj 25 : 1955 Cr LJ 327.

Culpable homicide committed under provocation but not falling within the Exception I to Section 300 will amount to murder but may be an extenuating circumstance justifying lesser punishment. AIR 1976 SC 915 : 1976 Cr LJ 677 ; AIR 1972 SC 2077 : 1972 Cr LJ 1371 ; AIR 1971 SC 2240 : 1971 Cr LJ 1544 ; AIR 1956 SC 89 : 1956 Cr LJ 278 ; AIR 1980 SC 448.

Where grave and sudden provocation was caused to accused by prosecution party. The accused was deprived of self control and attacked deceased with sharp-edged weapon. A fracture on skull was caused which resulted in death. The other two injuries which resulted in death was caused by co-accused who was acquitted. Under the circumstances conviction of accused under Section 302, IPC was altered to one under Section 304, Part I. *(Mst.) Madani* v. *State of Rajasthan*, 1994 Cri LJ 1978 (SC) : 1994 AIR (SC) 1713 : 1994 SCC (Cr) 1402.

Where though there was provocation and apprehension of danger but the accused exceeded the right of private defence. Hence no interference called for. *State of Karnataka* v. *Hanumanthappa Karlayappa Talawar*, (1995) 2 Ker LJ 158 (DB).

When offence of murder of two persons and there was sudden and grave provocation. Accused taking clothes to his daughter and daughter-in-law admitted in hospital. In the way deceased prevented his way from proceeding that way and abused. On such obstruction accused beat both deceased persons causing their death and injury to one. There being no requisite *mens rea*. Accused acted on sudden and grave provocation. Such act of accused falls under Exception 1 to Section 300 punishable under Section 304, Part I. *Rangaswami Goundar* v. *State*, 1995 MLJ (Cr) 228 (Mad).

There was illicit relationship between the deceased and wife of the accused. Resulting into a murderous quarrel between the deceased and the accused. Accused's plea of sudden Provocation. It cannot be allowed. Relationship was the motive for the killing and not the provocation. *Chinnan* alias *Chinnaswami* v. *State*, (1995) 2 LW (Cr) 589 (Mad).

When their evidence reliable and recoveries. Fire arms injury, empties recovered from the place of incident. Incidence occurred in heat of provocation on outraging modesty of sister of accused. Hence conviction under Section 302, IPC and Section 27 of Arms Act upheld. *Amarjeet Stngh* v. *State of Rajasthan*, (1995) 1 RCD 10 (Raj).

When accused saw his wife in compromising position with *KL*. Hence there was grave and sudden provocation. The accused cannot, therefore, be held guilty under Section 302, IPC but can be convicted under Section 304, Part I. Conviction under Section 326, IPC maintained. *Birbal* v. *State of Rajasthan*, (1995) 2 RCD 277 (Raj).

34. Riot.—In a conviction under Section 302 read with Section 149 a death sentence is not inappropriate, where it is found that the accused were among those who inflicted the injuries received by the deceased. AIR 1944 FB 35. But in the same case *Varadachariar, J.* said that the Court would not be justified in such a case in affirming a sentence of death independently of the question whether the case fell within Section 34 or only under Section 149. Lesser sentence is proper where the accused is not the ringleader. AIR 1935 Oudh 190.

Rioting & Multiple murders—Accused charged under Sec. 148 but acquitted cannot be convicted for offences under Sec. 302 read with Sec. 149. Where the appellants accused have been expressly charged for the offence punishable under Sec. 148 and have been acquitted thereunder, they cannot be legally convicted for the offence punishable under Sec. 302 read with Sec. 149. It is so because the offence of rioting must occur when members are charged with murder as the common object of the unlawful assembly. Sec. 148 creates liability on persons armed with deadly weapons and is a distinct offence and there is no requirement in law that members of unlawful assembly have also to be charged under Sec. 148 for legally recording their conviction under Sec. 302 read with Sec. 149. However, where an accused is charged under Sec. 148 and acquitted, conviction of such accused under Sec. 302 read with Sec. 149 IPC could not be legally recorded. *Ankoos & Ors vs. The Public Prosecutor, High Court of A.P.* AIR 2010 SC 566

35. State of mind.—Where the accused acts under the impulse of moment and makes unpremeditated attack, sentence of death should not be passed. AIR 1935 Sind 44. In awarding sentence under this section consideration may be made of the state of mind of the accused. AIR 1944 FC 1 : 45 Cr LJ 413 ; AIR 1941 Mad 50 : 42 Cr LJ 270 : AIR 1938 Lah 473 : 39 Cr LJ 718. Though it cannot be held that he was unsound and did not know the nature of the act as the circumstances that he was committing a crime, still it might be said that some kind of hallucination or frenzy might have been working in his mind, the ends of justice would be met if the sentence of death was reduced to one of transportation for life. (1951) 1 MLJ 291 : 1951 MWN 367 : 64 LW 731. The accused laboured under a strong delusion of unfaithfulness of his wife. The brooding over the character of his wife took the form of a kind of temporary insanity. Disturbed by his thoughts about the unchastity of his wife, during the night of occurrence, the accused caused her death by throwing acid. The medical evidence showed that he was capable of knowing what he was doing. *Held* that the accused was guilty under Section 302 but this was not a fit case for extreme penalty. AIR 1958 Punj 104 : ILR 1957 Punj 1914 : 1958 Cr LJ 555 : ILR 1955 TC 479 : 1955 Ker LT 580. Where the mental Condition of the accused is abnormal, capital sentence is not proper. *Vasant Laxman More v. State of Maharashtra*, AIR 1973 SC 806 : 1973 Cr LJ 583 : AIR 1975 SC 762 ; 1974 Cr LJ 1166 : AIR 1974 SC 1697.

36. Improvement in prosecution version—The occurrence had taken place on February 26, 1994 at 8 p.m. whereas the FIR came to be lodged on the same day at 9.45 p.m. In an hour and forty five minutes perhaps, the first informant had hardly any time for consultations and thus, came up with a true version wherein no role was ascribed to the appellant like that he had exhorted his Co-accused to take out the knife from his pocket and inflict injuries with the same. Realising later that even if the FIR is believed in toto, the appellant and his wife cannot possibly be convicted, he improved upon the prosecution version in its material details. The accused was not in the company of his co-accused. He had no occasion to come to know that co-accused was keeping a knife in his pocket and if that be so, there was no question for the accused to exhort his co-accused to take out the knife from his pocket and give injuries to deceased. In totality of the facts and circumstances of the case it can be said that the prosecution, in its endeavour to bring home the offence against the accused changed its version and attributed a crucial part to the accused at the time when evidence was recorded as an afterthought simply with a view to involve him in the crime. *Hari Krishan* v. *State of Haryana*, 1999 Cr LJ 938 (P&H).

37. Defective Investigation—Effect.—Accused cannot be acquitted solely on account of defective investigation. To do so would tantamount to playing into hands of investigating officer if investigation is designedly defective. *Dhanaj Singh* v. *State of Punjab*, 2004 Cr LJ 1807 : AIR 2004 SC 1920 : 2004(3) SCC 654 : 2004(2) Supreme 494 : 2004(2) Supreme 2 (SC).

Slip-shod investigation—Scope. Under Sec. 157 Criminal Procedure Code, the copy of the FIR has to be sent to the Magistrate. This never happened. However, seen from the records, this FIR reached the Magistrate only on 22.06.1994. This is extremely suspicious. In his deposition, the Investigating Officer proved that the FIR was chalked out in writing by Maheshwari Mandal, the SHO. Very significantly, this SHO or any other officer never examined the house thoroughly nor have they examined the inner rooms for ascertaining as to whether the doors and the latches were intact or not. This was a typical dumb investigation. Investigating Officer has not even bothered to draw a spot Panchnama. Though he stated that the accused were not present, he did not suggest any efforts having been made for their arrest. In his cross-examination, he admitted that in the case diary, he had not recorded as to which officer received information in the police station or was it mentioned in the case diary as to which lady was referred to in the telephonic information. Even the name of the informer was admittedly not there in the case diary. Specific questions were put as to whether he inspected the rooms at the place of occurrence or not. He admitted that it was not so recorded in the case diary. Even the time of sending the dead body for post-mortem was not mentioned. He admitted that when he reached the spot, neither the accused nor his parents were present. Then he asserted that their luggage was there. It is very significant to note that he admitted that Anil Kumar had not stated about the time of occurrence nor did he state the fact of beating Sushma with fists and slaps. Very significantly, he admitted that Anil Kumar had not stated about this meeting with Om Prakash Vidyalankar on the way. He had also not stated that his sister was murdered on account of not giving the colour television and motor cycle. He further admitted that Anil Kumar (PW-1) had not stated that his father had told him while he went for tuition that some articles were to be delivered to his sister. The witness admits "on enquiry by us, he remained silent".

The investigating agency would have done well in examining at least the neighbours but that does not seem to have been done. DW-2 was also a neighbour in the sense that she stayed very near to the house of the deceased. It is not known as to why the Investigating Officer did not examine neighbours, one of whom was the relative of the deceased. The apathy on the part of the Investigating Officer to examine the house closely creates suspicion. This is an unfortunate case where due to the slip-shod investigation the death of a young woman has to go unpunished.

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38. Deliberate Change of version-Effect.—Where the version of the incident as given by the eye-witnesses in FIR and in their statements under Section 161, Cr PC were changed deliberately to suit the medical evidence without giving any satisfactory explanation for the change, such change of version would create a serious doubt about the truthfulness of the prosecution case. *Shingara Singh* v. *State of Haryana*, 2004 Cr LJ 828 : AIR 2004 SC 124 : 2003(4) Crimes 446 (SC) : 2003(8) Supreme 21 : 2004(2) Recent Cr 940.

39. Jealousy.—The fact that the accused committed the murder prompted by jealousy is no ground for reducing the sentence. AIR 1934 Oudh 232 : 35 Cr LJ 894 : 1934 Cr C 273. Accused killing wife who had eloped with stronger in sense of frustration sentence of imprisonment for life and not death would meet ends of justice. *Maghar Singh v. State of Punjab*, 1965 (2) Cr LJ 366 : AIR 1965 Mad 385 : AIR 1975 SC 1320.

40. Weapon used.—In awarding sentence, under this section, the weapon used by the accused is to be taken into consideration. AIR 1942 Mad 237 : 43 Cr LJ 463 ; AIR 1941 Sind 117 : 42 Cr LJ 786 ; AIR 1936 Rang 60 : 37 Cr LJ 418. Accused striking deceased with a hatchet with knowledge of what he was doing and dangerous nature of the act, is guilty of murder. But where attack by him is result of foul language used by the deceased, death sentence should not be imposed, transportation for life is sufficient. AIR 1930 Lah 545.

Only because the recovery of a weapon was made and the Expert opined that the bullet found in the body of the deceased was fired from one of the weapons seized, by itself cannot be the sole premise on which a judgment of conviction under Sec. 302 could be recorded. There was no direct evidence. Accused, as noticed hereinbefore, was charged not only under Sec. 302 read with Sec. 34 of the Indian Penal Code but also under Sec. 302 read with Sec. 120-B thereof. The murder of the deceased was said to have been committed by all the accused persons upon hatching a conspiracy. This charge has not been proved. The learned Trial judge itself opined that the recovery having been made after nine months, the weapon might have changed in many hands. In absence of any other evidence connecting the accused with commission of crime of murder of the deceased, in our opinion, it is not possible to hold that the appellant or the basis of such slander evidence could have been found guilty for commission of offence punishable under Sec. 302 of the Indian Penal Code. *Abdulwahab Abdulmajid Baloch vs. State of Gujarat*, 2009 (11) SCC 625 : 2009 (5) JT 58 : 2009 (3) SLT 339 : 2009 (4) SCR 956 : 2009 (4) Scale 211.

Where appellant found to have gone armed with deadly weapon, trespassing into deceased house and inflicting spear injury on the vital part of the deceased—Conviction order not to warrant interference. *Anokhey* v. *State of U.P.*, (1995) 4 Crimes 335 (SC) : 1995(6) Scale 368 : 1996 SCC (Cr) 106 : 1996(1) CCR 9 (SC).

Doubts as to weapon of offence—When improper.—There was clear concession by learned Counsel for the accused that in the light of the report given there could be not doubt that deceased had died of gun shot wounds as wads and pellets have been recovered from her body. The High Court unfortunately did not consider the relevance of this concession. The High Court observed that the concession had been made rightly, but it further said that there was doubt about the weapon used on Major Singh. Even if that be so, there was no scope for directing acquittal of the accused persons in respect of murder.

Coming to the question of testimony of three injured eye witnesses the trial Court noticed that their statements were flawless and nothing has come out in their cross examination on the basis of which any doubt could be created about their veracity. The place was a secluded one. The incident took place on the turning of the passage. The incident continued sufficiently for a long time which was clear from the fact that many shots were fired, firstly by Lal Singh then by his son Dial Singh resulting in the death of Major Singh and his mother Dalip Kaur and injuries to some of the witnesses. The High Court discarded the credible evidence of the eye witnesses on mere surmises and conjectures. *State of Punjab vs. Atma Singh*, 2009 (7) JT 450 : 2009 (4) Supreme 298 : 2009 (7) Scale 689 : 2009 (8) SCR 549 : 2009 (2) Crimes 442 (SC).

Where testimony of eye-witnesses believed—Question of recovery of certain weapons are of no consequence. *Ukarda* v. *State of Rajasthan*, 1995 Cr LR (Raj) 351.

There was unexplained delay and inordinate delay in despatch of FIR. The weapons were recovered from house which is in possession of several persons. Recovery from joint possession is not sufficient to connect with the offence. The prosecution has failed to prove offence beyond reasonable doubt. *Kulvendra Singh* v. *State of Rajasthan*, (1995) 2 RCD 605 (Raj).

Where delay in sending FIR to Magistrate—Delay not explained. Reasonable apprehension of FIR being premeditated as being ante dated and timed by incorporating names of eye-witnesses when there were no eye-witnesses of local area but of distant place. Fire-arms recovered from accused not connected with crime. Hence conviction was not justified. *Surjan* v. *State of Rajasthan*, 1994 RCC 403 (Raj).

Where conviction only on the basis of recovery at the instance of the accused of the murder weapon from place accessible to all. It was held not sustainable. *Mohinder Singh* v. *State of Haryana*, (1995) 1 Crimes 387 : (1995) 2 CC Cases 284 (P & H).

Conviction cannot be recorded merely on the basis of recovery of the murder weapon at the instance of the accused. *Ratia* alias *Ratanlal* v. *State of Rajasthan*, 1995 Cr LR 201 (Raj).

Where all the accused armed with *lathis* and some with *farsa*—Accuseds having *farsa* acquitted—Because deceased got no injury of *Farsa*—Conviction of the person having *lathi* was not sustainable. *Nasir* v. *State of U.P.*, (1994) 3 Crimes 660 (All).

When injury of abdominal cavity deep on the right side back. Inquest report's fact not in the relevant column. Discrepancy alleged was mention of sharp-edged weapon. But *Chaku* in inquest report. Hence conviction was justified. *Yasin* v. *State of U.P.*, 1994 JIC 229 (All).

41. Single blow.—In the instant case it is true that the accused had dealt one single blow with a sharp-edged weapon on a vital part of body namely the neck. This act though solitary in number had severed sternoclinoid muscle, external jugular vein, internal jugular vein and common carotid artery completely leading to almost instantaneous death. Any reasonable person with any stretch of imagination can come to the conclusion that such injury on such a vital part of the body with a sharp-edged weapon would cause death. Such an injury not only exhibits the intention of the attacker in causing the death of the victim but also the knowledge of the attacker as to the likely. *State of Rajasthan* v. *Dhoul Singh*, AIR 2004 SC 1264 : 2004 Cr LJ 931 : 2004(1) Crimes 165 (SC) : 2003(8) Supreme 850 : 2004(1) JCC 91 : 2003(10) Scale 842.

Where evidence of informant sole eye-witness, daughter-in-law of accused and daughter of deceased that accused inflicted single blow by *khukri* on deceased in heat of passion without motive, corroborated by medical evidence and other witnesses therefore accused liable to be punished under Section 304-I, IPC and not under Section 302, IPC. *Braj Behari Singh* v. *State of Bihar*, 2005 (3) East Cr C 85 (Pat.).

It is not laying down that in no case of single blow or injury, the accused cannot be convicted under Section 302 IPC. In cases of single injury, the facts and circumstances of each case has to be taken into consideration before arriving at the conclusion whether the accused should be appropriately convicted under Section 302 IPC or under Section 304 Part II IPC. *Gurmukh Singh vs. State of Haryana*, 2010 (1) CrLJ 450 (SC).

42. Injury on victim by reverse side of axe.—Where accused armed with axe inflicted injury on victim deceased by reverse side of it on his stomach which resulted into his death, the act of accused fell under Section 326, IPC and not under Section 302, IPC. *Bharatsinh Pratapsinh Parmar* v. *State of Gujarat*, 2005 (2) Crimes 563 (Guj).

43. Number of knife blow injuries.—Where the evidence of eye-witness as to incident that accused assaulted deceased by conflicting number of knife-blow injuries was well established, the conviction of accused warrants no interference. *Seeman* v. *State*, 2005 (2) Crimes 222 (SC) : 2005 Cr LJ 2618 : AIR 2005 (SC) 2503 : 2005(5) JT 555 : 2005 SCC (Cr) 1893.

Though it cannot be laid down as a rule of universal application that whenever death occurs on account of a single blow Section 302, IPC is ruled out, the fact situation has to be considered in each case. Where it appeared from records of that a single blow was given on the head of the deceased by a small wooden yoke, it would be proper to alter the conviction from Section 302, IPC to Section 304, Part I, IPC. *V. Subramani* v. *State of Tamil Nadu*, 2005 Cr LJ 1727 : AIR 2005 SC 1983 : 2005 SCC (Cri) 1521 : 2005(1) Crimes 379 (SC) : 2005(2) Supreme 413 : 20005(10) SCC 358.

When the deceased was going to his filed he was attacked by the respondent along with other accused came out from hideout armed with knife, handle of hand-pump and with *dandas* in their hands. The respondent gave a fatal blow to the deceased consequent upon which the deceased succumbed to injuries. From the analysis of the prosecution story and injury caused by the respondent, namely, injury No. 2 by the knife the intention of the respondent to murder was clearly discernible. The order of the High court converting the offence under Section 302 IPC into one under Section 304 Part-I, IPC was set aside. The order of the trial Court convicting the respondent under Section 302, IPC was restored. *State of U.P.* v. *Murli*, 2005 Cr LJ 4382 : 2005 (12) SCC 586 : AIR 2005 (SC) 3609 : 2005(4) Crimes 82 : 2005(4) East Cri C 226 : 2005(6) Supreme 569.

44. Non-explanation of injuries.—In the incident case, the second injury on the left arm of accused was not explained. The accused had challenged deceased and, thereafter fired at him. Held, it is quite natural that deceased would have reacted by raising his hands either in defence or in accepting challenge and in process he would have sustained second injury as described—Such natural human behaviour was difficult to be proved by credible evidence. It had to be appreciated in context of given facts and circumstances of each case. Non-explanation of second injury therefore did not render prosecution case doubtful. *State of Himachal Pradesh* v. *Mast Ram*, 2004 Cr LJ 4973 (D) : AIR 2004 SC 5056 : 2004(4) Crimes 27 : 2004(3) JCC 1447 : 2004(23) CIC 326 (SC).

Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. *Hanumantappa Bhimappa Dalavai vs. State of Karnataka*, 2009 CrLJ 3045 : 2009 (11) SCC 408 : 2009 (4) JT 634 : 2009 (5) SCR 286 : 2009 (5) Scale 142.

Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it out-weighs the effect of the omission on the part of prosecution to explain the injuries. It is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of guilt of the accused beyond reasonable doubt, question of obligation of prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. In the case at hand, trifle and superficial injuries on accused are of little assistance to them to throw doubt on veracity of prosecution case, particularly, when the accused who claimed to have sustained injuries has been acquitted. *Sucha Singh* v.

State of Punjab, 2003 Cr LJ 3876 : 2003 (3) Crimes 272 (SC): 2003 SCC (Cr) 1697 : 2003 (7) SCC 643 : AIR 2003 (SC) 3617 : 2003(6) JT 348 : 2003 (5) Supreme 445.

In the present case, the circumstances indicate that Gajey Singh was assaulted on head by a sharp edged weapon 'balkati' causing a bone deep injury. As per the defence version there were four assailants who had come well prepared to assault at the door of their own house. In such a situation accused persons could have a reasonable apprehension of death or at least of grievous hurt. It was a case of single gun shot which was not repeated. Therefore, it cannot be said that the accused persons had exceeded their right of private defence in any manner. The trial Court convicted both the accused and the High Court allowed the appeal filed by the accused persons and acquitted them. In the instant case, the injury caused on Rajpal Singh is neither superficial nor of minor nature. Non-explanation of the injuries on Rajpal Singh and Gajey Singh has created serious doubt about the credibility of the prosecution version.

We have heard the learned Counsel for the parties at length. The view which has been taken by the High Court is certainly a possible and plausible view. Therefore, we do not think it appropriate to interfere with the impugned judgment. *State of U.P. vs. Gajey Singh*, 2009 (11) SCC 414 : 2009 CrLJ 2274 : 2009 (3) JT 1 : 2009 (3) Scale 337 : 2009 (2) SCR 998 : 2009 (2) Supreme 361 : 2009 (3) SLT 97 : 2009 (2) JCC 1197.

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According to prosecution case the accused in process of fleeing at the time of arrest sustained injuries being beaten by arresting party. The injuries sustained were simple in nature. Held, non-explanation of injuries would not vitiate the trial when prosecution evidence against accused was very strong. *State of U.P.* v. *Kishan Chand*. 2004 Cr LJ 4878 : AIR 2004 SC 4671 : 2004(2) Andh LT (Cri) SC 341 : 2004(3) Crimes 309 : 2005 MD LJ (Cri) 74 : 2004(7) Scale 75 : 2004(6) Supreme 277.

Injuries on accused—Absence of any explanation. It is difficult to hold that the complainant party was in settled and peaceful possession of 2/3 share of the plot in question on the date of incident and there seems to be weight in the defence argument that the accused party was in possession to the extent of 1/2 share and in any view of the matter there was a *bona fide* dispute between the parties regarding their shares and extent of possession. This finding gives twist to the entire prosecution version and it is not clear as to who were in fact the aggressors and whether the injuries caused by the accused persons to the complainant party were in fact caused in their right of their private defence or not.

The High Court also came to the conclusion that PW. 3 Sahadeo and PW. 4 Narayan cannot be said to be totally independent witnesses as the defence had filed documentary evidence to show that Lalloo, the father of the accused persons had lodged an FIR against these witnesses for an offence under Sec. 308 IPC. These witnesses were, therefore, also somewhat inimical to the accused persons and their evidence cannot be given due weight especially with regard to the use of Lathi and Danda by the prosecution witnesses, particularly when such an important fact had not been stated by them in their statements recorded under Sec. 161 Criminal Procedure Code and the statements being contradictory to each other with regard to the use of Danda by the prosecution witness. The High Court arrived at the conclusion that the injuries of the accused persons have not been satisfactorily explained.

The High Court in the impugned judgment arrived at a definite finding that it is highly doubtful that the complainant party was in exclusive possession of the disputed land at the relevant time and witnesses Sahadeo PW. 3 and Narayan PW. 4 cannot be considered to be independent witnesses. A serious doubt has been cast on the credibility of the prosecution version. The High Court allowed the appeal and set aside the conviction and sentence of the appellants and they were acquitted of the offences charged for.

When we apply the above mentioned parameters laid down by a number of cases decided by this Court to the facts of this case, then conclusions become irresistible and no interference is warranted by this Court. Consequently, the appeal filed by the State of UP being devoid of any merits, is accordingly dismissed. *State of Uttar Pradesh vs. Banne*, 2009 CrLJ 2234 : 2009 (4) SCC 271 : 2009 (3) Scale 35 : 2009 (3) JT 552 : 2009 (2) SLT 687.

The case of prosecution was that accused alongwith others attacked the deceased and others while passing through the public street but no explanation was given by the prosecution for the injuries sustained by the accused in the same incident. It was held that evidence of injured eye-witnesses who were close relations of deceased should be viewed in the background of the failure of the prosecution to explain the injury sustained by accused as prosecution case about nature of incident was suspicious. The accused were given benefit of doubt. *Sivaraman* v. *State*, 2003 Cr LJ 4186 (Ker).

There were two occurrences which took place on the same day. In the earlier occurrence, 'J' lost his life and 4 others were injured. There were, therefore, two different occurrence and it, therefore, cannot be suggested that 'T' and 'R' were injured in the course of the same incident and that the prosecution has failed to explain their injuries. The submission proceeds with fallacious assumption that the two of the appellants were injured in the course of the same incident. *Ahir* v. *State of Bihar*, 2005 Cr LJ 900 : AIR 2005 SC 712 : 2005 SCC (Cri) 427 : 2005(1) SCC 582 : 2005(1) JT 425 : 2005(1) Supreme 166 ; 2005(1) Crimes 121 (SC).

45. Intention.—In awarding sentence intention of the accused should be taken into consideration. AIR 1931 Lah 749 Cr LJ 1219. Where there is no intention to kill proper sentence is transportation. 33 Cr LJ 184 : AIR 1932 Lah 5 ; AIR 1931 Mad 420 : 32 Cr LJ 623. Where the accused stated that he caused the death of four children on account of anger caused by hunger, Section 84 is not applicable in such a case but the Court reduced the death sentence to one of transportation for life. AIR 1950 Mad. 593.

Sentence of death may be reduced to that of transportation for life. Where the accused was held not to have normal mind. AIR 1950 Mad 576. Where intention to cause injury to the deceased is proved an offence under this section is committed. AIR 1950 Mad 484. Sentence of death should not be reduced even when it is proved that one of accused took part in the offence in order to oblige his friend, the other accused. AIR 1950 EP 159. Lesser sentence can be imposed when murder is committed in a moment of extreme excitement. 4 DLR (Simla) 231 : AIR 1949 Punj 355; AIR 1948 Lah 58 : 49 Cr LJ 26.

It is Section 34, IPC, which embodies the concept of joint liability in doing the criminal act based on common intention. This Section only provides a rule of evidence and does not create a substantive offence. Thus, if the act is the result of a common intention, then, every person, who did the criminal act with that common intention, would be responsible for the offence committed irrespective of the role played in its perpetration. Common intention essentially being a state of mind, it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases, it has to be inferred from the acts, such as, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered from the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons, who are not responsible for the injury, can be further inferred from the conduct after the attack. In order to bring home the charge of common intention, the prosecution has to establish by evidence, direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment, but it must necessarily be before the commission of the crime.

In the instant case, none of the two accused was armed with any deadly or lethal weapon. Since the evidence on record reveals that the land, in question, was in the possession of husband of deceased and the accused his nephew's family also laid their claim thereon there was a dispute between the two families. It is in this background that the accused nephew had entered into the land and started ploughing the same. He had not, however, carried any lethal weapon with him. When deceased aunt on witnessing the ploughing of the land by the accused protested thereto and an altercation ensued between the two, the other accused came running to the place of occurrence, while the altercation was in progress between deceased and accused No. 1, and gave a blow with his lathi on deceased's leg. On being so assaulted on her leg, deceased fell down. It was thereafter, that both the accused gave blows with lathis and two injuries were caused on the head of deceased, one of the injuries being fracture, which was caused on the frontoparietal area of the scalp, and the other one being a lacerated injury on the left side of the scalp. While considering the question of common intention, it is imperative to note that the evidence on record also clearly shows that had the co-villagers of deceased not started rushing to the place of occurrence, she might have had been given more blows with lathis. However, in the face of the number of injuries sustained by deceased, it is difficult, nay impossible, to infer that the intention of the accused was to cause death of deceased. In view of the fact that deceased was not armed with any weapon and she had not assaulted any of the accused, the accused-appellants had no justification for assaulting deceased. What is, however, of paramount importance to note is that out of the two injuries sustained there was only one on head, by deceased, which proved to be fatal. It is not, however, discernible from the evidence on record, as to which of the two accused-appellants had caused the said fatal injury.

Held that, in the aforesaid circumstances it could not be said that the deceased was assaulted with the intention of causing her death. At the same time, the evidence on record clearly reveals that both the accused had assaulted deceased on her head and fracture was caused on the front parietal area of her scalp by one of the blows, which had so fallen on her head. From the fact that deceased had sustained two injuries on her head, it clearly follows that both the accused shared the common intention in causing grievous injuries and in such a situation, the accused instead of being held guilty of the charge of murder, ought to have been held guilty of the offence committed by them under Section 326 read with Section 34, IPC. *Abu Bahar Siddik alias Abu Mia and another, v. State of Tripura*, 2005 CriLJ 1332 (Gau).

Where the murder was not a deliberate one but occurred suddenly after mutual abuse, a sentence of transportation of life was substituted for the death sentence. AIR 1918 Lah 913 ; 39 PLR 41. Where it is clear from evidence that the intention was to commit death and not grievous hurt the accused should be given the maximum sentence. 105 Ind Cas 804 ; 24 Pat 131 : AIR 1945 Pat 470. In cases of sudden and unpremeditated attack lesser sentence is called for. AIR 1942 Lah 37 : 43 Cr LJ 370. Premeditation or intention to kill is not always necessary for passing a death sentence. *Bhabakhatwar and anothers v. State of Haryana*, AIR 1979 SC 1006 : 1979 Cr LJ 883. Intention to kill depend upon the facts and circumstances of the particular case. *Jawaharlal and another v. State of Punjab*, AIR 1983 SC 284 : 1983 Cr LJ 429.

Intention to cause death - Circumstances from which can be gathered. Court has to proceed to decide the pivotal question of intention, with care and caution, as that decides whether the case falls under S. 302 or 304 Part I or 304 Part II. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) Nature of the weapon used; (ii) Whether the weapon was carried by the accused or was picked up from the spot; (iii) Whether the blow is aimed at a vital part of the body; (iv) The amount offeree employed in causing injury; (v) Whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) Whether the incident occurs by chance or whether there was any premeditation; (vii) Whether there was any prior enmity or whether the deceased was a stranger; (viii) Whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) Whether it was in the heat of passion; (x) Whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) Whether the accused dealt a single blow or several blows. *Hari Singh and Anr. v. State*, 2008 CriLJ (2) 2133.

The dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries. There is also evidence on record to prove ant establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under Clause (4), of Sec. 300 of IPC. *Maniben vs. State of Gujarat*, 2009 (12) SCR 753 : 2009 (8) SCC 796 : 2009 (3) Crimes 298 (SC) : 2009 (12) JT 82 : 2009 (10) Scale 654 : 2009 (5) Supreme 700 : 2009 (4) JCC 2564.

Perusal of the entire evidence gives an impression that there was prior enmity between deceased and the accused persons and on the given day the accused persons assaulted him, but, then most of the injuries were dealt on the lower parts of the body, which reveals that they had no intention to murder. *Garjan Sahu and Ors. vs. State of Orissa*, 2010 (2) CrLJ 1880 (Ori).

The injuries inflicted by bricks numbering 5 or 6 can be held that accused intended to cause injuries likely to cause death. Therefore case under Section 304, Part II is made out. *Makhan Singh s/o Hukam Singh* v. *State of Rajasthan*, 1995 Cr LR 671 (Raj).

Where prompt lodging of FIR. Intention to kill reasonably made out by medical report duly substantiated by the ocular evidence. Hence conviction, held, legal and proper. *Atar Nag* v. *State of Orissa*, (1995) 1 Crimes 124 (Ori).

Where the death occurred by arrow inflicted injury on the stomach of the deceased and neither there was evidence to show the intention to kill nor any evidence to show that the injury was sufficient to cause death in the ordinary course. The case was covered by Section 304, Part II and not under Section 302. *Gengia* v. *State of Rajasthan*. 1995 Cr LR 193 (Raj).

Deceased did not remove pole from village passage. In altercation he was hit by a blow and died after 13 days. The deceased was obstinate, there was, no intention to kill. Hence conviction converted to under Section 304, Part II. *Mansharam* v. *State of M.P.*, 1995 Cr LR 215 (MP).

Where there was found to have no intention to commit murder—However knowledge that injury will cause death. Hence conviction converted into Section 304, Part II. *Tilak Chand* alias *Sita Ram* v. *State of Maharashtra*, (1995) 3 Crimes 426 : 1995 Cr R 868 (Bom).

When accused not intended either to cause death of his brother or deceased. He might have carried knife with him to threaten his brother to pay amount taken as loan. Accused might not have assaulted the deceased but for his intervention. Offence therefore falls under Section 304, Part I and under Section 302, IPC conviction modified accordingly. *Malla Govindaraju* alias *Govu* v. *State of A.P.*, (1995) 2 ALT (Cr) 9 (AP).

Where three acquitted by trial Court for lack of evidence—Two are convicted and sentenced for imprisonment for life. Then petition challenged. It is *held*, that in a case of murder by several persons if one of the accused is found to be responsible for non-fatal injury he is not convicted for murder whereas the accused responsible for injuries caused with intention to commit murder is convicted for murder. Hence conviction of accused under Section 302 is proper justified and that of '*P*' who gave one *lathi* blow can only be convicted under Section 325, IPC and not more than that. *Prahlad Oraon* v. *State of Bihar*, (1995) 2 East Cr C 84 (Pat).

When the doctor has deposed that incised wounds on her frontal region on her forehead were sufficient in ordinary course to have caused death. Hence it was apparent that appellant had intention to commit the murder and such conviction under Section 302, IPC is confirmed. *Asha Ram* v. *State of Rajasthan*, 1994 RCC 531 : 1994 Cr LJ 2431 : (1994) 2 EFR 39 : 1994 (2) WLC 443 (Raj).

Where accused hitting the deceased with crowbar. There was found no premeditation and intention to cause death. Occurrence was in the spur of moment out of sudden provocation. Offence is falling under culpable homicide not amounting to murder. Conviction and sentence under Section 304, Part I, IPC instead of Section 302 is maintained. *H. Madduleti* v. *State*, (1995) 3 Crimes 160 (AP).

Where very severe kick blows given and Sternum broken. Ribs fractured on both sides. Pleura damaged—Injuries are fatal—Accused not armed with any weapon. Fight was not premeditated. Accused with intention to cause injuries likely to cause death is convicted under Section 304, Part I and not under Section 302. *Roopsi* v. *State of Rajasthan*. 1994 RCC 132 (Raj).

Where accused unarmed initially but suddenly left spot and came back with knife immediately. Single knife blow inflicted. There was exception to Section 300. Intention to cause death inferred. It was held that due to sudden fight offence amounted to culpable homicide not amounting to murder—Conviction of accused altered to Section 304, Part I. *Mathura Murmu* v. *State*, 1994 Cri LJ 869 (Ori).

Where death of deceased brother was caused by his brothers and wives. There was family disputes and had fatal stone-injury. Medical report stating injury on head caused by stone is fatal and sufficient for causing death. Evidence was of prosecution. Witness being injured wife of deceased and was corroborated by FIR and her witnesses—Prosecution proved guilt of the accused *A* for causing death—No pre-meditation and common intention. Offence is not murder but Accused *A* is liable for conviction under Section 304, Part I. Conviction and sentence modified accordingly. *Siyadri Demullu* v. *State of Andhra Pradesh*. (1994) 1 ALT (Cri) 636 (AP) (DB).

Where accused caused injuries to deceased wife by stabbing her. Motive being some quarrel on missing money-matters and also on suspicion of fidelity of wife. No intention to cause death was proved, but stabbing by accused established by prosecution case. Offence was proved to fall under Section 304, Part I and hence conviction modified accordingly. *Avula Venkateswarlu* v. *State*, (1994) ALT (Cri) 593 : (1994) 1 ALT 726 : 1994 Cr LJ 2232 (AP) (DB).

Where the accused had intention to cause death. The conviction is under Section 302 hence it is held, sustainable. *Nashik* v. *State of Maharashtra*, 1994 SCC (Cri) 147 : AIR 1993 SC 1485 : 1993 Cr LJ 2619 : 1993(1) Crimes 1197 : 1993(2) Scale 165 : 1993(1) UJ 619.

Where repeated attempt to cause injury amounts to intention of the accused to cause the death of the deceased—Hence offence under Section 302, IPC was made out. *State of Haryana* v. *Manoj Kumar*, 1994 JIC 148 (SC) : (1994) 1 Crimes 102 : 1994 (1) SCC 495 : 1994 SCC (Cr) 93 : (1994) 1 East Cr C 88 : AIR 1994 SC 147.

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Where only one blow from blunt side of weapon. Blow not hard otherwise head of deceased would have crushed. Hence it was held that there being intention of causing bodily injury only, conviction altered from Section 302 to Section 304, Part I. *Madkami Laka* v. State *of Orissa*, 1995 Cr LJ 1484 (Ori).

Where it is obvious that accused did not have the intention of committing murder or attempting to murder any of the victims. It is also in evidence that gun was used as *lathi. Puran Singh* v. *State of Rajasthan*, 1995 Cr LR (Raj) 721.

Where evidence of wife of deceased corroborated by other prosecution-witnesses. Evidences inspiring confidence. Prosecution case proved against accused who inflicted four injuries on head of deceased—Repeated injuries—Intention to kill proved. Conviction which was under Section 302 was upheld. *Nanda* v. *State*, (1995) 1 RCD 502 (Raj).

The evidence of all the eye-witnesses have been duly corroborated by each other on all material particulars. On re-appreciation of evidence of eye-witnesses who have duly corroborated that accused intentionally killed his father and step-mother. Hence conviction maintained. *Laloo* v. *State of Rajasthan*, (1995) 2 RCD 355 : 1995 Cr LR 818 (Raj).

Deceased child not involved in dispute. Nothing preceded the incident which would have indicated the motive of the accused. Case of single blow on the back of the child. No intention to commit murder. Hence conviction under Section 302 converted into 304, Part I. *Prabhakar* v. *State of Maharashtra*, (1995) 3 Crimes 430 (Bom).

Where injury caused on the many vital part of the deceased. Hence intention was established and offence made out under Section 302, IPC." *Krishna Kamble* v. *State*, (1994) 2 Crimes 678 (Bom).

Where injuries inflicted by accused by *lathi* can not be said to be with sole intention to cause death and hence conviction can be altered from Sections 302 to 304 Part II. *Ramaotar* v. *State of Madhya Pradesh*, 1993 Cri LJ 57 (SC).

Where in absence of serious injuries on vital parts of body of deceased dying after six days of incident, no intention to cause death is attributable to accused who can be convicted under Section 304 Part II. Conviction under Section 304 Part II is valid & proper. *Babu Lal* v. *State of M.P.*, 1993 Cri LJ 2667 (SC) : 1993 AIR (SC) 1941.

When appellant stabbed into heart of deceased who dies instantly, inference is that be inflicted injury with intention to cause death. *Katta Ramudu* v. *State of A.P.*, 1997 (1) Crimes 302 (SC) : 1997 AIR (SC) 2428 : 1997 (3) JT 498 : 1997 (2) Scale 726 : 1997 (3) Supreme 209 : 1997 (1) CCR 279 (SC).

When accused being armed with *lathi* assaulted deceased who was unarmed on vital part of his body it shows intention to kill, even though extensive damage may not have caused to deceased. *State of U.P.* v. *Lakhan*, 1997 (2) Crimes 67 (SC) : 1997 (5) JT 33 : 1997 (3) Scaqle 647 : 1997 92) CCR 43 (SC) : 1997 (4) Supreme 348.

46. Instigation.—That the accused who committed murder were hired assailants was no reason to award lesser, sentences of life imprisonment. ILR, 1953 Hyd 32 : 1953 Cr LJ 935 : AIR 1953 Hyd 161.

47. Murder committed by several persons who inflicted injury not known.—There should be no discrimination and all the accused persons equally placed be awarded the same sentence. 1964 (2) Cr LJ 75 (All) ; AIR 1956 Hyd 99 : ILR 1956 Hyd 205 : 1956 Cr LJ 887 (commutation of death sentence to transportation for life) : AIR 1962 Cal 504 : 1962 (2) Cr LJ 456.

48. While sentence under Section 307 still in force.—The fact that the sentence for offence under Section 307 is still in force is no bar to trial and conviction under this section AIR 1935 Pesh 18.

The High Court rightly noted that the evidence adduced by the prosecution did not establish that remaining accused persons had any knowledge that Gajadhar was carrying a country made pistol or that he would go to shoot the deceased. The testimony of PW-2 shows that Janardan was initially arising the voters not to caste vote for Ramakant Yadav but to vote for his candidate and subsequently he had resorted to rowdism in order to disturb the voting process so that Ramakant Yadav may not win the election and that simple injuries were caused by blunt weapon to three persons. Therefore, as rightly observed by the High Court the common object of the assembly was not to commit the murder of Chandra Bhan Singh and it was the solitary act of Gajadhar. PW-2 had also stated that he had not seen the lathis or country made pistol in the hands of any of the accused persons at the time when Janardan was disturbing the voters and was asking them not to caste vote in favour of Ramakant Yadav. PW-4 *i.e.* Constable on duty had also stated that there was fight between the parties regarding disturbance in voting. *State of Uttar Pradesh vs. Gajadhar Singh*, AIR 2009 SC 1935 : 2009 (1) Crimes 348 : 2009 (11) SCC 366 : 2009 (2) JT 354 : 2009 (2) Scale 452 : 2009 (2) SCR 17 : 2009 (1) Supreme 793.

Where accused was convicted under Section 302 as well as under Section 307 for murder of only one person, conviction under Section 307 not proper. *Jagtar Singh* v. *State of Punjab*, 1993 Cri LJ 2886 (SC).

PW. 2 Suresh Kumar at the time of occurrence was studying in the school. He is the friend of Raj Kumar, who is the brother of PW. 1. According to him, on the date of occurrence, PW. 2 and his friend Raj Kumar accompanied PW. 1 and the deceased to go to river for taking bath. On the way, the occurrence had taken place. He could state about the occurrence only. He did not refer about the other happenings with reference to the motive as spoken to by PW. 1. At the time of deposition, he was studying B.A. in Nesamani Christian College. He clearly corroborated the evidence of PW. 1 with reference to the overt acts attributed to each of the accused. Nothing has been elicited from PW. 2 that he had anything to speak falsehood against the accused. As a matter of fact, when the victim was taken in a car to hospital, he also accompanied him. When Exh. P1 complaint was given to PW. 11 Head Constable, PW. 2 attested the said complaint. In Exh. P1 also the name of PW. 2 is mentioned. PW. 2 was examined at the hospital during the course of inquest by PW. 14. Therefore, there is no reason to reject the evidence of PW. 2. *Vijaykumar vs. State*, 2009 (12) SCC 629 : 2009 CrLJ 3056 : 2009 (7) JT 36 : 2009 (6) SCR 919 : 2009 (6) Scale 364 : 2009 (8) SLT 27.

When eye witness himself six ghastly murders and even sustained multiple gunshot injuries and there is no reason of false implication of appellant, conviction of appellant upheld. *Kashmir Singh* v. State *of Punjab*, 1997 (1) Crimes 111 (SC).

49. Custom.—Custom of killing for unchastity cannot mitigate sentence. AIR 1935 Sind 44 ; 28 SLS 279.

50. Killing under officer's order.—If a soldier kills another under illegal order of his superior officer, he is not excused, but this fact may be taken into consideration to mitigation of punishment, AIR 1940 Lah 210 : 41 Cr LJ 639.

51. Influence of father and elder brother.—Where accused is only 17 years of age and commits crime under influence of father and elder brother the case is a fit one for exercise of power, under Section 401. 137 IC 293 : 33 Cr LJ 484. In case of murder by two persons, the one taking part and acting under influence of the other, should be punished with lesser sentence. AIR 1930 Sind 305. A youth committing murder under the influence of others may be given the lesser sentence for life. AIR 1971 SC 1388 : 1971 Cr LJ 1109.

52. Unsound mind.—Where the accused being of unsound mind murdered his children, but his case does not fall Section 84 and he was an affectionate father, his sentence was reduced from death to transportation. 145 IC 119 : 34 Cr LJ 939 : AIR 1933 Lah 128 ; *see* also 135 Ind Cas 384 : 33 Cr LJ 163 : AIR 1932 Oudh 18 ; AIR 1965 AP 28.

When the mental condition of the accused is not normal, the case does not merit capital punishment. AIR 1973 SC 806 : 1973 Cr LJ 582 ; AIR 1975 SC 762 ; 1975 Cr LJ 646 ; AIR 1974 SC 1697.

53. Superstition.—Accused believing deceased to be witch struck her with axe. The accused is guilty of murder, Madh Bha 1955 HCR 1135 : Madh BLR 1955 Cr 171. Accused out of superstitious belief, caused burns as a result of which the deceased died, he is guilty of offence under Section 304, Part II and not under Section 302. 1964 Mad LJ 188 : 1964 (2) Cr LJ 557 : AIR 1964 Mad 480 ; AIR 1932 Cal 815 : 33 Cr LJ 663, but *see* 1957 MLJ (Cr) 803 ; AIR 1977 SC 1319 : 1977 Cr LJ 829.

54. Perverted sense of family honour.—The perverted sense of family honour which actuated the accused to commit murder cannot be regarded as a mitigating circumstance. AIR 1960 Mad 218 : ILR 1960 Mad 175 : 1960 Cr LJ 720 : 1960 Mad LJ (Cr) 133 ; ILR 1964 Cut LT 1 (possibility of accused committing widow's murder for preserving family honour held justified in reduction of sentence).

55. Sex.—That the accused is a woman is not a conclusive reason for not passing the sentence of death especially where she was armed with a dangerous weapon and did not hesitate to use it for a slight cause. 1 Rang 751. It has, invariably been held in all Courts in India that in the murder of her newly born illegitimate child by a woman there are mitigating circumstances sufficient to reduce the appropriate penalty very much below a sentence of transportation. Most of the circumstances apply, though in a lesser degree to the case of the father of such a child. 25 Cr LJ 63 : 75 IC 267. Generally the age and sex of a murderer cannot of itself be sufficient ground for a lenient sentence, if there are other reasons which very nearly justify the passing of the lesser sentence but do not quite do so, or when it is doubtful whether they do so or not, then the youth or sex of the criminal may certainly dip the scale to the side of mercy. 18 NLR 101 : 64 IC 277 (N) : AIR 1922 Nag 65. Where illiterate woman caused death of child urged by wicked superstition, lesser penalty should be imposed. AIR 1938 Lah 718 : 146 IC 228. Where a young girl of 15 kills her newly born baby, a sentence of transportation for life is wholly inappropriate. In England it is always assumed that a girl who commits such a murder at such a time is hardly responsible for her actions. It being well known that the child's birth produces occasionally peculiar reactions in the mother. The sentence of transportation for life should be reduced to a sentence for a short period. AIR 1938 Lah 473. Comparative lenity to woman is a commonly accepted rule of practice though needless to say not of law, but in dealing with atrocious crime like this the mere sex of the criminal should not bar the imposition of a sentence which would be considered appropriate in the case of a man. 16 Cr LJ 20 : 26 Ind Cas 324. The effect of Section 4 of the Evidence Act interpreting "shall presume" is that the Code shall record the absence of the soundness of mind as proved unless and until it is disproved. ILR (1962) Cut 806.

56. Guilt of Rape and Murder.—Where the appellant submitted that in any set of circumstances, this is not the rarest of the rare case where accused is to be sentenced to death. He submitted that age of the accused on the relevant day was less than 22 years. It is his submission that even though the act is heinous, considering the fact that no injuries were found on the deceased, it is probable that death might have occurred because of gagging her mouth and nonetrix by the accused at the time of incident so that she may not raise hue and cry. The death, according to him, was accidental and unintentional one. In the present case, there is nothing on record to indicate that the appellant was having any criminal record nor it can be said that he will be a grave danger to the society at large. It is true that his act is heinous and requires to be condemned but at the same time it cannot be said that it is rarest of the rare case where accused requires to be eliminated from the society. Hence, there is no justifiable reason to impose the death sentence. Therefore, the conviction under Section 302 IPS maintain but sentence of death commuted to life imprisonment. *Bantu alias Naresh Giri v. State of M.P.* 2002 Cri LJ 211 (S.C.) : 2002 AIR (SC) 70 : 2001 (7) Scale 523: 2001 (8) Supreme 7 : 2001 (7) SLT 577.

Doubtful evidence—Rape and murder. What has been stated above relating to the law on circumstantial evidence, only question to be examined is whether the presence of the injuries on the accused can be held to be sufficient to hold appellant guilty. The trial Court held that the accused was examined on 24.03.1993 by the doctor PW. 3 who found abrasions on the thighs and hip joints of the accused, as the injuries must have been received in a scuffle. This circumstance found supported from the finding of chappals and other articles. It was held that recovery of utensil and chappals of the deceased does not lead to the guilt of the accused but that circumstances show the involvement of the accused who was found to have injuries on the persons corresponding with the injuries on the deceased. The High Court noted as follows :

> "In our considered view, a very strong circumstance which connects the appellant with the commission of offence is the presence of injuries on his person especially thigh and hip joints."
>
> "This certainly is a very strong circumstance which by itself can be said to be conclusive in its nature pointing towards the guilt of the accused."
>
> "The recovery of chappals, Dolu (steel container) and certain other articles from the fields of the appellant speak volumes of the fact of a strong corroborative circumstance against the appellant."

"The aforesaid strong circumstances can very well be taken in to account for upholding the conviction of the appellant."

Circumstances on which the trial Court and the High Court had relied to hold the accused guilty by no stretch of imagination can be determinative of the fact that accused was responsible for the commission of rape. Even if it is accepted that the chappals and the utensils were found in the fields of the appellant, the dead body was found by another place *i.e.* in the field of Sheo Ram.

Above being the position that the judgment of the trial Court affirmed by the High Court cannot be maintained and are set aside. The appeal is allowed. The appellant who is in custody shall be released forthwith unless required to be in custody in connection with any other case. *Baldev Singh vs. State of Haryana*, AIR 2009 SC 963 : 2008 CrLJ 948 : 2008 (14) SCC 768 : 2009 (2) SLT 243 : 2008 (15) Scale 366 : 2008 (16) SCR 826.

Rape and murder of a girl aged 2 years. The evidence of PW-5 and PW-6 reveals that appellant had been seen around the complainant's house on the previous day and as he was not a resident of this area, he had been quickly singled out. These witnesses further stated the appellant had been seen in the vicinity again after the rape and murder and he had accordingly been apprehended and handed over to the police and two chains worn by deceased had been taken from his pockets. PW-13 also identified the chains in Court. It is true that in the cross-examination of these two witnesses, several improvements *vis-a-vis* their statements under Sec. 161 of Criminal Procedure Code had been pointed out by the defence Counsel, but the fact that the appellant had been present in the vicinity of the house and had been arrested, soon after the incident has been admitted even by the defence.

Another significant piece of evidence is the statement of PW-7 who testified to the fact that about 2:30 a.m. on the night of the murder he had gone out of the house to urinate and had seen the appellant outside and on being questioned, the appellant had threatened him with dire consequences with the result that he had not informed anybody till the third day after the police had come to the village to verify the facts. He too stated to the fact that two chains had been recovered from the pocket of the appellant. It is true that several improvements have been made by the three primary witnesses but there is absolutely no reason as to why they would involve the appellant in a false case as admittedly he was a stranger to the locality and they bore him no ill will.

We have also gone through the evidence of PW-12 relating to the recovery of the frock pursuant to a disclosure statement made by the appellant under Sec. 27 of the Evidence Act. Nothing could be spelt out from the cross-examination of this witness except that the recovery had not been made from a closed place, though he explained that there was very little movement of human beings in that area as no one was residing close by. This witness also identified the frock that had been recovered. It is equally significant that the strands of fibre recovered from the place of incident had been matched with the material of the frock and were found to be from the same source.

It is true that in a criminal matter the onus of proof lies almost exclusively on the prosecution. As already mentioned above, however, the appellant has not been able to give any explanation in his statement under Sec. 313 of Criminal Procedure Code as to what he had been doing in that locality. On the contrary he admitted his presence by stating that he had been caught by the neighbours on suspicion of the murder and beaten up, and had suffered several injuries in the process. The medical evidence on the contrary reveals that these injuries could also have been sustained while raping and killing the young child.

The evidence that the appellant was a paedophile with extremely violent propensities also stands proved on record in that he had been convicted and sentenced for an offence punishable under Sec. 354 in the year 1998 and later for offences punishable under Secs. 363, 376, 379, 302 and 201 of the IPC for the rape and murder of a young child and had been awarded a sentence of imprisonment for life under Sec. 302, and several other terms of imprisonment with respect to the other Secs., though, an appeal in this connection was pending as on date. It is also extremely relevant that the appellant, had, in addition, been tried for the murders of several other children but had been acquitted on the 28.07.2005 with the benefit of doubt. The present incident happened three days later. We accordingly dismiss the appeals but modify the sentence of death to one for the rest of his life in terms of the judgment in *Shraddananda's* case. *Sebastian vs. State of Kerala*, 2010 (1) SCC 58 : 2009 (4) Crimes 121 (SC) : 2009 (13) JT 136 : 2009 (13) Scale 210 : 2009 (7) Supreme 8 : 2009 (8) SLT 96.

57. Accused having small child.—The existence of an extremely young baby born to the accused since the murder is not a ground for lessening the sentence. AIR 1963 Ori 144 : 1963 (2) Cr LJ 294 : ILR 1962 Cut 262 ; ILR 1962 Cut 726.

58. Accused killing ailing wife as he could not provide for operation.—Also killing his two children as they would be neglected after their mother. It is a crime committed out of poverty and not actuated by any lust, vengeance or gain and imprisonment for life and not death sentence is to be awarded. AIR 1955 SC 50.

59. Deaf and mute accused.—Accused can not be exempted from puni-shment simply on the ground that he is deaf and dumb. (1960) 2 Ker LR 206.

60. Cases.—Absence of name of solitary eye-witness from rukka sent by doctor to police station immediately after arrival of dead body in hospital, created doubt about presence of eye-witness at time of incident. *Sukhawant Singh* v. *State of Punjab*, 1995 SCC (Cr) 524 (SC) : 1195 AIR (SC) 1601 : 1995 (3) SCC 367 : 1995 (3) JT 495 : 1995(2) Scale 482 : 1995 (2) UJ 29 : 1995 (2) SCJ 81 : 1995 (2) Crimes 148.

Where the accused drove the vehicle in such a way that tyres of lorry ran over middle portion of the body which resulted in crush injuries. From these facts, it is fully established that accused intentionally caused such bodily injuries so as to cause death of the deceased. Hence he committed offence of murder under Section 300, IPC liable to be punished under Section 302, IPC. *Satheesan* v. *State of Kerala*, (1995) 1 KLJ 410 (Ker).

Where child was murdered by strangulation and asphyxia—Circumstantial evidence is that the body of deceased child recovered from hut of appellant. Appellant-accused was absconded and arrested after two days—Complainant mother of child being poor illiterate lady cannot fabricate false case to implicate appellant. Hence conviction of appellant was upheld. *Ramshray Mithai Lai Vishvakarma* v. *State of Maharashtra*, 1994 B Cr C 149 (Bom).

Where death of bystanders and Appellant police constable fired two shots killing two persons and third shot went off. Actual quarrel and fight between appellant and two more police constable was on one side and prosecution-witness and his brother was on other side—Appellant started indiscriminate firing—Occurrence was at 9 p.m. and so due to darkness appellant could not have noticed any bystanders—There found no aim of firing at two deceased, he fired only to scare away people. It was held that appellant acted in haste, rashly and without circumspection and due care. Conviction under Section 304-A ordered. *Balwant Singh* v. *State of Punjab*, (1994) 1 Crimes 745 (SC) : 1994(2) JT 30 : 1994 Supp (2) SCC 67 : 1994(1) Scale 679 : 1994 JCC 258 : 1994 SCC (Cr) 844.

Death was caused by strangulation—Even in absence of external marks a person may be killed by manual strangulation. *Lalu Mia* v. *State of Tripura*, (1995) 2 GLR 145 (Gau).

Where prosecution case entirely depending upon testimony of solitary eye-witness who is wife of the deceased—But this testimony is found not reliable—Unexplained delay in filing FIR—Bald statement of doctor without any medical report as to how injured person became unconscious. Therefore conviction was set aside. *Jaipal Lal* v. *State of U.P.*, 1994 ACC 376 : 1994 Cr R 176.

Where deceased was alleged to have pregnancy of 4 months from accused—But dead body recovered had no traces of pregnancy and thus it cannot be said that dead body recovered is connected with deceased's case—Identification of deceased by her brother only from photographs of dead body taken after 36 hours of death cannot establish to be the dead body of the deceased. No evidence of last seen of accused near place of recovery of dead body—Hence conviction of accused not sustainable. There is no evidence that accused was seen even alone near about the place where the dead body was found on 29.9.1988 or 30.9.1988 or even on 1.10.1988, when the dead body was found. With many links missing, it becomes doubtful if accused caused death of *R*. Therefore, on the facts and circumstances of the case, an inference cannot be drawn that accused has caused the death of R. True it is that the *pant* and *shirt* recovered from the house of the accused contained bloodstains. There is, however, no evidence that the pant and shirt belonged to the accused which he was wearing at the time *R* was seen with him last. *Bira Naik* v. *State*, (1994) 1 Crimes 1169 at p. 1171 (Ori).

Where that eye-witnesses produced by prosecution has implicated the acquitted accused person as well and that part of evidence was not held to be reliable beyond reasonable doubt. But this was not sufficient to reject their testimony in relation to appellant because the same was corroborated by surrounding evidence as well. Though the presence of defence-witness '*V* on the scene of occurrence has been admitted by the prosecution eye-witness yet since the theory of accidental fire resulting in death of two deceased persons has already been held as an impossibility the trial judge was justified in rejecting the testimony of *V* who propounded the theory, hence impugned judgment suffers from no infirmity. *Ramkripal* v. *State of M.P.*, 1994 Cr LR 139 (MP).

Where there was 32 hours of delay in lodging FIR—Two remaining family members also injured—Incident in the winter night—Only residing member widow lady and minor son, who were injured—Delay was properly explained. *Ram Kumar* v. *State of Haryana*, (1994) 3 Recent CR 631 (SC) : 1995 AIR (SC) 280 : 1995 Supp (1) SCC 248 : 1994 (6) JT

502 : 1994 (1) Scale 484 : 1994 (3) Crimes 633 : 1995 (2) SCJ 75 : 1994 (4) CCR 779 (2) (SC) : 1995 SCC (Cr) 355.

During record of case history the deceased told that she was set on fire by her mother-in-law who poured kerosene oil on her. This was correctly treated as dying declaration as recitals were contained in case history. *Smt. Chandrabai Balu Kapase* v. *State of Maharashtra*, (1995). 1 Bom CR 503 (Bom).

Where there was possibility of two views. The view favouring the accused to be accepted. *Public Prosecutor* v. *Bandi Balaiah*. (1994) 1 ALT (Cri) 115 : 1994 Cr LJ 331 (AP) (DB).

When defence taken plea of private defence—Not established from the conduct of the accused—Prosecution version inspiring confidence—Conviction and sentence recorded by the High Court. It was held sustainable. *Pandurang Dnyandeo Hatkar* v. *State of Maharashtra*, 1994 SCC (Cri) 33 (SC) : 1993 (1) JT 445 : 1993 (1) Crimes 656 : 1993 (1) Scale 410 : 1993 (1) CCR 70 (SC).

In dowry death charge both under Sections 302 and 304-B may co-exist. *Bhoora Singh* v. *State*, 1993 Cri LJ 2636 (Alld).

Where accused sexually assaulted infant girl of 4 months and body thrown in a well pulled out after 24 hours, mere absence of traces of semen on deceased would not exonerate accused from charge of rape. *Siddik Singh Pritam Singh* v. *State of Maharashtra*, 1993 Cri LJ 2919 (Bom).

Where there is no evidence that footprints were preserved. Even otherwise science of identification of foot prints is rudimentary science and much reliance cannot be placed on result of such identifications. *Niranjan Lal* v. *State of Haryana*, (1994) 2 Recent Cr R 620 (P & H) (DB).

Where in case of death by burns by fire set by husband and material witnesses to the incident kept back.—Court can draw adverse inference. *Jalba son of Santuka Kamble* v. *State of Maharashtra*, (1995) 2 Bom CR 575 (Bom).

Eye-witnesses were probable and natural—Offence was established by all corners—Hence conviction was justified. *Balbir Singh* v. *State of UP*, 1994 Cri LJ 3400 (Alld) : 1994 UP Cr R 622 : 1994 JIC 823 (All).

Where allegation of causing death was by axe-injury. Six persons were dead—Incident due to minor altercations. Recovery was not proved. Identification parade was also held improperly—Conviction was not justified. It was held that offence not established against—May be more persons and weapons used in the incident. *State of Gujarat* v. *Dindol (Adivasi) Ratna Surpal*, 1994 Cr LR 148 (Guj).

Where to kill is cruel and all murders are cruel. But such cruelty may vary in degree of culpability when it assumes the proportion of extreme depravity the special reasons exist. *State of M.P.* v. *Manmohan Choubey*, 1994 Cr LR 71 (N) (MP).

Where it appears probable that due to discard there would be false implication the Court would be careful in scrutinising the evidence. *Vital Sadashiv Gaikwad* v. *State of Maharashtra*, (1994) 1 Bom CR 702 : 1994 Cr LJ 2035 (Bom).

Where death of the wife was by burning and intention and motive to kill was not present. Conduct of the appellant not strengthening such inference—She was 50%

burnt—There was discrepancy with regard to the fact whether kerosene and match box was brought by deceased herself or the accused. Other important discrepancy being the statement 'burn yourself. `and accused lit fire'. There was evidence to the effect that the deceased burnt herself having been disgusted with the conduct of the accused. It was held that the conviction was modified to one under Section 498-A, IPC. *Gunti Yadagiri* v. *State of A.P.*, (1995) 3 Crimes 366 (AP).

Where death was caused by gunshot injury. But blood was not recovered from the place where body was found lying seven hours. The stomach was found empty. Hence manner of incident doubtful—Conviction was not justified—It was held that prosecution case is doubtful. *Subrata Roy* v. *State of U.P.*, 1994 JIC 337 (All).

For delayed FIR there was no explanation for delay and had Unfair investigation—There was lack of motive—Eye-witness was too not trustworthy. Accused entitle for acquittal. *Ram Singh Meena* v. *State of Rajasthan*, 1995 R Cr C 601 (Raj).

Where there was delayed recording of the statements of material witnesses rendering these witnesses unreliable. It would vitiate the prosecution. *Kishan Singh* v. *State of Rajasthan*. 1995 RCC 123 : 1995 Cr LR 176 : 1995 Cr LJ 2127 : (1995) 2 RCD 38 : 1995 Cr LR 547 : (1995) 1 RCD 76 : (1995) 2 RCD 189 (Raj).

In review petition against death sentence when petitioner was 20 years old on date of commission of offence as proved by School leaving certificate, there is no use to medical examine accused at this stage. Petition dismissed. *Amrutlal Someshwar Joshi* v. *State of Maharashtra*, (1995) 2 CCR 32 (SC) : AIR 1994 (SC) 2582 : 1994(5) JT 509 : 1994(6) SCC 200 : 1994(3) Scale 901 : 1995(1) UJ 130 : 1994 SCC (Cr) 1604.

Where witnesses are neighbours hence no mistake in identification. Witnesses swearing the fact that accused gave the blow on the head of the deceased with axe-witnesses are natural. It is held that it was the accused who caused injury to the deceased with axe. *Shiodas* v. *State of Maharashtra*, (1995) 2 Crimes 531 : 1995 Cr LJ 2054 (Bom.) (DB).

Where the incident was witnessed by two eye-witnesses. Hence the discrepancies in number of axe-blows given was not material. Therefore, held that the impugned judgment suffered from no infirmity to warrant interference. *Punem Landri* v. *State of U.P*, 1994 Cr LR 176 (N) (MP).

Where the death was caused by burning hence conviction by trial court for offence under Section 302, IPC and sentenced to life imprisonment and fine of Rs. 5,000/ : . It was challenged in appeal. It was *held*, that at the time of incident, the deceased was in the company of the accused at his house. The burden lies on him to explain satisfactorily the circumstances leading to the incident. The evidence plainly demonstrates that he has failed to discharge this burden rather he has made crude attempts to escape from this responsibility by setting up false defences. His behaviour is such which no person of reasonable and ordinary prudence would ever display. The evidence has been properly noticed and weighed before conclusion has been drawn. Hence there is no reason to differ with the findings of trial Court. The involvement of accused is clearly established, Appeal dismissed. *Bhag Singh* v. *State of Himachal Pradesh*, (1994) 1 SLJ 70 at p. 76 (HP).

The sole witness was child-witness who cannot be relied upon. The dying declaration which sought to inculpate the accused was contradictory and was not corroborated. The prosecution has failed to prove the guilt of the accused beyond reasonable doubt. Hence accused was entitled to benefit of doubt. *Suresh Ganpat Rathod* v. *State of Maharashtra*, (1994) 2 Crimes 603 (Bom.)

Where the act of appellant-accused in causing injuries on the person of the deceased cannot be stated to be one not done in exercise of private defence of person in facts and circumstances of the case. Hence the accused is found guilty of offence under Section 302, IPC and conviction awarded by Court below is not sustainable. *Kaliyaperumal* v. *State*, (1994) 1 LW (Cri) 319 (Mad).

Where prosecution of the husband and wife for offence thereunder and Acquittal of the husband. Since conviction of wife was held to be not sustainable. *State of W.B.* v. *Vindu Lachmandas Sakhrani*, 1995 SCC (Cr) 175 (SC) : 1994 AIR (SC) 772 : 1994 Cr. LJ 919.

Where ill-treatment was not complained. Hence was not proved otherwise. Whether the conviction was justified. It was not proved beyond reasonable doubt. *Vinod Kumar* v. *State*, (1994) 54 Del LT 697 (Del) (DB).

When there were no evidence to establish the alleged murder committed by accused. Hence offence under Section 302, IPC and sentence to life imprisonment set aside. *Satendra Pal* v. *State*, 1995 (32) ACC 15 (All).

Where mere fact that only in course of trial they had been named as those who had dragged the deceased out cannot create reasonable doubt about these appellants. *Kaki Ramesh* v. *State of Andhra Pradesh*, (1994) 2 Crimes 268 (SC) : (1994) SCC 397 : 1994 (3) JT 532 : 1994 (2) Scale 753 : 1994 (1) UJ 776 : 1994 (2) CCR 503.

Where right of private defence against aggressors was justified. Hence right of private defence may be pleaded. *Jagit Singh* v. *State of Punjab*, (1994) 2 CC Cases 270 : (1994) 1 CC Cases 630 : (1994) 2 Crimes 566 : (1994) 2 Recent Cr R 118 (P & H).

Where hired does not mean recruitment but without recruitment to act as servant or agent. To attract provisions of Section 150, IPC the prosecution has to prove that persons were either hired or engaged or employed or conceived at hiring engagements or employment. *Vinit* v. *State of Maharashtra* (1994) 1 Bom CR 648.

Where merely on the ground that the name of the eye-witness does neither find place in FIR nor in the sketch of the place of occurrence testimony of eye witness can not be discarded. *Naresh Kumar* v. *State*, (1995) 1 CCR 619 (Del) : (1995) 1 CC Cases 418 : 1995 JCC 179 : 1995 Cr R 431 (Del).

When if the appellant has not been found guilty for the substantive offence of murder of Vir Pal Kaur, then his conviction under Section 201 of the Indian Penal Code for causing the disappearance of the evidence of murder of the deceased cannot be said to be legally sustainable. *Khem Singh* v. *State of Punjab*, (1994) 1 CC Cases 381 at p. 383 : (1994) 1 Recent Cr 214 (P & H).

Prosecution's failure to explain minor injuries on the person of the accused. Hence it is *held*, that is inconsequential in the face of consistent version of the incident as narrated by the eye-witnesses. *Venu* v. *State of Tamil Nadu*, 1994 SCC (Cri) 40 : 1993 Cr. LJ 3671.

The incident took place at 10 p.m. and report was lodged on next morning at 8 a.m. The mother of deceased the eye-witnesses to occurrence sent for her husband and on his arrival the FIR was lodged. It cannot be termed as unexplained delay. *Satpal* v. *State of Punyab*, (1995) 3 Crimes 735 (SC) : 1996 AIR (SC) 201 : 1995 (6) JT 379 : 1995 (5) Scale 235 : 1995 SCC (Cr) 1039 : 1995 (4) CCR 110 (SC) : 1996 Cr. LJ 406.

In an Allahabad case, the defence challenged the presence of eye-witness on the place of occurrence. It was pleaded that if eye-witnesses were present on spot he would have tried to save his brother/father and would have sustained injuries in process. The plea was held untenable and it was held that inaction of witness in not coming to save deceased out of fear was very natural. The Court further observed that any exaggeration of his evidence that he followed accused and had also witnessed murder of his father in the field could be ignored, but his total evidence would not be discarded. The presence of witnesses on place of occurrence was held probable and natural and corroborated by medical evidence and F.I.R. Conviction on the basis thereof was held proper. *Ram Sanchi* v. *State of U.P.*, 2005 Cr LJ 153 (All) : 2004 All LJ 3573 : 2004(50) All Cri C 112 : 2004(3) All Cri R 2676.

Where there was extensive head injury made offence of murder under Section 302. Doctor's evidence and repentance will not alter nature of offence committed. Accused convicted. *Phoolbhan Sah* v. *State of M.P.*, 1995 MPLJ 73 (N) (MP).

Where it was pleaded that accused was suffering from para void there were facts establishing that he understood implication of his act at the time he committed offence. Plea in question was not maintainable. *S.K. Nair* v. *State of Punjab*, 1997 Cri LJ 772 (SC) : 1997 AIR (SC) 1537 : 1997 (1) SCC 141 : 1996 (10) JT 338 : 1996 (8) Scale 237 : 1996 (8) Supreme 182 : 1996 (4) Crimes 186 (SC) : 1997 (3) CCR 53 (SC) : 1996 (8) AD (SC) 77 : 1997 SCC (Cr) 60.

Commission of murder by a known person was unrealistic as known person will never venture to commit murder without concealing their identity. *Afzauddin Ansari* v. *State*, 1997 (2) Crimes 53 (Cal) (DB).

Under Section 86, IPC initial burden will be on accused. *Mirza Ghani Baig* v. *State of A.P.*, 1997 (3) Crimes 19 (AP).

In case of single injury implication of four persons create doubt about complicity of accused other than one which inflicted fatal injury. *Shubh Narayan Pandey* v. *State of Bihar*. 1997 (1) Crimes 225 (Pat).

Setting ablaze on fire of bus with passengers resulting in death of 23 passengers, facts that accused were young and prime motive was not murder but property and no passenger was allowed to escape from bus, can not constitute mitigating circumstances. *Gentela Vijaya Vardhan Rao* v. *State of A.P.*, 1996 Cri LJ 4151 (SC). : 1996 AIR (SC) 2791 : 1996(7) JT 491 : 1996(6) SCC 241 : 1996 (6) Scale 231 : 1996 (6) Supreme 356 : 1996 (3) Crimes 197 (SC) : 1996(3) SCJ 247 : 1996 SCC (Cr) 1290 : 1996 (6) AD (SC) 352 : 1997 (2) CCR 119 (SC).

Committing rape on 7 years old girl and then strangulating her to death and throwing her body in well, come within "rarest of rare" cases and attract death sentence. *Kamta Tiwari* v. *State of M.P.*, 1996 Cri LJ 4158 (SC) : 1996 AIR (SC) 2800 : 1996 (8) JT 198 : 1996 (6) Scale 337 : 1996 (6) SCC 250 : 1996 (6) Supreme 482 : 1996 (3) Crimes 241 (SC0 : 1996 (3) CCr 141 (SC) : 1996 SCC (Cr) 1298 : 1996 (6) AD (SC) 362.

In circumstantial evidence when witness of dying declaration turned hostile, it can not be proved that deceased was murdered by appellant. *Sham Lal* v. *State of Haryana*. 1997 (1) Crimes 245 (SC) : AIR 1997 (SC) 1873 : 1997(3) JT 91 : 1997(2) Scale 328 : 1997(1) CCR 231 (SC) : 1997 Cr LJ 1927.

It is not incumbent upon police officer to mention names of assailants in inquest report. *Mahendra Rai* v. *Mithilesh Rai*, 1997 (1) Crimes 41 (SC) : 1996 AIR (SC) 2800 : 1996 (8) JT 198 (SC): 1996 (6) Scale 337 (SC): 1996 (6) SCC 250 : 1996 (6) Supreme 482 : 1996 (3) Crimes 241 (SC) : 1996 (3) CCR 141 (SC) : 1996 SCC Cr 1298 : 1996 (6) AD (SC) 362.

If holes can be picked in the defence that does not mean that prosecution case is automatically proved. *Daulat Ram* v. *State of Punjab*. 1997 (2) Crimes 63 (SC).

61. Offence proved by confessions.—Where the Court held that the offences of murder was committed but sentenced the accused to transportation solely on the ground that their confessions alone made the conviction possible, the reason was not sufficient for not awarding the sentence of death. 2 Bur LJ 277. Extra judicial confessions are not usually considered with favour but does not mean that such a confession coming for a person who has no reason to state falsely and to whom it is made in the circumstances which tend to support his statement, should not be believed. *Held*, on facts, that the appellant did commit the murder and was rightly convicted and sentenced to death under Section 302, 1962 SCD 133 : (1962) 2 SCJ 733 : 1962 SCR 136 : 1962 All Cr L 147.

Extra-judicial confession before Village Administrative Officer—Non-compliance of duties by Officer. When an extra judicial confession is given to the Village Administrative Officer, he goes to the scene of occurrence; observes the dead body as well as the scene; satisfies himself about the truth of the statement given by the person concerned and then, prepares the material records. In this case, he did not do anything of that sort. Over and above all this PW. 1 has categorically admitted he knows that when an extra judicial confession statement is given to him, he should prepare not only a duplicate of the same but also prepare a duplicate of the Yadast which must be sent to the Court by him. He had categorically admitted that he neither sent Exh. P1 nor Exh. P3 to the Court. He had been a Village Administrative Officer of ten years standing. The purpose of sending documents like Exhs. P1 and P3 to the Court and the copies of the same to the Police is to eliminate false implication and to add credibility to the extra judicial confession statement itself. The failure on the part of PW. 1 to send the material records to the Court, especially, when he was aware of his duty in that regard is yet another circumstance which is sufficient to doubt the entire case of the prosecution put through PWs. 1 and 7.

The High Court has rightly held that the prosecution version is unacceptable. *State of Tamil Nadu vs. Manmatharaj*, AIR 2009 SC 1757 : 2008 (13) JT 194 : 2008 (15) Scale 279 : 2008 (16) SCR 735 : 2009 (1) Supreme 455.

It is a fallacy that the extra-judicial confession by itself, is not considered sufficient to base a conviction. The Supreme Court in *Vinayak Shivajirao Pol* v. *State of Maharashtra*, 1998 (2) Sec 233 : 1988 Cri LJ 1558 made a reference to and relied upon its earlier decision in the case of *Piara Singh* v. *State of Punjab*. (1977) 4 SCC 452 : 1977 Cri LJ 1941 where in it was laid down that the law does not require that the evidence of an extra-judicial confession should in all cases be corroborated and where such confession was proved by an independent witness who was a responsible officer and who bore no animus against the accused, there was hardly any justification to disbelieve the same.

In *State of Maharashtra* v. *Vilas Pandurang Patil*, 1999 Cri LJ 1062 (Bom), the extra-judicial confession was made to a person who was although not a friend of the respondent and was not on visiting terms with him. But he and the respondent had been classmates in childhood and his house was situated near that of the accused. The Court held that it was probable that on account of the said circumstance, the respondent made the extra-judicial confession to him. Often, when a person is placed in a grim situation, like the one in which the respondent must have been having committed the murder of his wife his action is not always in conformity with logic. He becomes desperate to seek help. The respondent must have been in such a mental state and therefore, there was nothing improbable in his making a extra-judicial confession to the said independent witness.

Extra-judicial confession—Reliance on—Scope. In the instant case, having concluded that Exh. P. 1 lacks corroboration, High Court has referred to the oral evidence of PWs. 1 and 7 to find out whether their evidence would pass the test of reliability. High Court was of the view that it could rely upon their evidence if it was held that Exh. P1 had come to be recorded without any suspicious circumstance surrounding it. In this context, a perusal of Exh. P15 as well as Exh. P1 itself give room to doubt the very truth of Exhs. P1 and P15. At the foot of Exh. P1, PW1 had made an endorsement. The endorsement as it stood originally reads that PW. 1 himself had taken the accused and Exh. P1 to the Police Station. However, there is a correction in the endorsement made at the foot of Exh. P1 and it is made to appear that the accused was sent to the Police Station along with Exh. P1 and other material records only with PW. 7, village menial. PW. 7 would state that he went to the Police Station where he presented the accused as well as Exhs. P1 and P3 to the Sub-Inspector of Police, examined as PW. 10 in this case. PW. 10 had also stated so. But, in the same breadth, PW. 7 stated that he reached the Police Station at 12 in the night *i.e.*, in the midnight of 29.05.1990; waited there for one hour; the Inspector of Police came and gave Exh. P1 only to him. He knows the difference between a Sub-Inspector and an Inspector. If the evidence of PW. 7 is accepted, it will show beyond doubt that he had reached the Police Station only, in the midnight of 29.05.1990 and Exh. P1 had been handed over by him only to the Inspector of Police., Exh. P. 15 is the printed First Information Report. The evidence of PW. 10 shows that Exh. P1 had come to be registered in the Police Station at 10 p.m. on 29.05.1990. Though under normal circumstances, the evidence of PW. 7 regarding the time at which he reached the Police Station and to whom he had handed over the material records and the accused would not assume any importance if there are any other direct circumstance in favour of the prosecution, yet, in view of the fact that the prosecution, in this case, rests only upon the extra judicial confession statement which does not find corroboration at all on general particulars, this evidence of PW. 7, definitely cannot be brushed aside while appreciating the case of the prosecution. *State of Tamil Nadu vs. Manmatharaj*, AIR 2009 SC 1757 : 2008 (13) JT 194 : 2008 (15) Scale 279 : 2008 (16) SCR 735 : 2009 (1) Supreme 455.

Extra judicial confession by co-accused—When not reliable. Such a purported extra judicial confession was made by Avtar Singh before Sukhdev Singh (PW. 22). The distance between the village wherein Avtar Singh was a resident and that of the said Sukhdev Singh was said to be 100 kms. He allegedly visited Sukhdev Singh on 18.02.2001 at about 9.00 a.m. For no apparent reason, he had disclosed that he along with Bhinda (Harbhinder Singh) had committed the murder of Pritam Singh. No details thereof had been furnished. A purported disclosure was also made that the murder was committed at the instance of the appellant herein. He was asked to come on the next day. He neither visited him thereafter nor was he produced before the police by PW. 22. There is nothing on record to show that such a purported extra judicial confession by Avtar Singh was conveyed to the police authorities; PW. 22's statement having been recorded on 19.02.2001. If he was so familiar with the family of Avtar Singh, there was absolutely no reason why he was not in a position to state as to what was the composition of his family. He admitted that he had never visited the village of Avtar Singh.

Extra judicial confession must be found to be reliable. PW. 22 was examined by the police authorities also in some other cases. A suggestion was put to him that he was a police tout. His evidence, therefore, in our opinion, cannot be relied upon. If his evidence cannot be relied upon, the same could not have formed foundation of recording a judgment of conviction and sentence and that too in a case of conspiracy. We must also notice that the evidence of purported extra judicial confession by itself cannot be held to be sufficient for recording a judgment of conviction against a co-accused in terms of Sec. 30 of the Evidence Act. *Baldev Singh vs. State of Punjab*, 2009 (3) Crimes 8 (SC) : 2009 (6) SCC 564 : 2009 (7) JT 334 : 2009 (7) Scale 493 : 2009 (4) Supreme 497 : 2009 (7) SCR 855.

Reliance on confession recorded by Magistrate after compliance of procedure—Scope. Accused alleged to have caused the death of his parents. Trial Court by placing reliance on judicial as well as extra judicial confession, found the accused guilty of offence, hence convicted him. High Court on appeal, set aside the conviction for failure of magistrate to follow requisite procedure while recording confession and PW. 3 not supported the case.

A bare perusal of the evidence of PW. 9 shows that necessary questions were asked and due care was taken before recording the statement of the accused. It was specifically told to him that the statement could be used in evidence against him. Time was given to the accused to ensure that he was making the statement voluntarily without any pressure and it was specifically indicated to him that the statement could be used against him. Therefore, the High Court was not justified in holding that the requisite procedure for recording statement under Sec. 164 has not been followed. *State of Punjab vs. Harjagdev Singh*, AIR 2009 SC 2693 : 2009 (8) SCR 54 : 2009 (7) JT 538 : 2009 (8) Scale 568.

62. Argument of two lives for one.—The argument that two lives should not be forfeited for one should not be accepted. AIR 1936 Cal 227 : 63 CLJ 142: 37 Cr LJ 676 : AIR 1941 Mad 27 : 42 Cr LJ 257.

63. Power of appellate Court.—Where the lower Court has failed imposing a proper sentence of death. High Court has power to pass a capital sentence. AIR 1941 Mad 120 ; 42 Cr LJ 770 ; 1934 MWN 958 ; 1933 MWN 1423.

Where injury is sufficient to cause death in ordinary course of nature—Hence conviction and sentence by the trial Court ought not to be disturbed in appeal. *Kidia* v. *State of Rajasthan*, 1994 Cr LR (Raj) 247 : 1994 RCC 2 (Raj).

When there were material discrepancies in statements of eye-witnesses. The investigating officer planted a weapon of offence not linked with murder of deceased. There was enmity between appellant and deceased and his family. Prosecution failed to establish beyond reasonable doubt about crime being committed by appellant—Hence the appeal is allowed. *Shyam Sunder and Raj Kumar* v. *State (Delhi Admn.)*, (1995) 58 DLT 505 : 2 (1995) 3 CCR 57 (Del) (DB).

Where finding of acquittal cannot be converted into conviction specially when State has not filed any appeal. *Ram Narayan* v. *State*, (1995) 1 RCD 236 (Raj).

The trial Court records burnt in accidental fire. The reconstruction of records is not possible. Hence it is not possible to discharge obligations of appellate Court. Hence direction issued to the appellants not to surrender to their bail bonds. *Nathoo* v. *State*, 1995 (32) ACC 56 (All).

64. High Court's power to enhance sentence.—The High Court will not enhance sentence even though it is of opinion that sentence of death, could be awarded. 1964 (2) Cr LJ 75.

65. Relative eye witness.—The Court should not discard the evidence of eye-witness on the ground that he was related to the deceased because such witnesses in general do not try to implicate persons falsely in serious offences. Such persons generally will ask accused not to beat and on being threatened will run away and inform the things to other family members and men of public. Therefore conviction based on their evidence can be sustained. *Ram Singh* v. *State*, 2003 Cr LJ 3678 (MP) : 2003(2) All imd Cas 130 : 2003 Cri LR (SC & MP) MPJ 471 : 2002(4) MPHT 146.

Doubtful evidence—Related eye-witness. The statement of witness who is none other than the daughter of the deceased. The incident according to her took place at about 2.00 A.M. in the night when the appellant hacked her mother and father. She stated that on her raising hue and cry one Kanniah Tata and others came to the spot. She did not reveal the name of the appellant to the neighbours when they came to the house on her raising hue and cry. Kanniah Tata who is examined as PW-7 stated in his evidence that PW-4 informed him that her father and mother were beaten by somebody. The evidence on record suggests that even PW-4 has also acquaintance with the appellant but she did not mention the name of the appellant at any point of time prior to her evidence in the Court. Her evidence is also vague based on which it would be difficult to record any finding of commission of any crime by the appellant. *Gajula Surya Prakasarao vs. State of Andhra Pradesh*, 2010 (1) SCC 88 : 2009 (4) Crimes 199 (SC) : 2009 (13) Scale 656 : 2009 (14) JT 203 : 2009 (8) SLT 546.

Where the injured eye-witness was daughter of deceased and motive of crime was established, it was held that the defence plea that gun accidentally went off was belived by fact that injury was not result of close range firing and that conviction under Section 302/307 was justified. *Parsadi* v. *State*, 2004 Cr LJ 104 (All) : 2003 All LJ 2628 : 2003(47) All Cri C 153.

FIR is not important piece of evidence and same is true of the police report also. The eye-witness if not confronted with FIR or additional police statement, the said omission will not be fatal to the prosecution case and accused could not claim benefit therefrom. There is no rule that close relations of deceased could not be believed and hence conviction can be based on such evidence. *Ibrahim Khan* v. *State*, 2003 CrLJ 1572 (SC) : AIR 2003 (SC) 1813 : 2003 (3) SCC 355 : 2003 (2) Supreme 852 : 2003 (2) Crimes 268.

Where testimony of related eye-witness was not reliable as his presence on spot was in doubt and no independent witness was examined relating to incident though available and weapons of offence also were not recovered, the appellants were held entitled to benefit of doubt and so conviction was set aside. *Hem Raj* v. *State of Haryana*, 2005(3) East Cr C 10 (SC) : 2005 Cr LJ 2152.

Where there was no significant contradiction of infirmity in the evidence of eye-witnesses, the same cannot be disbelieved on account of relationship with the victim of crime. *Nirmal Singh* v. *State of Bihar*, 2005 Cr LJ 672 : AIR 2005 SC 1265 : 2005 SCC (Cri) 1461 : 2005(9) SCC 725 : 2004(8) Supreme 696 : 2005(1) Crimes 68 (SC).

Where in an incident of burning, the victim was alleged to have disclosed the incident to her parents, but medical evidence showed that the deceased was not conscious at the relevant time, testimony of her parents was held not believable. *State of Maharashtra* v. *Sanjay D. Rajhans*, 2005 Cr LJ 120 : AIR 2005 SC 97 : 2005 SCC (Cri) 231 : 2004(4) Crimes 338 (SC) : 2004(10) JT 253 : 2004(8) Supreme 138.

Testimony of relation witness—Reliance on—Scope. Merely because the eye-witnesses are family members, their evidence cannot 'per se' be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

The ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh's* case (Supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. *Joginder Singh vs. State of Punjab*, AIR 2009 SC 2263 : 2009 CrLJ 2805 : 2009 (11) SCC 467 : 2009 (7) JT 310 : 2009 (3) SCR 714 : 2009 (4) Scale 329.

In the instant case, the High Court had discussed evidence of wife of deceased in detail and had come to the conclusion that her presence at the time of occurrence was doubtful. The medical evidence disclosed that the deceased must have taken his meals about three hours before the occurrence since semi-digested food was found in his stomach. If wife of deceased was really with her husband since morning, she would have certainly stated about their having taken food. She, in the course of her deposition claimed to be at different places when the occurrence took place. At one place she stated that she was North of her husband, and at another place she stated that she was behind her husband, and latter that she was 20-25 steps behind her husband. The shots were fired from him. When the case came before the Supreme Court, it was held that having considered the discrepancies in the evidence of wife of deceased, the High Court rightly did not find it safe to rely on her testimony. *State of UP* v. *Gambhir Singh*, 2005 Cr LJ 2579 : AIR 2005 SC 2439 : 2005(11) SCC 271 : 2005(5) JT 553 : 2005(2) Crimes 145.

66. Interested witness.—In an Allahabad case where the accused armed with *Ballam, Gandasa*, and *Lathies* were alleged to have belaboured the deceased and caused multiple injuries and the eye-witnesses were son and brother of deceased and were considered as interested witness, it was held that false implication of accused was not ruled out as there existed enmity between the parties. Inordinate delay in filing of FIR, the accused was held entitled to the acquittal. *Islam* v. *State*, 2003 Cr LJ 2688 (All) : 2003(46) ACC 1085 : 2003(2) A Cri R 1620 (All).

Interested witness—Effect of. The facts of the case do not show that the first informant who is father of the deceased had any dispute with any of the accused including the appellant. His simple case is that Hukam Singh who is father of accused Jagge and Munna was murdered for which his deceased son was prosecuted but acquitted and, therefore, in order to take revenge, the deceased was done to death. The cross examination of the material witnesses makes it very clear that the son of the first informant was prosecuted for murder of Hukam Singh but acquitted. This fact would not show in any manner that the first informant was interested in securing conviction of the appellant and, therefore, he had wrongly deposed on oath before the Court that his son died due to the shot fired by the appellant. *Ram Bharosey vs. State of Uttar Pradesh*, 2009 (4) Crimes 236 (SC) : 2009 (14) JT 260 : 2009 (14) Scale 54 : 2009 (15) SCR 947 : 2009 (7) Supreme 404 : 2009 (8) SLT 415 : 2010 (1) JCC 87.

Related eye-witnesses—Reliability of—Scope. Out of witnesses PWs. 1 to 8 have not supported the prosecution case to prove that one day before the day of incident, the witnesses noticed PW-1 and PW-2 carrying food to the field of the deceased. So far as the motive is concerned, however, they have supported PW-1 and PW-2. Admittedly, the appellants and the deceased are close relatives. It has come on the record that there was some civil litigation pending between A-1 to A-4 and the deceased over a pathway leading to their respective lands. It was also proved on record that A-1 to A-4 on one hand and the deceased on the other hand used to quarrel over this issue. It is the evidence of PW-1, PW-2 and PW-5 the family members of the deceased which was corroborated by PW-6, PW-7 and PW-8 the independent witnesses that about two years before the day of incident, A-2 and deceased had a quarrel over the pathway leading to their respective fields. The defence has failed to impeach the evidence of the independent witnesses on this count. The evidence of the witnesses would go to show that the panchayat of the elders of the village was held, but dispute of the pathway could not be settled and solved by them which finally led the death of the deceased. The High Court relying upon the evidence of PWs. 1, 2, 5, 6, 7 and 8 has concluded that though the prosecution has proved that there was no strong motive attributed to A-1 to A-4, yet A-1 to A-4 had some motive to do away with the life of the deceased who was not residing at the place of the incident and had been cultivating his land from a far of place in the State of Maharashtra where he was living with his family members.

The case of the prosecution entirely rests upon the evidence of PW-1 and PW-2 the witnesses of the occurrence. It is the evidence of PW-1 that on the day of the incident at about 4.30 p.m., she alongwith PW-2 daughter of the deceased carried cooked-food for the accused from village Devarahipparagi to the fields where he had gone for harvesting the seasonal crop. They at about 8.00 or 8.30 p.m. jointly took their dinner and went to sleep. She and PW-2 had slept in front of heap of the crop stacked on the land of the deceased, whereas the deceased slept at a short distance near a hut. In mid-night hours, PW-1 and PW-2 heard loud cries raised by Allisab uttering "Allah Marare". It is the evidence of PW-1 that on hearing cries, she and PW-2 both woke up and rushed to the nearby place where Allisab was sleeping. They saw A-1 assaulting the deceased with a blow of axe on the head. It is her evidence that when she and PW-2 tried to save the life of the deceased, A-2 threatened them if they would dare to interfere or shout for help, they would meet the same fate. A-2 openly shouted and commanded A-3 and A-4 to drag Allisab. A-3 and A-4 caught hold of the legs of Allisab and dragged him to a short distance. A-1 poured petrol from a can on injured-Allisab, whereas A-2 lit a match stick and threw the burning stick on Allisab with an intention to screen of the crime. She stated that A-1 to A-4 left the place of occurrence holding threats to them not to make any noise lest they would be finished. PW-2 corroborated the evidence of PW-1 in its entirety.

It is well-settled that if the eyewitness is related to the deceased, his evidence has to be accepted if found to be believable and reliable because he would *inter alia* be interested in ensuring that the real culprits are punished. Both the eyewitnesses have been subjected to search in cross-examination by the defence, but nothing tangible has been extracted from their evidence to create any shadow of doubt that they are not reliable and truthful witnesses. Therefore, the finding of the trial Court disbelieving and discarding the evidence of PW-1 and PW-2 eyewitnesses on the sole ground of stamping them as interested, partisan and parrot-like witnesses, in our view, is wholly unjustified and not tangible.

It is the evidence of PW-14 that disclosure statement (Exh. P-13) was voluntarily made by A-1 and in pursuant thereto, weapon of offence MO-7 was recovered at the instance of A-1. Gunny bag seized from the spot and the blood-stained clothes of the deceased were sent to Forensic Science Laboratory, Bangalore. The report of the FSL, Bangalore, reveals that the presence of petrol was detected from partly burnt clothes of the deceased. On our examination of the judgment of the High Court, we find that the High Court has properly and rightly re-assessed and re-appraised the entire evidence on record and there is no infirmity or perversity in the reasoning record by the learned Judge of the High Court to interfere with the well reasoned judgment to the extent of holding A-1 and A-2 guilty of the charged offences. *Razak Jinnesab Karajagi vs. State of Karnataka,* 2009 (2) Crimes 59 (SC) : 2009 (4) JT 667 : 2009 (5) Scale 116 : 2009 (5) SCR 422 : 2009 (2) Supreme 801 : 2009 (4) SLT 565.

67. Child witness.—In a case the accused intentionally caused injuries on vital part of the body. These injuries resulted in instantaneous death. The child who was sleeping with his father was awakened by sound of fatal blow of axe on neck and he started shouting and calling his mother who alongwith her daughter saw the accused holding an axe in his hand. It was held that the evidence of child witness was relevant as per Section 6 of Evidence Act as he had shouted immediately after the assault. The conviction of accused under Section 302 was held proper. *Uttam Singh* v. *State*, 2003 Cr LJ 560 : 2002 Cri LR (SC & MP) MPJ 434.

Dying declaration and child witness—Reliance on—When valid. Quarrel between appellant and deceased, residing in neighbourhood. After this, appellant bought kerosene bottle and allegedly poured the same on deceased, she also lit her by matchstick. Her son poured water on person of his mother and tried to extinguish fire. Hearing shouts of her son returned back from his house. Husband of deceased, took her to hospital.

Nine witnesses were examined to further the prosecution version. Sharad (PW. 1) is the eye-witness. Bhaurao (PW. 2) is the neighbour of the deceased and the appellant, who after hearing ugly abuses between the appellant and the deceased went to his house and returned after hearing shouts of Sharad (PW. 1). Pandurang is the husband of the deceased. The accused to establish the plea of innocence examined two persons. The trial Court accepted the evidence of Sharad (PW. 1) as trustworthy and to have been corroborated by the evidence of Bhaurao (PW. 2) and other evidence on record for the sake of dying declaration before the police office and the Executive Magistrate.

The reason as to why PW. 1 did not tell PW. 3 has been explained by PW. 3 himself. The said witness stated PW. 1 did not disclose him as to how deceased caught fire because he himself had no time to ask about it and was busy in making arrangement for taking the injured to the hospital where she subsequently breathed her last. *Kalawati vs. State of Maharashtra*, AIR 2009 SC 1932 : 2009 (4) SCC 37 : 2009 (2) JT 362 : 2009 (2) Scale 488 : 2009 (3) SCR 187 : 2009 (1) Supreme 800.

In a Supreme Court case it has been held that when the evidence of child witness is cogent and reliable, it may be admitted and conviction is sustainable. *State of Himachal Pradesh* v. *Prem Chand*, 2003 Cr LJ 872 (SC) : AIR 2003 (SC) 708 : 2003(10) SCC 518 : 2003(1) Crimes 426 (SC) : 2003(1) Supreme 393.

In a Supreme Court case, it was held that the evidence of a child witness (who had seen the appellant attacking deceased person with a wooden stick and the next day they were found dead) had credibility which revealed truthful approach and her evidence had ring of truth in it and there was no exaggeration. She had stuck to her statement made during investigation in all material particulars and as such trial court and High Court were justified in placing implicit reliance on her testimony. *Ratan Singh Dalsukhabhai Nayak* v. *State of Gujarat*, 2004 Cr LJ 19 (SC) : AIR 2004 (SC) 23 : 2004 SCC 64 : 2003(4) Crimes 387 (SC) : 2003(7) Supreme 535.

68. Injured witness.—In a case the evidence of injured witness attributing overt acts to accused was not supported by medical-evidence. It could not be stated by said witness as to how he reached the place of incident, situated about one furlong away, when he himself was having paralysed legs for past 20 years. Moreover his presence was not mentioned in dying declaration of the deceased. It was held that his evidence could not be relied upon and acquittal of accused was proper. *Devatha Venkataswamy* v. *State of AP*, 2003 Cr LJ 4332 (SC) : AIR 2003 (SC) 3217 : 2003(10) SCC 700 : 2003(4) Crimes 235 (SC) : 2003(7) Supreme 101.

Reliance on testimony of Injured witness—Scope. K Danam (PW-11), was posted as Assistant Sub Inspector of Police at the relevant time. Having come to know of the incident that two persons belonging to the Congress Party were done to death at

Gollalaguduru Harijanwada by the Telugu Desam Party faction. PW-11 immediately rushed to the Government Hospital. He found that PW-11 was undergoing treatment in the emergency ward. As PW-1 was in a fit condition to give statement. PW-11 recorded his statement marked Exh. P-1. PW-10 also made an endorsement on Exh. P-1 that PW-1 was in a fit and proper condition to give a statement. Based on Exh. P-1. first information report came to be registered.

We are unable to accept the submission of the learned senior Counsel that FIR is a concocted document. It is true that Injury No. 1 received by PW-1 in front of left parietal area and the depressed fracture of frontal bone was extremely grave and serious but on the face of clear, categorical and unambiguous endorsement made by Dr. T.V. Raghavendra Reddy (PW-10) that PW-1 was in a fit and proper condition to give a statement at that time and the fact that PW-11 recorded the statement of PW-1 in the presence of PW-10, there cannot be even slightest doubt about the authenticity of Exh. P-1 and we find no justifiable reason to even remotely conclude that Exh. P-1 is not the statement given by PW-1. The contention that PW-11 is a chance witness, is noted to be rejected. Pertinently, the FIR was forwarded to the Magistrate without any delay. As a matter of fact, FIR reached the Magistrate at 10.45 P.M. on 16.05.1996 itself. As to whether PW-1 was in a fit and proper condition to give statement or not, could have been assessed by PW-10 under whose treatment PW-1 was at that time and no else. The evidence of PW-7 referred to by the learned senior Counsel in no way creates any doubt about the correctness of statement of PW-10 as PW-7 has not stated in definite terms that PW-1 was not in a fit state of condition to give statement at that time. The trial Court as well as the High Court did not accept the contention made on behalf of the accused that Exh. P-1 was fabricated. We agree with this view of the trial Court and the High Court. *Anna Reddy Sambasiva Reddy vs. State of Andhra Pradesh*, AIR 2009 SC 2661 : 2009 (3) Crimes 17 (SC) : 2009 (12) SCC 546 : 2009 (5) JT 617 : 2009 (6) Scale 223 : 2009 (6) SCR 755 : 2009 (4) Supreme 506.

Where the evidence of injured witness was supported by medical-evidence and that of other witnesses on record, the conviction of accused was held proper. *Krishna Ram* v. *State*, 2003 Cr LJ (NOC) 294 (Raj) : 20034) Crimes 2 : 2003(3) Raj CriC 1211 : 2003(3) Raj LR 572 : 2003(4) Raj LW 2197 : 2003(3) WLC 387.

Chances of false implication—Testimony of injured victim. PW-3 was conscious and coherent to make her statement and made her statement in Exhibit P-21 in which not only she did not mention the name of the appellant but positively stated that she was attacked by an unknown person aged about 20 years. Be it noted that the appellant even at the relevant time was of 50 years and was well known to PW-3. She did not explain as to and under what circumstances she made the statement in Exhibit P-21 nor there is any explanation as to how she omitted the name of the appellant and described somebody else to be the assailant. On the other hand, she went to the extent of stating that she did not know whether the Magistrate had recorded her statement in the house or in the hospital.

The evidence of PW-3 is completely at variance with what has been stated by her in Exhibit P-21. This vital aspect of the matter has completely escaped the attention of the Courts below which resulted in miscarriage of justice. Enmity between her husband (deceased) and the appellant may be one possible reason for her to implicate the appellant in the case after deliberations. *Gajula Surya Prakasarao vs. State of Andhra*

Pradesh, 2009 (4) Crimes 199 (SC) : 2009 (13) Scale 656 (SC): 2009 (14) JT 203 (SC): 2009 (8) SLT 546.

In a murder case, the evidence of informant eye-witness was corroborated by evidence of injured eye-witness who was accompanying the deceased. Medical evidence also supported the prosecution story. The manner and actual place of occurrence and subsequent events were duly proved. The eye-witness testimony was so consistent and reliable that nothing could be elicited in long cross-examination to render their evidence untrustworthy. The conviction of accused under Section 302/307 was held proper. *Bikram Singh* v. *The State*, 2003 Cr LJ (NOC) 211 (Pat).

The solitary evidence of injured witness can form the basis for conviction only when the same is cogent and reliable but when the same is in conflict with other evidence and medical-evidence, it cannot be relied upon, and conviction of accused on the basis of sole testimony of injured witness is not proper. *Joseph* v. *State of Kerala*, 2003 Cr LJ 813 (SC) : AIR 2003 (SC) 507 : 2003(1) SCC 465 : 2002(8) Supreme 589 : 2003(1) Crimes 206 (SC).

Where two witnesses, half an hour before the death of the deceased received injuries at the hands of the accused and informed the deceased about the same and when the deceased went to question the accused about the incident, he was done to death by the accused and chased away by the said two injured witnesses who had followed the deceased, the later incident is a continuation and consequence of the previous incident and thus, both incidents form the part of the same transaction and as such they are injured witnesses in the case. *Public Prosecutor* v. *Pulicherla Govinda Reddy*, 2004 Cr LJ 238 at p. 240 (AP) : 2003(2) ALD (CRL) 606 : 2004(1) Andh LT (Cri) AP 413.

Where later incident of killing of deceased by accused was a continuation and consequence of earlier incident of causing injuries to eye-witnesses, brothers of deceased form part of same transaction then such witnesses can be treated as injured witnesses in murder case. *Public Prosecutor, High Court, Hyderabad, AP* v. *Pulicherala Govinda Reddy*, 2004 Cr LJ 238 (AP) : 2003(2) ALD (CRL) 606 : 2004(1) Andh LT (Cri) AP 413.

69. Approver's evidence.—Where the evidence of approver is well corroborated and no doubt is left as to the guilt and the murder is a planned one, sentence of death is proper. 138 IC 223 : 33 Cr LJ 567. There should be corroboration in material particulars and qua each accused. 1963 (1) Cr LJ 489 : (1963) 2 SCJ 327 : 1963 SCD 276 : AIR 1563 SC 599.

Where statement under Section 161, Cr PC was made by approver. It was no supported by the medical report. Presence was doubtful—Conviction was not justified—Hence offence was not established. *Dee Cee Singh* v. *State of Punjab*, (1994) 2 CC Cases 3 : (1994) 1 CC Cases 293 (P & H).

Where prosecution witness accomplice to all a made-up or false witness—Testimony thereof unreliable and incredible. It is held that such evidence not fit to base conviction thereon. *Krishan* v. *State of Haryana*, (1995) 2 Crimes 630 (P & H).

In a case where the accused was charged for the offence of murder and destroying the available evidence, the conviction of the accused was based solely on the evidence o the co-accused (sister of the deceased), who was granted pardon as per Section 306, C

PC, it was held that conviction was liable to be quashed as evidence of co-accused, sister of deceased could not form a basis for conviction and it could be used only for the purpose of lending support to the prosecution story in cases where the balance was otherwise evenly posed. *Rakesh Kr. Singh* v. *State*, 2003 Cr LJ 3206 (Goa) : 2003(4) Cur Ci R 9 : 2003(2) DMC 447 : 2003(2) Gau LT 126.

The accused were charged for committing murder of a doctor out of professional jealousy whereas evidence showed that deceased was not doing a roaring practice. The extra-judicial confession made before brother of deceased and approver was not believable. The evidence of prosecution was self-contradictory and there was no corroboration to the evidence of approver on material particulars. It was held that conviction solely on the basis of evidence of approver was not proper. *State* v. *Surinder Mohan*, 2003 Cr LJ 4223 (Him).

Where the presence of injured witnesses is not disputed, their testimony can be made basis for convicting accused. *Nagalla Mukhalingam* v. *State of AP*, 2005 Cr LJ 2583 : (2005) 11 SCC 242 : AIR 2005 SC 2466 : 2005(2) Crimes 165 : 2006 SCC © 105 : 2005(3) Supreme 624 : AIR 2005 SCW 2432.

In a case of free fight between the parties, non-explanation of injuries suffered by the defence party is not fatal. *Mukhtalingam* v. *State of AP*, 2005 Cr LJ 2583 : (2005) 11 SCC 242 : AIR 2005 SC 2466 : 2005(2) Crimes 165 : 2006 SCC (cr) 105 : 2005(3) Supreme 624.

70. Chance Witness.—In a case three persons attacked a person and it was natural for witnesses to get scared. Close relatives were witnesses in this case and they could not be believed to have tried to implicate innocent people. The police personnel were chance witnesses as they were on patrolling duty in area where deceased and prosecution witnesses resided. It was held that non-examination of shopkeepers as independent witnesses was not fatal as they got terrified due to ghastly attack. The acquittal was set aside. *Surinder Singh* v. *State of UP*, 2003 Cr LJ 4446 (SC) : AIR 2003 (SC) 3811 : 2003(10) SCC 26 : 2003(7) Supreme 562 : 2003(4) Crimes 393.

Presence of witness—Place of occurrence—Determination. It is true that Smt. Kaushalya Devi (PW. 6) admitted in her cross examination that she was residing in Gorakhpur in connection with the education of her minor daughter. But she also stated that she very often comes to her village to look after cultivation of lands and household affairs. It is in her evidence that she came to the village about 4-5 days prior to the occurrence. It is an admitted fact that deceased Sita Ram Singh and Bichari Singh, husband of Smt. Kaushalya Devi are real brothers and residing in the same house in the village, but in separate portions. Bichari Singh has interest in the lands possessed by the family in the village. There is nothing improbable in Smt. Kaushalya Devi frequently visiting the village and staying in the house at her own convenience. It is relevant to note that the Investigating Officer (PW. 9) stated that on 26.06.1994, he visited the spot and examined PW. 6 along with other witnesses. Therefore, there is no reason to disbelieve her statement that she was very much present on that fateful night at the scene of occurrence.

Learned senior Counsel further contended that absence of injuries on the person of Smt. Kaushalya Devi (PW. 6) makes her presence at the scene of occurrence doubtful. This aspect of the matter has been clearly explained by PW. 6 who was subjected to very rigorous cross examination that when she came out of her room to see as to what was happening, the appellants Moti Lal and Virendra Singh after spotting her, chased her and she ran away and re-entered into her room and bolted the doors from inside. Two shots were fired aiming at her out of which one hit the door and the other went through the window hitting the inner wall of the room. She saved herself from those two shots aimed at her. We do not find any reason to disbelieve her evidence in this regard as to how she escaped from getting injured in the melee. *Moti Lal vs. State of Uttar Pradesh*, AIR 2010 SC 281 : 2010 (1) SCC 581 : 2009 (4) Crimes 276 (SC) : 2009 (14) JT 569 : 2009 (14) Scale 323 : 2009 (7) Supreme 632 : 2009 (8) SLT 668.

In a Rajasthan case the accused persons armed with *Dharias gandasa* chased and caught the deceased and then belaboured him mercilessly. The evidence of chance witness with regard to injuries inflicted on person of deceased being inconsistent created doubt about their presence at the time of occurrence. The statement of witness that deceased after receiving severe injuries could manage to cover the distance of five hundred feet to reach his house did not appear to be trustworthy. The prosecution had withheld the origin and genesis of the occurrence. The guilt of accused persons was not established beyond reasonable doubt and conviction was set aside. *Ram Swaroop* v. *State*. 2003 Cr LJ 3960 (Raj) : 2003(12) All India Cus 616 : 2003(4) WLC 65.

Chance witness—Presence on spot—Scope. Submission of Mr. Kanagraj that PWs. 2 and 3 are chance witnesses again cannot be accepted. PW-3, as noticed hereinbefore, is owner of a tailoring shop which is situated by the side of the shop belonging to the deceased. The plea of occurrence is a small village. PW-2's presence, therefore, at the place of occurrence, cannot be doubted or disputed. *Padmanaban vs. State*, AIR 2010 SC 47 : 2009 (10) JT 172 : 2009 (10) Scale 526 : 2009 (5) Supreme 765 : 2009 (12) SCR 252 : 2009 (6) SLT 751.

71. Accused belonging to a particular community.—Where accused was found guilty of murder, immunity for capital sentence cannot be granted merely because he belongs to a particular community. AIR 1932 Lah 500 : 33 Cr LJ 497. The fact that the accused was encouraged in his crime of mischievous literature cannot justify lesser punishment than death. 34 Cr LJ 720 : AIR 1933 Lah 305 ; 1964 (1) Cr LJ 121 (accused being aborigines of backward tribes by itself is not an extenuating circumstance for passing lesser sentence) ; 1964 (l) Cr LJ 464 : (1963) 5 Ori JD 145.

As per the post mortem report deceased Jai Karan Singh was a young man of 35 years of age and of good built and, therefore, there was no need for PW. 1 Subedar Singh to go to the railway station to take a bag of khalli from his son and carry the same from the railway station to the village. It has come in the evidence of PW. 1 that his son Jai Karan Singh was a patient of asthma and, therefore, he used to be vigilant that his son should not take much physical strain and because of that reason he went to the railway station to share with his son the burden of the load of one bag containing 15 kgs. of 'khalli'. We do not find anything wrong if PW. 1 had gone to the railway station for extending some help to his son. Thus, the entire approach of the trial Court in appreciating the evidence of the eye-witnesses is perverse and grossly improper. *Indra Pal Singh vs. State of Uttar Pradesh*, AIR 2009 SC 958 : 2009 CrLJ 942 : 2008 (16) SCR 990 : 2008 (15) Scale 400.

72. Other extenuating circumstances.—No general rule can be laid down for determining the class of cases in which lesser punishment may be imposed. AIR 1979 SC 1384 : 1979 Cr LJ 1053 ; AIR 1978 SC 1605 ; AIR 1974 SC 1570 : 1974 Cr LJ 1035 ; AIR 1975 SC 159 ; AIR 1974 SC 1918 : 1974 Cr LJ 1365 ; AIR 1974 SC 739 : 1974 Cr LJ 683 (sterner sentence imposed on the facts and circumstances of the case) ; AIR 1974 SC 1039 : 1974 Cr LJ 791 (totality of circumstances justifying lesser sentence) ; AIR 1978 SC 1248 : 1978 Cr LJ 1251 ; AIR 1977 SC 2423 : 1978 Cr LJ 18 ; AIR ; 1977 SC 2407 : 1977 Cr LJ 1744 : AIR 1977 SC 2102 ; AIR 1977 SC 1747 : 1977 Cr LJ 1139 ; AIR 1976 SC 2327 : 1976 Cr LJ 1873.

On circumstantial evidence the conviction justified. It was held that motive, facts and other materials should be considered. *Satbir Singh* v. *State of Punjab*, 1994 JIC 274 (SC).

73. Kidnapping and murder.—When the offence of kidnapping was in fact part of the transaction which led to the murder, a separate conviction and sentence could not be maintained. 2 Lah LJ 653 ; *see* AIR 1979 SC 716 : 1979 Cr LJ 538 (accused enticed a girl into his house and the girl not submitting to his attempts to rape her, murdered her, no extenuating circumstance for lesser punishment).

When accused is aged 18 years and not habitual offender and having cordial relations with family of deceased child and taking this advantage kidnapped child and killed him for ransom, such case is not rarest of rare cases and hence death sentence committed to imprisonment for life. *Lalit Kumar* v. *State*, 1997 Cri LJ 848 (Del).

74. Murder committed in consequence of abduction.—Section 302 is not inapplicable to a case of murder committed in consequence of an abduction. Where it is proved that three persons were found holding the deceased as a captive and his dead body was subsequently found, the proper sentence for conviction is under Section 302 or 362/109, IPC, and capital sentence is the proper punishment in each case. 224 IC 435 : 47 Cr LJ 680 : AIR 1947 Cal 35.

75. Section 302 and Section 149.—The lowest sentence for an offence under Section 302, IPC Code being transportation for life, a sentence for various terms of imprisonment for offences under Sections 302 and 149 is not according to law. 9 MLT 510 : 42 Cr LJ 145 : 9 Ind Cas 885 : 11 PR 1871 Cr. The alteration of charge from Section 302/34 to Section 302/149 at the appellate stage and conviction on the latter charge will not cause prejudice to the accused. 76 CWN 301 ; 1981 Cr LJ 1710.

Insufficient evidence—Unlawful assembly. It is interesting to note that before recording the concession of learned Counsel for the prosecution, the High Court noted that the evidence of Narayan Pandy Ghungre (PW 9) as regards the particular part played by accused Nos. 2 and 14 are relevant. It has been noted as follows :

> "But PW 9 Narayan says that he was able to identify 2/3 persons that were rushing at him with some instruments in their hands and accordingly he says that accused Nos. 12 and 14 were these persons who were chasing them. It is on the basis of the statement of PW. 9 Narayan that the particular part played by accused Nos. 12 and 14 in the commission of the crime of murder has been sought to be established by the prosecution, while maintaining that so far as the other accused are concerned, there is no evidence whatsoever to connect them with the crime."

The High Court's judgment is equally baffling. The High Court noted that the identification parade took place after three months when PW 9 identified accused Nos. 12 and 14. The High Court in this context noted as follows :

> "PW 9 further states that the woman then directed her attention to the witness and told the villagers that Narayan and Sitaram were also thieves. Then 2/3 villagers rushed at Narayan, asked Sitaram to come down from the three immediately. Accordingly, Sitaram came down and 2/3 persons who had rushed on them were identified as accused Nos. 12 and 14. He stated that in the parade that took place after three months, he identified the accused Nos. 12 and 14."

But after indicating some reasons, the High Court noted that the evidence regarding the parade is to be rejected. The High Court also noted the fact that before the police PW. 9 did not say anything about his being an eyewitness. But High Court went on to hold that just because he has given different versions at different points of time, his evidence cannot be discarded and it cannot be said that he is not an eye-witness. The conclusions of the High Court are certainly not defensible. It is to be noted that PW 9 Narayan's evidence is full of contradictions.

That being so, the High Court was not justified, apart from other important aspects highlighted above, in convicting the appellants. The appeals are allowed to the aforesaid extent. The conviction as recorded by the trial Court and the High Court, so far as Nathu Keru is concerned and the conviction as recorded by the High Court so far as Ram Maruthi Pawar is concerned, are set aside. The accused appellants are acquitted of the charges. *Ram Maruthi Pawar vs. State of Maharashtra*, 2009 (12) SCC 406 : 2009 (8) JT 403 : 2009 (5) Scale 551 : 2009 (5) SCR 956.

Acquittal under Sec. 148—Conviction under Sec. 302 r/w 149 despite—Scope.—Where the appellants have been expressly charged for the offence punishable under Sec. 148 IPC and have been acquitted thereunder, they cannot be legally convicted for the offence punishable under Sec. 302, read with Sec. 149 IPC. It is so because the offence of rioting must occur when members are charged with murder as the common object of the unlawful assembly. Sec. 148, IPC creates liability on persons armed with deadly weapons and is a distinct offence and there is no requirement in law that members of unlawful assembly have also to be charged under Sec. 148, IPC for legally recording their conviction under Sec. 302, read with Sec. 149 IPC. However, where an accused is charged under Sec. 148 IPC and acquitted, conviction of such accused under Sec. 302 read with Sec. 149, IPC could not be legally recorded.

In view of the aforesaid legal position, the appellants having been acquitted under Sec. 148 IPC by the trial Court as well as the High Court, they could not have been legally convicted by the High Court under Sec. 302 read with Sec. 149 IPC. *Mohammed Ankoos vs. Public Prosecutor, High Court of Andhra Pradesh*, 2010 (1) SCC 94 : 2009 (13) Scale 584 : 2009 (14) JT 7 : 2009 (8) SLT 265 : 2009 (15) SCR 616 : 2009 (4) Crimes 158 (SC).

Where conviction under Section 149 not vitiated because of the fact that other accused have been acquitted and remaining accused convicted one less than five. *Bhurya* alias *Subhan* v. *State of Maharashtra*. (1995) 3 Crimes 621 (Bom.).

In the instant case village political rivalry led to double murder. The accused were put to notice under charge No. 1 that they were members of an unlawful assembly armed with deadly weapons and in prosecution of common object of such assembly, namely, in murdering deceased 1 and 2, they committed offence of rioting, punishable under Sec. 148 IPC. A-1 to A-5 and A-6 to A-9 were noticed of the particulars under charge No. 4 that during the course of same transaction as mentioned in charge No. 1, they committed murder by intentional causing death of D-1 and thereby committed an offence punishable under Sec. 302 IPC. A-3, A-6, to A-8, A-10 to A-13 were put to notice under charge No. 5 that during the course of the same transaction as mentioned in charge No. 1 they committed murder by intentional causing death of D-2 and thereby committed an offence punishable under Sec. 302. Reading of charge No. 4 and charge No. 5 leaves no manner of doubt, since the transaction mentioned in charge No. 1 has been made integral part thereof, that all the necessary ingredients of Sec. 149 IPC are implicit therein except mentioning of Sec. 149 IPC specifically. The particulars stated in charge Nos. 4 and 5 are reasonably sufficient to give the appellants adequate notice of Sec. 149 IPC although not specifically mentioned. Thus, non-mentioning of Sec. 149 in charge No. 4 and charge No. 5 would not be a fundamental defect of an incurable illegality that may warrant setting aside the conviction and sentence of the accused. Non-framing of a charge under Sec. 149 IPC, on the face of the charges framed against the appellants would not vitiate their conviction; more so when the accused have failed to show any prejudice in this regard. The present case is a case where there is mere omission to mention Sec. 149 in charge Nos. 4 and 5 which at the highest may be considered as an irregularity and since the appellants have failed to show any prejudice, their conviction and sentence is not at all affected. Tenor of cross-examination of injured witnesses by the defence also rules out any prejudice to them. The offence, in the established facts and circumstances of the case, under Sec. 302 read with Sec. 149 IPC is implicit, the omission to mention Sec. 149 IPC specifically in the charge Nos. 4 and 5 cannot affect their conviction. In no way their conviction is rendered bad as the appellants has assembled together armed with axes and sickle and were parties to the assault on deceased and others. In a situation such as this it was not obligatory upon the prosecution to prove which specific overt act was done by which of the accused. *Anna Reddy Sambasiva Reddy and Ors. v. State of A. P.*, AIR 2009 SC 2661 : 2009 (6) SCR 755 (SC) : 2009 (12) SCC 546 : 2009 (3) Crimes 17 (SC) : 2009 (5) JT 617 (SC) : 2009 (6) Scale 223 (SC) : 2009 (4) Supreme 506 (SC).

When as per record it is proved that accused went on spot with deadly weapons to take forcible possession of land against injunction order issued by civil court. It was a criminal act from the very beginning. Hence were rightly convicted under Sections 302/149, IPC for having shared the common intention for murder. No interference called for. *Rambharos* v. *State of M.P.*, 1995 Cr LR 231 (MP).

There is not an iota of evidence placed on record by the prosecution to prove that A-3 and A-4 had participated in the commission of the crime alongwith A-1 and A-2. PW-1 and PW-2 only stated A-3 and A-4 on the asking of A-2 caught hold of the legs of the deceased and dragged him to a short distance. The allegation levelled by the prosecution against A-3 and A-4 do not attribute any overt act or part played by them in the commission of the crime. The evidence of the prosecution is wholly lacking to hold that A-3 and A-4 had shared a common intention with A-1 and A-2 to cause the murder of Allisab. Similarly for the lack of any tangible, satisfactory or credible evidence, A-3 and A-4 cannot be held liable for causing disappearance of the evidence with intention of screening A-1 and A-2 from legal punishment under Sec. 201 read with Sec. 34, IPC. Therefore, the judgment and order of the High Court holding A-3 and A-4 guilty of the charged offences cannot be sustained. *Razak Jinnesab Karajagi vs. State of Karnataka*, 2009 (2) Crimes 59(SC) : 2009 (4) JT 667 : 2009 (5) Scale 116 : 2009 (20 Supreme 801 : 2009 (4) SLT 565 : 2009 (5) SCR 422.

Specific charges—Non-mentioning of specific Sec. 149 in charge—Effect of. All the accused were put to notice under Charge No. 1 that on 16.05.1996 in the morning near Gollalaguduru Harijanawada, they were members of an unlawful assembly armed with deadly weapons and in prosecution of common object of such assembly, namely, in murdering deceased 1 and 2, they committed offence of rioting, punishable under Sec. 148 IPC. A-1 to A-5 and A-6 to A-9 were noticed of the particulars under Charge No. 4 that during the course of same transaction as mentioned in Charge No. 1, they committed murder by intentional causing death of D-1 and thereby committed an offence punishable under Sec. 302 IPC. A-3, A-6 to A-8, A-10 to A-13 were put to notice under Charge No. 5 that during the course of the same transaction as mentioned in Charge No. 1 they committed murder by intentional causing death of D-2 and thereby committed an offence punishable under Sec. 302 IPC.

A careful reading of Charge No. 4 and Charge No. 5 leaves no manner of doubt, since the transaction mentioned in Charge No. 1 has been made integral part thereof, that all the necessary ingredients of Sec. 149 IPC are implicit therein except mentioning of Sec. 149 IPC specifically. The particulars stated in Charge Nos. 4 and 5 are reasonably sufficient to give the appellants adequate notice of Sec. 149 IPC although not specifically mentioned. Is non-mentioning of Sec. 149 in Charge No. 4 and Charge No. 5 a fundamental defect of an incurable illegality that may warrant setting aside the conviction and sentence of the appellants? We do not think so. Non-framing of a charge under Sec. 149 IPC, on the face of the charges framed against the appellants would not vitiate their conviction; more so when the accused have failed to show any prejudice in this regard. The present case is a case where there is mere omission to mention Sec. 149 in Charge Nos. 4 and 5 which at the highest may be considered as an irregularity and since the appellants have failed to show any prejudice, their conviction and sentence is not at all affected. Tenor of cross-examination of PW-1 and PW-3 by the defence also rules out any prejudice to them. The offence, in the established facts and circumstances of the case, under Sec. 302 read with Sec. 149 IPC is implicit and applying the dictum laid down by the Constitution Bench of this Court in Willie (William) Slaney, the omission to mention Sec. 149 IPC specifically in the Charge Nos. 4 and 5 cannot affect their conviction. In no way their conviction is rendered bad as the appellants had assembled together armed with axes and eathapululu (sickle) and were parties to the assault on D-1 and D-2 and others. In a situation such as this it was not obligatory upon the prosecution to prove which specific overt act was done by which of the accused. *Anna Reddy Sambasiva Reddy vs. State of Andhra Pradesh*, AIR 2009 SC 2661 : 2009 (3) Crimes 17 (SC) : 2009 (12) SCC 546 : 2009 (5) JT 617 : 2009 (6) SCR 755 : 2009 (6) Scale 223 : 2009 (4) Supreme 506.

Evidence of single eye-witness if not corroborated can not be castigated on this ground alone as corroboration is what court required as matter of prudence and as step of caution. *Balo Yadav* v. *State of Bihar*, 1997 (2) Crimes 38 (SC) : 1997(5) SCC 360 : 1997(5) JT 117 : 1997(3) Scale 729 : 1997(4) Supreme 278.

76. Imposition of fine in addition to death.—In addition to the sentence of death, the Sessions Judge sentenced the accused to a fine, and directed that, if the fine is realised it should be paid to the heirs of deceased. It was held that the subsidiary order was not sustainable. 18 PR 1913 Cr : 14 Cr LJ 522 : 20 Ind Cas 1002 : 41 PWR 1913 Cr.

When the conviction under Section 302 or under the first part of Section 304 of the IPC, the convicted person "shall also be liable to fine". If the conviction is under the second part of Section 304, the sentence could be "imprisonment of either description which may extend to ten years or with fine or with both." The words "shall also be liable to fine" in the former provisions are not to be understood as a legislative mandate that the Court shall without exception award fine also. In this context, it is apposite to note that those words are invariably used in provisions where imposition of imprisonment is made mandatory, and that those words are absent in provisions where fine was prescribed as an alternative punishment. By the words "and shall also be liable to fine", power is conferred on the Court to impose sentence of fine also in addition to imprisonment. It does not mean that Courts should impose fine in all such cases as a rule. The Court has the discretion to impose or not to impose a fine sentence also in addition to the sentence of imprisonment.

When the High Court consider the propriety in combining a sentence of fine with sentence of imprisonment for life. High Court agree that it is not usually done. Legitimacy and propriety are not the same. Hence, the latter has to be dealt with independent of the former. Bombay High Court in *State* v. *Pandurang Shinde*, AIR 1956 Bom 711 : 1989 Cr LJ 1306, expressed the view that sentence of fine for an offence of murder is wholly in apposite. The said view was not, however, approved by the Supreme Court in *Palaniappa Gounder* v. *State of Tamil Nadu*, AIR 1977 SC 1323 : 1977 Cr LJ 992. Chandrachud. J. (as he then was) struck a note of caution that before imposing fine for an offence of murder "one must pause to consider whether the sentence of fine is at all called for and if so what is a proper or adequate line to impose in the circumstances of the case". In the aforesaid exercise if the Court is of the view that in a particular case a fine sentence, in addition to imprisonment, is necessary to meet the ends of justice it is only proper that the Court award fine sentence as well.

When the legislature has not fixed any upper limit for the quantum of fine in respect of a particular offence. Court has the freedom to fix any amount by then the court must see that the fine imposed is not excessively high or repulsively low. Section 63 of the Penal Code says that where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable should be unlimited, but shall not be excessive. At the same time, Court should not make it a mockery of sentence by fixing ridiculously low amount as line. Financial capacity of the accused, enormity of the offence, extent of damage caused to the victim of the offence etc., are relevant considerations in fixing up the amount. Section 357 of the CrPC contains provision for ordering payment of compensation in criminal case. The mode of realisation of such compensation is through imposition of fine. It is for the Court to decide whether any person involved in the criminal offence deserves payment of compensation. Accused sentenced of fine in conjunction with the sentence of imprisonment would be appropriate and proper, *Sebastian* v. *State of Kerala*, 1992 CrLJ 3642 at 3646 (Ker) (DB).

The sentence of fine in addition to death sentence can be passed. It is mistake in drafting. *State of Assam* v. *Bhuban Tanti*, (1995) 1 GLR 81 (Gau).

77. Difference of opinion between Judges.—Where there is a difference of opinion in the High Court on the question of sentence the accused is entitled to the benefit of doubt and death penalty should not be imposed. ILR 1962 Cut 516. The sentence should be reduced to transportation when there is difference of opinion in the High Court, not only on the question of guilt, but also on that of sentence. AIR 1955 SC 216 : (1955) 1 SCR 1083 : 1956 SCA 228 : 1955 SCJ 106 : 1955 Cr LJ 572.

78. Deterrent sentence.—Wife's murder is so common an offence in Sind, that it is necessary that deterrent sentence should be passed in all cases even where the provocation is that the wife was found in adultery. 5 SLR 256 : 15 Ind Cas 807 : 13 Cr LJ 635. A custom amongst the *Baluchis of* killing for unchastity cannot be taken into consideration in mitigation of sentence. 28 SLR 279. Where the accused murdered their cousin who had supplanted one of them in an intrigue with woman, *held*, that having regard to the state of society at the place where the act was committed, the sentence of death should be commuted. 2 PR 1867 Cr. When the murder was cold blooded and ruthless and there was no extenuating circumstance, death sentence should be inflicted. *Banamali Saman* v. *State of Orissa*, AIR 1968 SC 43 : 1970 Cr LJ 780 : 1979 Cr LJ 1086 : AIR 1979 SC 1414. The discretion to impose the sentence of death or life sentence is not so wide, after all Section 354(3) Cr. P. Code has narrowed the discretion. AIR 1979 SC 964. *See* AIR 1976 SC 192 (special reasons for death sentence) AIR 1983 SC 448 : AIR 1978 SC 1248.

Reduction of sentence—87 years old—Scope. It is no doubt true that FIR came to be recorded at 11:00 p.m. on 18.07.1996 in the Police Station by Head Constable P. Mallikajunarao (PW-8), who was posted at the relevant time at Police Station. The incident of murder of deceased No. 1 and deceased No. 2 took place at 7:30 p.m. on 18.07.1996 as per Complaint (Ex. P1) made by PW-1 to Sub-Inspector Maqbool Khan (PW-11), which was sent to Police Station for registration of the FIR. It has come in the cross-examination of PW-8 that the distance between Police Station, Thulluru, and Mangalagiri where the Magistrate holds court is about 20 kms. PW-8 categorically stated that FIR was registered by him at 11:00 p.m. on 18.07.1996 and even if the copy of the FIR was to be sent to the Magistrate during the midnight, it was not possible for the Police Constable to take the FIR and deliver the same to the Magistrate at Mangalagiri on the intervening night of 18/19.07.1996 as there was no bus service available during the night time between the two places. The trial court in its judgment observed that the FIR was received by the Magistrate at 4.00 p.m. on 19.07.1996. The trial court has noticed but not accepted the contention of the learned counsel for the accused persons that in these circumstances the statement of PW-1 (Ex. P1) might have been recorded at 3.00 p.m. on 19.07.1996 at village Uddandayunipalem and from the village itself the statement might have been sent to Mangalagiri in a police vehicle and, therefore, the same was received by the Magistrate at 4.00 p.m. on 19.07.1996. We have independently scrutinized the evidence of PW-1 and PW-11, the Investigating Officer. It is their clear and consistent testimony that statement (Ex. P1) was recorded at 9.00 p.m. on the night of 18.07.1996 after the incident of murder had occurred at 7.30 p.m. It is undisputed fact that one Ramamohanarao, son of A-6, was murdered on the same evening at about 6.00 or 6.30 p.m. at the outskirts of village Uddandayunipalem. It is the evidence of PW-11, Sub-Inspector of Police, that about 7.15 p.m. M. Venkatarao informed him that his rival group of men armed with deadly weapons was moving towards their village and on receiving the information he along with other police personnel had immediately proceeded to village Uddandayunipalem in a private jeep for maintaining law and order. PW, Head Constable, in cross-examination, corroborated the version of PW, Sub-Inspector of Police, that on 18.07.1996 around 7.15 p.m. on receipt of the information in regard to some incident of violence in the village, P.W. 11 along with five staff members left the Police Station for maintaining law and order in the village. PW-8 sent FIR to the Magistrate who brought statement of PW-1 [Ex. P-1] at 11:00 p.m. to the Police Station. PW-13, Circle Inspector of Police, stated that on the midnight of 18/19.07.1996 at about 00.15 hours he received a copy of express FIR disclosing the incidents of murder of three persons in village Uddandayunipalem. The endorsement made on FIR by the Magistrate on its bare perusal would reveal that he received a copy of the F.I.R. through PC No. 1293 and not through PC No. 2896 as deposed by P.W. 8. It appears from the record that PC No. 2896 handed over a copy of express FIR to PW-13, Circle Inspector of Police, at village Uddandayunipalem at 00.15 hours on the intervening night of 18/19.07.1996 and then constable PC No. 1293 might have been deputed to deliver the FIR (Ex. P5) to the Magistrate at Mangalagiri. The trial court in its judgment observed that keeping in view the serious and tense situation in the village because of the murder of three persons on the same evening, the entire staff of Police Station was deputed to maintain law and order problem there. Out of the victims, one was the son of A-6, ex-Sarpanch of the village, whereas deceased No. 1 was the sitting Sarpanch of the same village. Taking these circumstances into consideration, the trial court held that there was no delay in lodging the FIR with the police and delay in sending a copy of the FIR to the Magistrate was a result of shortage of police personnel who could not be deputed to deliver the same to the Magistrate during the night of 18.07.1996 or in the early hours of 19.07.1996. The High Court has re-examined the evidence on record and held that the delay in sending FIR to the Magistrate was not deliberate or intentional, but because of some technical errors committed by the Investigating Officer during the course of investigation of the case which could not be found fatal to the case of the prosecution, especially when the Investigation Of ficer was not cross-examined on this point.

A-10, one of accused found guilty for being member of unlawful assembly and sharing common intention. Ground that he was 87 years old and suffering from multiple ailments. This apart A-10 has already undergone jail suffering for about three years and, therefore, taking all these factors into consideration, his sentence may be reduced to the period already undergone by him. We are afraid to accept this submission of the learned counsel, be cause A-10 has been held guilty for being a member of unlawful assembly and sharing common intention with A-l, A-2, A-10, A-11 and A-12 to commit the murder. *Bathula Nagamalleswar Rao and Ors. v. State, Rep. by Public Prosecutor.*, AIR 2008 SC 3227 : 2008 (6) SCR 829 (SC) : 2008 (11) SCC 722 : 2008 (6) JT 162 (SC) : 2008 (6) Scale 169 (SC) : 2008 (3) Supreme 129 (SC) : 2008 (4) SLT 646 (SC) : 2008 (6) SRJ 72 (SC) : 2008 (3) SCC (Cr) 898 : 2008 (2) Crimes 188 (SC).

The accused husband as per medical report had strangulated the wife while she was sleeping with him at night. The plea of accused that wife had died of acute abdominal pain was not worthy of credence. The conviction of accused was confirmed as murder of wife was caused in such a cruel, atrocious, and cold blooded manner that he did not deserve any sympathy. *Kondana Laxminarayan* v. *State*, 2003 Cr LJ (NOC) 53 (Orissa) : 2002 (23) OCR 604.

Where appellant was 60 years old at the time of his filing of appeal. Now he is 73 years old. Hence considering his old age sentence reduced to 2 years. *Amar Singh* v. *State of Punjab*, 1994 SCC (Cri) 1171.

Where the probation officer recommended his pre-mature release which was opposed by District Magistrate and S.P. of District due to presence of feeling of revenge. The State Government did not take into consideration the relevant facts in report specification laid down by control order nor to specification laid down by export contract. Hence liable to attachment and seizure. Petition dismissed. *Natraj Organics Ltd.* v. *State of U.P.*, 1995 AWC 1056 (All).

Where accused sexually assaulted infant girl of 4 months resulting her death, accused deserved nothing less than maximum sentence. *Siddik Singh Pritam Singh* v. *State of Maharashtra*, 1993 Cri LJ 2919 (Bom.).

Where the conviction and sentence awarded set aside and instead he shall stand convicted and sentenced to life imprisonment under Section 302, I.P.C. *Manmohan Choubey* v. *State of M.P.*, 1994 Cr LR 70 (N) (MP).

In view of mitigating circumstances death sentence commuted to that of imprisonment of life. *R.S. Bhudwar* v. *Union of India*, 1996 Cr LJ 2862 (SC).

79. Conviction under different sections.—Where facts relied upon by the prosecution to prove an offence under Section 364, I.P. Code, are such that if believed they are sufficient to establish an offence of murder under Section 302 or abetment of murder under Section 302/109 and if not believed the case under Section 364 would fail, the Court should frame a charge under Section 302 or Section 302/109. ILR (1944) 1 Cal 280 : AIR 1945 Cal 42 ; *see* also AIR Pat 247 : 45 Cr LJ 809. While considering an accused of murder it is not desirable to convict him for concealing evidence. AIR 1942 Mad 257 : 43 Cr LJ 543 ; but *see* AIR 1940 Pat 289 : 41 Cr LJ 910. In a case of murder, it is not desirable procedure to charge the accused under Section 404 for misappropriation of the articles of the deceased. AIR 1941 Mad 306 : 42 Cr LJ 424. Charges can be framed both under Sec. 302 & 318. AIR 1941 Pesh 22 : 82 Cr LJ 381.

Where murder of the abducted girl is alleged by the prosecution, the accused should be charged under Section 302 and not under Section 364. AIR 1940 Cal 561 : 42 Cr LJ 285 : 71 CLJ 697. Where the charge is framed in the alternative in respect of offence under Section 302 and 201, I.P. Code, the position contemplated by Section 72 may arise and it may be open to the Court to give judgment that the accused is guilty of one of several offences specified in the judgment, but that it is doubtful which of these offences he is guilty of. Such fmding is in accordance with Section 367 (3), Cr. P. Code. The accused in such a case is under Section 72, I.P. Code, liable to be punished for the offence for which the lowest punishment is provided. 41 Cr LJ 910 : AIR 1940 Pat 289 : *see* also AIR 1939 Sind 130 : 40 Cr LJ 661.

Conviction under Secs. 307/110 instead of under Secs. 302/109—Validity. The High Court on appeal held that so far as conviction of Appellant No. 1 is concerned, he was the person who gave the order and after that a fatal blow was inflicted by Appellant No. 2 on the deceased. He has been rightly convicted under Sec. 302 read with Sec. 109 IPC and so far as Appellant No. 2 is concerned he was convicted under Sec. 302 IPC.

PW-4 is the informant *i.e.* wife of the deceased and PW-3 is the father of the deceased. From the evidence of PWs. 3 and 4 it is clear that there were physical fights abuses. At the time of abuses except PWs. 3 and 4 nobody else was there. The other persons came there just to stop the fight hearing noise on the road. On a close reading of the evidence is seen that the accused persons were armed. There was really no direct exhortation to kill but the same was to the effect that the deceased and others should not be permitted to run away and should be attacked. On hearing the exhortation accused No. 2 pierced the spear to the chest of the deceased. The evidence of PWs. 3 and 4 are different so as to the manner of exhortation. One says "Maro Sale Chintamani Ko" while the other said "Maro Sale Ko Jaan Se". The words "Jaan Se" appears to be entered later in the records. *Jaleshwar Singh vs. State of Bihar*, 2009 CrLJ 3995 : 2009 (2) Crimes 383 (SC) : 2009 (7) JT 572 : 2009 (7) Scale 219 : 2009 (8) SCR 130.

It is settled practice in murder cases, not to accept the place of guilty by the accused unless the Court is satisfied that the accused knew exactly what is the effect of such plea. 46 Cr LJ 357 : 217 IC 370. Under Section 309, Cr Pro Code, the Judge is bound to pass a sentence on each of the charges of which the accused is found guilty by him. AIR 1939 Pesh 23 : 40 Cr LJ 686. It can not be laid down as a matter of law that in no circumstances a charge under Section 364 I.P.C. can be made out if the prosecution alleges that the accused met him dead after he was abducted and that his death was met at the hand of other person. ILR 1958 Raj 181 : 1958 Raj LW 584.

We find that the case against the appellant has been proved by the evidence of PW. 1 Ramprasad, his brother, PW. 3 Devilal and PW. 11 Vinod his neighbours, who had all seen the dead bodies with the appellant sitting beside them armed with a knife and he had in fact threatened that anyone else interfering would meet the same fate. It is also significant that Ramprasad had locked the door from the outside and it was in that condition that the appellant had been arrested by SI Karulal and his bloodstained clothes and knife had been recovered. It is true that in a case of circumstantial evidence motive does have extreme significance but to say that in the absence of motive, the conviction based on circumstantial evidence cannot, in principle, be made is not correct. It bears repetition that the appellant and the deceased family members were the only occupants of the room and it was, therefore, incumbent on the appellant to have tendered some explanation in order to avoid any suspicion as to his guilt. The story that a thief was present in the room introduced by Ramprasad at the stage of the trial was doubtless an attempt to help the appellant who was his brother. The medical evidence also supports the prosecution story in its entirety. The two doctors. R.K. Joshi and Dinesh Bansal who had conducted the post-mortem examination on the dead bodies, concluded that the knife recovered at the instance of the appellant could have been used to commit the murders. There is another extremely relevant circumstance pointing towards the appellant's involvement. The appellant, after arrest, was found with injuries on his person and was subjected to a medical examination by PW. 5 Dr. K.C. Kothari. The doctor reported six superficial incised injuries on his person, some on the neck and the others on the fingers, and opined that they could all be self suffered. This statement was further corroborated by the unrebutted testimony of PW. 3 Devi Lal who testified that the appellant had told him that after killing his family he had attempted to commit suicide. All the factors referred to above are undoubtedly circumstances, but they are so evidently categoric, that they constitute a chain even stronger than an eye-witness account, and do remind us of the clichi that men often lie, circumstances do not. We are, therefore, of the opinion that the conviction of the appellant on the charge of multiple murders is fully justified. *Jagdish vs. State of Madhya Pradesh*, 2009 (9) SC 495 : 2009 (4) Crimes 72 (SC) : 2009 (12) JT 300 : 2009 (12) Scale 580 : 2009 (14) SC 727 : 2009 (6) Supreme 692 : 2009 (7) SLT 401.

That no one cut inflicted on the deceased was in itself fatal is no reason to hold th the offence committed is not murder or that all the accused who participated in th occurrence can not be convicted of the offence. Where the fact that there was enmi between the accused on the one hand and the deceased on the other hand was not on proved in the case but admitted by the accused, and the facts that the injuri sustained by the deceased external and internal, were of a serious nature, all the thr came to the scene well-prepared and well-armed and after the incident, all three ra away together and remained in hiding some time before their surrender together—All prove that they were acting in pursuance of the common intention. ILR 1957 Ker 524 1957 Ker LJ 1224 ; 1954 All WR (HC) 366.

Appellate Court to refuse interference where conviction recorded on the ju appreciation of evidence. *Kamati Rajam* v. *State of A.P*, (1995) 1 CCR 360 : (1995) 1 AI (Cr) 217 (AP).

Where evidence of Child witness was shaky and uncorroborated. Conviction on th basis of such evidence, had to be, vitiated. *Shukram* v. *State of Madhya Pradesh*, (199 1 CCR 515 (MP).

Conviction can be sustained on the basis of cogent, trustworthy and w corroborated evidence of a solitary eye-witness. *Gudise Venkappa* v. *State*, (1995) Crimes 43 : (1995) 3 CCR 129 (AP).

Where deceased found dead on the alternate day and deceased recovered fro possession, conviction held not justified. *Thankayyan* v. *State of Kerala*, 1994 SSC (C 1751.

Where injury was sufficient to cause death—Witnesses proved the case convicti was justified. *Ayodhya Singh* v. *State of U.P.*, 1994 JIC 356 (All).

The deceased was attacked while going to harvest.—It was proved that there w prior litigation between the parties. The witnesses of the FIR were not examin Labourers as well as eye-witnesses too were not examined Conviction was held n justified. *Banwalal Mandal* v. *State of Bihar*, (1994) 1 Crimes 460 (Pat).

Prosecution case fully supported by eye-witness—FIR with details was also lodged time and—Human blood-stained earth taken from the place of occurrence.—*He* conviction was held sustainable. *Kapur Singh* v. *State of Punjab*, (1995) 3 Crimes 4 (P&H).

Where the facts clearly indicate that deceased had been taken from his house railway station by present appellant and his companion and there he had be assaulted with *Ballam* on the chest and back. This goes to show that appellant and companion intended to cause death of the deceased. Conviction and sentence is uphe Under Section 302/34 I.P.C. *Gullu* v. *State of M.P.*, 1994 Cr LR 36 (N) (MP).

The FSL Report and other exhibits fully connecting accused with crime. Hence th was no illegality on part of trial judge in scanning, analysing, discussing and evaluat evidence in right perspective. The conviction does not call for interference. *Asha Ram State of Rajasthan*, (1994) 2 WLC (Raj) 443.

FIR was promptly lodged by sister of deceased. Her statement therefore corroborates FIR. It was corroborated by eye-witnesses. Medical evidence and chemical examiner's report. Conviction and sentence confirmed. *Sudhir Suresh Kamble* v. *State of Maharashtra*, (1994) 2 Mah LR 119 (Bom.).

Where appellant *G* fired gun and caused injuries to the deceased—Other appellants present there also took part in it—Testimony of eye-witnesses consistent—They remained with dead body for whole night not unnatural. Hence conviction was upheld. *Gurmit Singh* v. *State of Punjab*, (1995) 4 Crimes 185 : (1995) 7 JT (SC) 171 : (1995) 3 CC Cases 113 (SC) : 1995 Supp (4) SCC 146 : 1996 Cr. LJ 390 : 1995 (5) Scale 630 : 1995 (4) CCR 56 (SC) : 1996 SCC (Cr) 45.

Where medical report corroborating the prosecution case and witnesses were natural and supporting the case. It was held that conviction was justified. *Jaskaran Singh* v. *State of Punjab*, 1994 SCC (Cri) 1468 : 1994 AIR (SC0 157 : 1994 Cr. LJ 3837.

Where the death was caused due to multiple injuries on head. The evidence of eye-witnesses, PW-1 and PW-2 was reliable. FIR was duly corroborated. Hence conviction under Section 302, I.P.C. maintained. *Puran Nath* v. *State of Rajasthan*, (1995) 2 RCD 326 (Raj).

Eye-witness the basis of prosecution case motive immaterial—Evidence of solitary is witness safe to be relied for conviction—Appeal dismissed conviction of accused is maintained. *Hanamanth Ramanna* v. *State of Karnataka*, (1995) 3 KarLJ 461 (Kant) (DB).

Where there was homicide—Eye-witnesses are relatives but there are cause to disbelieve their version. There are direct evidence. Same getting corroborated by FIR and medical evidence. Weapon used concealed—Discovered in pursuance of the statement by appellant—Human blood present on the weapon used—Belongings of the appellant discovered from the site of occurrence conviction upheld. There was found absence of any motive which was not fatal. *Amarjit Singh* v. *State of Punjab*, (1995) 3 Crimes 409 : (1995) 3 CC Cases 124 (P & H).

Where accused alone caused fatal injuries as stated by prosecution. Hence conviction held proper. *Chinnam Chandraiah* v. *State of Andhra Pradesh*, 1994 Cri LJ 1210 (SC) : AIR 1994 SC 959.

Where death was caused by throttling. But at the time of death only the accused persons were present—Inescapable conclusion that in all human probability the accused and none else had committed the crime. Hence conviction under Section 302 was upheld. *Lalu Mai* v. *State of Tripura*, (1995) 2 GLR 145 (Gau).

Where several persons chasing and inflicting injuries to the deceased—Presence of witnesses proved—They being interested witnesses—Specific overt acts attributed to accused corroborated by medical and circumstantial evidence. Thus only such accused convicted. Other accused acquittal—Plea of appellants that as some of accused were acquitted same evidence cannot be accepted against other accused, not tenable. Conviction was held proper. Hence appeal was dismissed. *Bolineedi Venkataramaiah* v. *State of Andhra Pradesh*, AIR 1994 SC 76 : 1994 Cri LJ 61 (SC) : 1994 Supp(3) SCC 732 : 1995 SCC (Cr) 191.

Where incident took place at market place before a number of eyewitnesses, who testified about the guilt of the accused in a straightforward manner. There was found no reason for false implication. Hence conviction justified. *Zaffar* v. *State (Delhi Admn.)*. 1994 SCC (Cr) 295 : (1994) 1 CCR 13 (SC : 1993 (4) Scale 571 : 1993 (3) Crimes 1096.

Where F.I.R. delay in dispatching the same. Forwarded the same day to the Magistrate. Placed before him a day after the dispatch date, no lapse on part of investigating officer. Hence conviction was upheld. *Promoda Kumar Mantri* v. *State of Orissa*, (1995) 3 Crimes 510 (Ori).

Where the assault was inside sleeping room and there were incised wounds on neck. Accused-party and complainant-party belonged to different factions in village. Hence conviction recorded was legally sustainable. *Kaki Ramesh* v. *State of Andhra Pradesh*, (1994) 2 Crimes 268 (SC) : (1994) 4 SCC 397 : 1994 (3) JT 532 : 1994 (2) Scale 753 : 1994 (1) UJ 776 : 1994 (2) CCR 503 (SC) : 1994 SCC (Cr) 1214.

Where accused caused stab injuries to deceased. Altercation over quarrel between children, accused armed with knife, evidence was also corroborated by medical evidence. Name of witnesses too found in F.I.R. Incident took place in mid-night in front of deceased's house. Hence was also conviction was upheld. *Tejgir* v. *State of M.P.*, 1995 Cr LR (MP) 324.

Murder is of female child and dead body was found after two days. Death was by strangulation. Prosecution case based on circumstantial evidence. There was no independent witness-conviction was not justified. Hence conviction was set aside. *State of Punjab* v. *Major Singh*, (1994) 2 CC Cases 73 (P & H).

Where son gave fatal *lathi* blow to his father who was deceased. Prosecution witness's testimony reliable and corroborated, blood-stained *lathi* and clothes of accused recovered which contained same blood group as of deceased. Prosecution-case established beyond reasonable doubt. Hence conviction was upheld. *Sawat Nath* v. *State of Rajasthan*, (1995) 2 RCD 226 (Raj).

Where the presence of witnesses at the place of occurrence is natural and their evidence inspire confidence. There was recovery of blood-stained clothes with AB group of blood which was of the deceased at the instance of accused. Hence conviction upheld. *Pyara* v. *State of Rajasthan*, (1995) 2 RCD 391 (Raj).

Where the version of witnesses before investigating officer and at the trial substantially varied. Hence conviction cannot be sustained. *Maskandar Ali* v. *State of Assam*, (1995) 1 GHC 73 : (1995) 3 CCR 604 (Gau).

Where silver ring discovered at their instance—Recovery after six months conviction was not sustainable. *Mahabir Biswas* v. *State of West Bengal*, (1994) 3 Crimes 809 (SC) : 1995(2) SCC 25 : 1994(7) JT 279 : 1994(4) Scale 736 : 1995(1) SCJ 193 : 1995(1) CCR 10 (SC) : 1995 SCC (Cr) 308.

The Courts below did not accept the prosecution case of death being caused in pursuit of common object. P.W. 3 had deposed that A-14 caused stab injury by *Peishcup* but witnesses deposed that A-14 was armed with *Poumikara*. In such circumstances conviction of A-14 cannot be sustained. As regards A-5, P.W. 5 attributed authorship of injury and they were disinterested. Hence his conviction liable to be upheld. *G. Satyanarayana Reddy* v. *State of Andhra Pradesh*, (1994) 2 Crimes 318 (SC) : 1994 Supp(2) SCC 287 : 1994(4) JT 216 : 1994(2) Scale 857 : 1994 SCC (Cr) 1239.

Where circumstances proving prosecution case beyond doubt, consistent with the guilt of the accused--Excluding all chances of the innocence of the accused, conviction of accused is mentioned. *N. Rajendra Prasad Bhat* v. *State of Kerala*, (1995) 4 CCR 605 (Ker).

The Judge's task is to find out truth involved in the case before him and if at any stage accused pleads guilty and the judge is satisfied that said plea is voluntary and without any coercion, mental or physical there is nothing in Criminal Procedure Code to prevent such guilt being recorded and conviction can be based on its basis. *Ram Kishun* v. *State of U.P.*, 1994 UP Cr R 372 : (1994) 31 ACC 564 (All).

Where falsity of the defence version cannot be a ground for conviction. *Kanku* v. *State of Rajasthan*, (1995) 1 CCR 317 : 1995 (1) RCD 49 (Raj).

Where conviction cannot be sustained in a brutal murder of a teen-aged girl due to a infirmity, improper investigation and non-examination of witness. *Maleshwar Bhagat* v. *State of Bihar*, (1995) 1 East Cr C 650 : (1995) 3 Crimes 163 : 1995 Cr R 46 (Pat).

There being material in consistencies in statements of eye witnesses, uncorroboration and not truthful and no independent witness from neighbouring houses examined conviction not sustainable. *Indu Mian* v. *State of Bihar*, 1997 (1) Crimes 369 (Pat).

Where accused inflicted sword injury which proved fatal. Motive being that accused took away two cocks, thereupon ladies of deceased house abused him. Evidence of eye-witnesses reliable, unshaken and corroborative—Medical evidence also corroborated—Recovery of shoes of accused at the place of occurrence strengthened involvement of accused. Hence it is that offence proved beyond reasonable doubt—Conviction upheld. *Deva* v. *State of Rajasthan*, (1995) 2 RCD 160 : 1995 Cr LR 837 (Raj).

Where the theory that villagers have launched attack on them is difficult to believe. It is therefore difficult to believe the defence version. Hence order of conviction recorded by Sessions Court is legally sustainable and High Court was wrong in reversing the order of conviction. *State of U.P.* v. *Roop Singh*, (1995) 3 Crimes 743 (SC) : 1996 Cr LJ 410 : AIR 1996 SC 215 : 1995(6) JT 479 : 1995(5) Scale 264.

The first injury was on the chest and this injury pierced the sternum at its middle and the description of the internal injury showed that right ventrical was pierced. It was stated that injury No. 1 was sufficient in the ordinary course of nature to cause death and the evidence of PW 1 was clear and convincing on this aspect. Therefore, conviction was confirmed. *Gopalakrishnan* v. *State of Kerala*, 1996 Cr LJ 2438 (Ker) : 1996 (2) Crimes 16 : 1996 (1) Ker LJ 232 : 1996 (1) Ker LT 2[illegible] : 1996 MLJ (Cr) 406 : 1996 (2) Cur Cr R 236 : 1996 (20 ILR (Ker.) 592.

Where killing the person by putting on fire, it had 90% burns. There was prompt F.I.R. corroborative ocular testimony—Dying declaration recorded by Head Constable well corroborated by independent witnesses. Hence conviction held, legal and proper. *Charipalli Shankararao* v. *Public Prosecutor, High Court of Andhra Pradesh*, (1995) 1 CCR 66 (SC) : (1995) 1 Crimes 393 : 1995 JIC 684 : (1995) 32 ACC 430 : 1995 Cr R 253 (SC) : 1995 AIR (SC) 777 : 1995 Supp (5) SCC 24 : 1995 (1) JT 364 : 1995 (1) Scale 192 : 1995 (1) UJ 354 : 1996 SCC (Cr) 21.

Where infliction of *Barchha* blow on the neck of the deceased. There was death on the spot. Injured eye-witnesses being parents of the deceased—Non-manufactured injuries of the eye-witnesses. It had being made prompt FIR—Medical evidence corroborating the ocular evidence—Murder-weapon recovered at the instance of the accused—Conviction is justified. *Inder Singh* v. *State of Punjab*, (1995) 1 Crimes 854 (SC) : 1995 (2) CCR 5 : 1995 SCC (Cr) 542 : 1995 AIR SCW 1545 : 1995 Cr LJ 2627 : (1995) 3 CCR 30 : (1995) 3 SCC 702 : 1995 SCC (Cr) 586 (SC).

When evidence of eye witness remained unshaken and extra judicial confession proved by witness, conviction justified. *Ram Singh* v. *State of Rajasthan*, 1997 (1) Crimes 280 (Raj).

When medical evidence is corroborated by ocular account, conviction proper. *Putti Manda* v. *State of Bihar*, (1995) 2 East Cr C 112 (Pat).

80. Acquittal.—When testimony of complainant is not corroborated by medical evidence and full of contradictions, acquittal of accused proper. *Kapoora* v. *State of Rajasthan*, 1995 R Cr C 498 (Raj).

Pulmonary embolism is, thus, caused by reason of the blockage in the lungs, a clot may form on any part of the body and then travel upto the lungs. Pulmonary embolism is an extremely common and highly lethal condition that is a leading cause of death in all age groups. It may arise from anywhere in the body. It may be caused even during long air travels as commonly it arises from the calf veins. It is not a disease by itself. It has been argued by the learned Counsel for the appellant that the death of the deceased occurred due to pulmonary embolism as a result of the operation that he had to undergo after the incident and not due to the injury caused to him at the time of the scuffle. This argument has been rightly pointed out by the lower Court is misconceived. *Mohammed Asif vs. State of Uttaranchal*, 2009 CrLJ 2789 : 2009 (11) SCC 497 : 2009 (4) JT 1(2) : 2009 (3) Scale 695 : 2009 (4) SCR 12 : 2009 (3) SLT 77.

Acquittal of Co-accused.—It is also not a case where the testimonies of the eye-witnesses had been totally disbelieved. Benefit of doubt has been given only because the testimonies of the witnesses in regard to the place of assault on the person of the deceased were not corroborated by the medical evidence. The High Court failed to notice that all the accused persons were charged of having common object of causing murder. A few of them might have taken active part and others might have aided and abated the commission of the offence. It is, however, neither possible nor necessary to delve into the said question as the State has not filed any appeal questioning the correctness of the said order. The fact, however, remains that both the Courts below have placed implicit reliance on both witnesses. We see no reason to take a different view.

The second contention of the learned counsel, in our opinion, is also without any merit. It may be true that all the five accused persons were said to have a common object; they were punished under Sec. 302/149 of the IPC; but the same would not mean that only because three of them were given benefit of doubt on a premise which may not be wholly correct, no case of common intention has been made out against the appellants. They came together armed. They had threatened the deceased. They went back together. It has not been established that the appellants herein had in any way been prejudiced by non-mentioning of Sec. 34, of the IPC in the concluding portion of the judgments of the High Court.

The High Court, on a plain reading of its judgment has attributed common intention on the part of the appellants in committing the aforementioned crime. Their conviction under Sec. 302/34, therefore, was justified. In absence of any prejudice having been shown on the part of the accused, this Court on such technicalities alone would not interfere with the impugned judgment. *Prem Singh vs. State of Haryana*, AIR 2009 SC 2573 : 2009 (7) SCR 1142 : 2009 (8) JT 185 : 2009 (7) Scale 637.

The allegation was that accused had stolen the ornaments of deceased and killed her while she was alone in the house. The circumstance that he was seen in the house of deceased on that particular day and had taken some money on loan from her was not sufficiently established. The conviction was not proper and accused was held entitled to the acquittal as links in chain of circumstances were missing. *Kanti Lal* v. *State of Gujarat*, 2003 Cr LJ 850 (SC) : AIR 2003 (SC) 684 : 2002(10) SCC 39 : 2002(8) Supreme 629 : 2003(1) Crimes 6 (SC).

If a person is sentenced to imprisonment, even if it be for life, and subsequently it is found that he was innocent and was wrongly convicted, he can be set free. *Mohd. Farooq Abdul Gafur vs. State of Maharashtra*, 2009 (11) JT 47 : 2009 (11) Scale 327 : 2009 (6) SLT 676.

If certain persons are given benefit of doubt and are acquitted, that does not mean that others whose involvement in crime was proved should also be extended benefit of doubt. Their acquittal was set aside and conviction order of Sessions Judge was confirmed. *State of UP* v. *Rashid*, 2003 Cr LJ 2011 (SC) : AIR 2003 (SC) 1243 : 2003(9) SCC 449 : 2003(2) Supreme 743 : 2003(2) Crimes 65 (SC).

The appellant tried to extinguish the fire of Aruna and during the process, she suffered burn injuries. The appellant's stand in her statement under Sec. 313 of the Criminal Procedure Code, 1973 is that Aruna herself set her on fire and appellant tried to extinguish the flames and in the process sustained certain burn injuries and she has been falsely implicated out of the victim's grudge towards her.

It appears that the injuries on the appellant are very insignificant. She sustained only 4-5% burn injuries that too not on her palm but near her elbow. Neither the trial Court nor the High Court accepted the defence plea and it is also difficult for us to accept the same. *Jaishree Anant Khandekar vs. State of Maharashtra*, 2009 (2) Crimes 23 (SC) : 2009 (11) SCC 647 : 2009 (4) Scale 172(2) : 2009 (4) JT 198 : 2009 (2) Supreme 639 : 2009 (4) SCR 992 : 2009 (3) SLT 282 : 2009 (2) JCC 1461.

Where prosecution version was not inspiring confidence and there were interested prosecution witnesses and previous enmity was also established the conviction was not sustainable. *Rama* v. *State of U.P.*, (1995) 1 Crimes 468 : 1995 (32) ACC 113 (Alld).

Examination—Not putting relevant questions under Sec. 313—No incriminating materials were put to the accused under Sec. 313 of the Code. There is no accusation specifically put in question during examination as quoted above. It only refers to victim of kidnapping. So far as the Question No. 3 is concerned same relates to PW. 10. He did not say that he had seen gun fired by the appellant.

Above being the position the appeal deserves to be allowed. It is a matter of regret and concern that the trial Court did not indicate the incriminating material to the accused. Sec. 313 of the Code is not an empty formality. There is a purpose behind examination under Sec. 313 of the Code. Unfortunately, that has not been done. Because of the serious lapse on the part of the trial Court the conviction as recorded has to be interfered with. Conviction recorded by the High Court is set aside. *Ranvir Yadav vs. State of Bihar*, 2009 CrLJ 2962 : 2009 (2) Crimes 434 (SC) : 2009 (6) SCC 595 : 2009 (7) Scale 60 : 2009 (7) SCR 653.

Where the accused was last seen in company of deceased or that deceased's shoes were recovered at the instance of accused it would not be sufficient to advance prosecution case. *State of Madhya Pradesh* v. *Ashok Kumar*, 1995 MPLJ 32 (MP).

In the first dying declaration recorded by a Nayab Tehsildar, it has been clearly stated that she tried to set herself ablaze by pouring kerosene on herself, but in the subsequent declaration, recorded by the another Nayab Tehsildar, a contrary statement was made. It appears that one dying declaration earlier was made before the Doctor. The trial Court referred to the evidence of Dr. Chaturvedi who stated that the deceased was admitted on bed No. 8, but the father of the deceased stated that her daughter was admitted on some other bed number.

The trial Court and the High Court came to abrupt conclusions on the purported possibility that the relatives of the accused may have compelled the deceased to give a false dying declaration. No material was brought on record to justify such a conclusion. The evidence of the Nayab Tehsildar who recorded Exh. D4 was examined as PW. 8. His statement was clear to the effect that nobody else was present when he was recording the statement. That being so, in view of the apparent discrepancies in the two dying declarations it would be unsafe to convict the appellant. *Heeralal vs. State of Madhya Pradesh*, 2009 CrLJ 2787 : 2009 (12) SCC 671 : 2009 (4) JT 115 : 2009 (3) Scale 715 : 2009 (4) SCR 283.

Where the conviction was based on the testimony of sole eye-witness, there was material contradiction in the statement of single eye-witness as his testimony was not corroborated by evidence, the motive was not proved and there was alleged enmity between accused and eye-witness, conviction was held liably to be quashed. *Beswa and others* v. *State of Rajasthan*, 1994 RCC 455 (Raj).

Dead body was recovered from the well. There was no direct evidence. Evidence of father of deceased lady on behalf of prosecution was not relied upon by trial Court. There was no sufficient evidence to conclude that respondents were guilty. It was concluded that when two views are possible and one is taken by trial court in acquitting accused acquittal cannot be interfered with. *State of Rajasthan* v. *Bhoja*, (1995) 1 RC 257 (Raj).

The alleged eye-witness did not disclose the name of assailants and he was a related witness. Further the author of FIR *'B'* was not examined. The contention that he was suffering from mental breakdown, was not substantiated. Hence the trial court was justified in recording acquittal of respondent. *State of M.P.* v. *Narayan*, 1994 Cr LR 170 (N) (MP).

There cannot be an acquittal merely on account of the fact that FIR is no substantive evidence by itself. *Sununga Malik* v. *State*, (1995) 2 CCR 285 (Ori).

The Trial Court had examined the evidence on record thoroughly and correctly. There were no good reasons to differ from views of trial court. Hence order of acquitta was sustainable. *State of Rajasthan* v. *Mohd Sahid*, (1994) 2 Crimes 363 : 1994 Cr L 391 : 1994 R Cr C 361 (Raj).

Where dead body could not be identified. Conviction was not justified and was acquitted. *Kuldeep Singh* v. *State of Haryana*, (1994) 2 CC Cases 156 (P&H).

It was alleged by deceased that her mother-in-law set her on fire by chimney in her back. There were no burn injuries on back of deceased. The appellant mother-in-law also sustained burn injuries on her both palms. It seems that she tried to extinguish fire. In absence of any burn injuries on back of the deceased it cannot be said that accused put her ablaze from backside. Hence, prosecution failed to establish guilt of the accused. *Kamlabai Dattatraya Gaikwad* v. *State of Maharashtra*, 1995 BCrC 474 (Bom.).

Homicidal death not proved beyond doubt. There was existence of the possibility of the accidental death—Acquittal of the accused proper. *Balram Prasad Agarwal* v. *State of Bihar*, 1995 East Cr C 391 (Pat).

Where there being discrepancy between evidence of eye-witness and medical evidence. Acquittal of accused was held justified. *State of Karnataka* v. *Revakka* alias *Mudakappa*, (1995) 3 Ker LJ 451 (Karn.) (DB).

Occurrence report was sent to Magistrate on third—Nothing to show whether report was actually sent and received by Magistrate and if so on what date and time.—Articles seized but put to identification after more than a month—Fard bayan and FIR not lodged or recorded at time and hour mentioned in FIR—Fard bayan and FIR not recorded till police raided house of accused and seized articles—Material witnesses all relatives of deceased—Concurrent findings of both courts below—Conviction set aside. *Arjun Marik* v. *State of Bihar*, 1994 (1) Crimes 777 (SC) : 1994 Supp(2) SCC 372 : 1994(2) JT 627 : 1994(1) UJ 610 : 1994(1) Scale 821 : 1994(2) CCR 445 (SC).

In spite of strong suspicion if prosecution has failed to establish its case of murder and defence case is found possible, conviction by making a third story is not justified and accused is entitled to acquittal. *Archi Nawal Kishore Kujur* v. *State of Bihar*, (1995) 1 East Cr C 548 (Pat).

The prosecution failed to disclose the complete and true story. There were several omission and contradictions in the evidence. The medical report did not corroborate the oral evidence. The empty shells of the pistol did not match with the test shots fired from pistol so recovered. Conviction was held not sustainable. *Bhani Ram* v. *State of Rajasthan*, 1995 Cr LR 245 (Raj).

There were material contradictions in statement of prosecution-witnesses. No proper investigation was conducted. The conviction was based only on examination-in-chief and was bad and hence set aside. *Prem* v. *State of U.P.*, 1995 JIC 804 (Alld).

Case based on eye-witness account—Prosecution case suffering from several discrepancies—Unexplained delay in sending FIR to the Court.—Minor misreading of one of the statements of the witnesses does not impair the verdict recorded by trial Court. Verdict of acquittal not be converted into conviction unless the judgment suffers from perverse reasoning. Hence there found no error acquitting the accused. *State of Madhya Pradesh* v. *Gyarsu*, (1995) 2 Crimes 343 (MP).

Two respondents were present and indeed their mere presence by itself cannot be of criminal nature in the sense that by their mere presence a common intention can not be attributed to them. Indeed, they have not done anything. No overt act is attributed to them though it was tried to be claimed by one of the witnesses that when the police party reached that they were standing on one leg. This also appears to be a tall claim without any basis and the High Court has rightly not believed this story which was tried to be introduced.

There can be no dispute that the specter of superstition had affected the psyche of all these accused persons. The case of the Shahrunnisa (A-3) is one of a Mohammedan lady whose husband and daughter were overpowered by the superstitious belief. The force of the superstition was so overpowering that A-1 and A-2 probably were convinced of the non-existent supernatural powers of A-2. A poor Mohammedan lady coming from the humble background, whose husband and whose daughter claimed these powers could not have ordinarily opposed which was being done and, therefore, had to see with open eyes the death of her two sons. We do not think that her not opposing the gruesome acts speaks in favour of her nurturing the common intention. The High Court was undoubtedly right that she could be afraid of A-1 and A-2 has she herself might be under the superstitious psyche.

It is bane of the Indian society that in search of some worldly gains, the society becomes superstitious and blindly follows the path which leads only to desolation. Number of lives are lost and number of families are destroyed because of this false belief in the so-called black magic and so-called supernatural powers. All this is a result of the total lack of education and human avarice. It is for this reason that we agree with the findings of the High Court. Even the case of the 4th respondent is no different. True it is that he was a police Constable, but the fact is that he has not committed any overt acts. Again it is his own wife who claimed all the supernatural powers and went on to commit the horrible acts of un-paralleled cruelty against the two innocent boys. True it is that it was his duty to stop the crime from being committed but inaction on his part would not by itself make him join the company of the guilty accused. This is apart from the fact that he has not been asked about his duty in his examination. In fact, the whole prosecution is strangely silent about the aspect of Sec. 221 IPC nor was such charge ever levelled against him.

We are dealing with an appeal against acquittal where the law so far crystallized desists us from fact finding exercise. Though, the whole evidence is open for us to appreciate the finding of acquittal that too by the High Court has to be given its own weight. We have, therefore, gone through the evidence ourselves only to find that the evidence against the two respondents is not clinching enough and it cannot be said that the finding of the High Court is perverse or such as cannot be reached after reasonable and careful survey of the evidence. A suspicion by itself cannot take place of the proof much less in an appeal against acquittal. The law requires hard facts duly proved by admissible and truthful evidence. In case where the High Court has recorded the finding of acquittal giving benefit of doubt, unless such a finding was an impossible one, the interference at this stage is not feasible. We, therefore, would agree with the High Court, though with a heavy heart. *State of Uttar Pradesh vs. Sahrunnisa*, AIR 2009 SC 3182 : 2009 CrLJ 4151 : 2009 (9) Scale 170 : 2009 (9) JT 16 : 2009 (6) SLT 47 : 2009 (10) SCR 237.

Absence of evidence with regards to infliction of the fatal injury by the accused—Eye-witnesses giving different versions on different occasions—Absence of motive—prosecution evidence not inspiring confidence—Conviction quashed in appeal. *Ram Pal v. State of Rajasthan*, (1994) 1 C CR 157 (Raj).

This Court wish the expert would have been forthright in her view in regard to the cause of death. A different conclusion was required to be arrived at keeping in view the fact that a large number of symptoms were absent which ordinarily point out to the cause of death of asphyxia by smothering. Most of the symptoms noticed by Modi should have remained present.

There was frothy fluid discharge of blood from mouth and nose. However, no frothy fluid blood was found on the pillow. It may not be imperative but that could have been a lead to a fairly definite opinion. It is in the aforementioned situation, the learned Sessions Judge opined that death might not have been caused by asphyxia.

The learned Judge noticed that witness was specific in her statement that paleness in the brain could not have been noticed as it had liquefied by that time. It was also found that witness had deviated from her earlier opinion and stated that it was not correct to say that no opinion of cerebral anoxia could be given or arrived at in the case of liquefaction of the brain. No saliva, blood and tissue cells were found in the pillow; no scratches, distinct nail marks, or laceration of the soft parts of the victim's face was noticed. It was not brought to notice that pillow was a soft one or not. No bruising or laceration was found in the lips, gums and tongue. The conduct of the accused that he had all along been present and the opinion of the Doctor did not satisfy the tests laid down in the authoritative book of Modi.

The High Court, on the other hand, while noticing only a part of the said tests proceeded on the premise that those symptoms spoken to by her in her evidence were not noted by her in the post-mortem report. Apart from the fact that the quotation from Modi does not take into consideration all the symptoms noted therein, a wrong test was applied that all the features in a given case would not be available where the body is burnt after killing, which is not the case herein. Despite noticing that some of the usual symptoms that would be available in the case of death due to asphyxia by smothering were necessary still a purported formal opinion was arrived at that the prosecution had definitely established the cause of death. *Subramaniam vs. State of Tamil Nadu*, 2009 CrLJ 3002 : 2009 (3) Crimes 140 (SC) : 2009 (7) JT 403 : 2009 (7) Scale 317 : 2009 (4) Supreme 788 : 2009 (4) SLT 384 : 2009 (9) SCR 725.

SHO taking 19 days in obtaining statement of eye-witnesses and no explanation for delay given—Prosecution evidence doubtful regarding presence of eye-witness—Hence prosecution failed to prove the case beyond shadow of reasonable doubt. Conviction set aside. *Jhillar* v. *State*, 1995 (32) ACC 669 (All).

Acquittal by High Court—When no sustainable. There was practically no cross examination on the assault part. So far as fixing of the axe on the head is concerned, unnecessary importance appear to have been attached to the same. As a matter of fact the conclusion of the High Court is erroneous because PW-4 in his evidence has categorically stated that the deceased was having injury on his body due to assault by means of axes. One axe was found inserted in the bone of head near the left ear. The handle of that axe was in a broken condition. According to the evidence the axe was inserted near about 4 to 5 inches in the head. Thereafter, all the three accused persons ran way from the spot. The motive indicated was that the deceased was having a illicit relationship with another lady and, therefore, the family members of the wife were upset. The High Court has come to an absurd conclusion that the eye witnesses PWs. 3

and 6 gave account of 4 to 5 external injuries but the witnesses did not utter a single word about remaining 15 injuries. The High Court came to the conclusion that if at all these two witnesses witnessed the incident from a short distance then it was not explained as to why they were not able to account for the remaining injuries which were found on the body of the deceased. A witness who witnesses an attack on another by three persons armed is not supposed to go on counting number of assaults on the parts of the body where the injuries were inflicted. They had categorically stated about the external injuries 1, 4, 8, 14 and 18. It is noticed that PWs. 3 and 4 came running after hearing shout of the deceased. So it was possible that they had not noticed the injuries which were earlier sustained due to assaults. They appeared at the spot when the assault was continuing. As a matter of fact, in his cross examination PW-4 had stated that on hearing shout of the deceased he rushed towards him and reached there within a short time. When he reached at the spot of incident, at that time the deceased was lying on the ground having injuries on his person. As noted above, there is practically no cross examination of any of the eye witnesses *i.e.* PWs. 3, 4 and 6 on the assault part. *State of Maharashtra vs. Prakash Sakha Vasave*, AIR 2009 SC 1636 : 2009 (11) SCC 193 : 2009 (1) JT 621 : 2009 (1) Scale 713 : 2009 (1) SCR 450 : 2009 (1) Supreme 531.

When the prosecution witnesses of fact are not reliable and their statements are not sufficient to establish that they were actually present at scene of occurrence and that the murder was committed at the time alleged. Appellants held entitled to acquittal. *Nirottam* v. *State of U.P*, 1995 (32) ACC 265 (All).

Acquittal—Failure to hold Identification parade—Conviction on basis of identification for the first time in Court.

None of the prosecution witness knew any of the accused-appellants. However, in Column No. 2 of the FIR, not only their names but also their parentage and complete addresses were stated. It is, however, not clear as to whether the name of the accused Hemu was recorded in the said FIR or not, the translated version thereof has been placed before us.

Appellants herein admittedly were not known to the police officers. Only Sattey was known to them. PW. 1 Anoop Singh in his deposition categorically admitted that he did not know the assailants previously. After their arrest, no identification parade test was held. Although the first informant as also witnesses in their depositions proceeded on the basis that all the accused had been coming in a Maruti Car and they were heavily armed, no arm was recovered from any of them.

How their names could be taken is beyond anybody's comprehension. Even two persons, namely, Lilu and Vinod were called by their first names. How the Officer In-charge even could ascertain their actual names has not been disclosed. He admitted that apart from Sattey, he had not seen any accused persons on previous occasion. Why despite the same, identification parade was not held has not been explained. Appellants were identified only in Court.

Mr. Rajeev Gaur 'Naseem' learned Counsel appearing on behalf of the State would contend that identification for the first time in Court is permissible in law.

There cannot be any dispute so far as the aforementioned proposition of law is concerned. The said principle, however, should be applied having regard to the facts and circumstances of each case. Courts, as is well known, ordinarily, do not give much credence to identification made in the Court for the first time and that too after a long time.

In the present case, PW. 1, 2 and 3 in their depositions admitted that they had not been knowing the accused from before the despite so, no test identification parade was held. The accused persons having been identified for the first time in the Court, it is difficult for any Court to rely upon the same and that too after such a long time.

As indicated hereinbefore, appellants were not known to the police officers; they were not involved in any other case. In fact, so far as the Hemu is concerned, no case at the relevant time was pending against him. Only because Sattey allegedly called them by their names, which appears to be wholly unlikely, they could not have been identified particularly in view of the fact that the incident had taken place in an isolated area and that too on a dark night.

Sattey furthermore could not have been instrumental in murdering Lasker Singh. Lasker Singh died of a firearm injury shot from a service revolver, *i.e.*, at the hands of the police party only. Such a revolver, thus, was not and could not have been used by any of the accused persons. *Hem Singh vs. State of Haryana*, 2009 (6) SCC 748 : 2009 (7) JT 433 : 2009 (6) Scale 784 : 2009 (7) SCR 888 : 2009 (4) Supreme 338 : 2010 (1) SLT 126.

Solitary eye-witness being the mother of the deceased—Absence of name from rukka sent by doctor to police station immediately after the arrival of the dead body in the hospital created doubt about her presence at the place of occurrence at the time of the incident—Identification at the time of post mortem not to cure the defect of absence from rukka. Delay in sending special report to Magistrate—Post-mortem report also contradicting. Statements of the witness. *Held* that in view of the infirmities prosecution not able to establish the case beyond a reasonable doubt, hence conviction and sentence cannot be sustained. *Sukhwant Singh* v. *State of Punjab*, 1995 SCC (Cr) 524 : (1995) 3 SCC 367 : 1995 Cr R 473 (SC) : 1995 AIR (SC) 1601 : 1995 (3) JT 495 : 1995 (2) Scale 482 : 1995 (2) UJ 29 : 1995 (2) SCJ 181.

During scuffle death was caused by blows. There was evidence as to witnessing of the incident. Accused had pleaded false implication. It was found that there was enmity between accused and deceased and there was unexplained delay in FIR. Wife admitted presence of herself and two witnesses watching two accused assaulting her deceased husband but they did not prevent accused. Presence of these two witnesses was not stated in FIR. There was variations in versions about place where deceased was found. It was held. that circumstances falsify versions of wife and two witnesses. Hence accused was acquitted. *Mariappan* v. *State*, 1994 Cri LJ 749 (Mad).

There was material contradiction as to place of incidence in evidence of PW 2. There was no light in and around place of incidence, hence the claim of PW 2 that he identified the miscreants and seen the incident was wholly unacceptable and not creditworthy. Hence conviction was set aside. *Shahbuddin Abdul Khaliq Sheikh* v. *State of Gujarat*, 1995 JCC 681 (SC) : 1995 SCC (Cr) 690: (1995) 3 CCR 33 (SC) : 1995 (Supp (2) SCC 441 : 1995 (3) JT 456 : 1995 (2) Scale 647.

Allegation against the accused that they caused injury by fire arms Eye-witness examined and statement recorded in delay—No proper explanation—Conviction was not justified. Acquittal order passed. *Basudeo* v. *State of U.P.*, 1994 JIC 927 (All).

The conviction of the accused on the basis of suspicion is not proper. *M. Abbas* v. State *of Karnataka.* (1995) 4 CCR 682 (Kant).

Where the evidence adduced was neither clear or cogent, nor was independent and credit-worthy, accused was held entitled to acquittal. *Brij Nandan Rai* v. *State of Bihar*, (1995) 1 CCR 769 (Pat).

Accused alleging to have killed his wife by axe-blow and his son by gun fire—Wife and son's family living separately from accused—Trial Judge observed that accused should have proved his innocence—Criminal justice requires prosecution to prove its case first and only then defence version to be looked into—Such principle not observed by trial Court. Hence conviction set aside, appellant acquitted of charge. *State of Rajasthan* v. *Sher Singh*, 1994 RCC 1 : 1994 Cr LJ 904 (Raj).

When defence version that deceased was dead drunk is supported by medical evidence which is reliable and contradicts ocular account of eye-witnesses, accused was acquitted. *Dharmendar* v. *State of Haryana*, (1995) 2 CC Cases 177 (P & H).

When evidence of eye witnesses was doubtful and FIR was lodged after considerable delay with no satisfactory explanation, conviction of accused was set aside. *Mela Singh* v. *State of Punjab*, 1996 Cri LJ 3695 (P&H).

Supreme Court set aside acquittal after 7 years and death sentence imposed—Death sentence commuted to imprisonment for life in view of passage of time. *State of U.P.* v. *Abdul*, 1997 (5) JT 265.

81. Duty of Judge not passing sentence of death.—If a trial Judge does not think it proper to pass a sentence of death upon the accused who is convicted under Section 302, IPC, he to bound to record reasons why a sentence of death was not passed upon him, that is to say, he must find that there are extenuating circumstances and not merely an absence of aggravating circumstances. 154 Ind Cas 691 : 36 Cr LJ 529 : 1935 OWN 321 : 1935 Cr C 547 : 1935 Oudh 265. It is the duty of the judge to consider first of all on a charge under this section whether the case is not murder as defined in Section 300, and if he considers that it does not fall within the definition to give his reasons. AIR 1942 Oudh 368 : 43 Cr LJ 634 ; AIR 1938 Sind 63 : 39 Cr LJ 460.

Rarest of rare. The accused persons were not criminals. They were friends. The deceased was said to have been selected because his father was rich. The motive, if any, was to collect some money. They were not professional killers. They have no criminal history. All were unemployed and were searching for jobs.

Further if age of the accused was a relevant factor for the High Court for not imposing death penalty on accused Nos. 2 and 3, the same standard should have been applied to the case of the appellant also who was only two years older and still a young man in age. Accused Nos. 2 and 3 were as much a part of the crime as the appellant. Though it is true, that it was he who allegedly proposed the idea of kidnapping, but at the same time it must not be forgotten that the said plan was only executed when all the persons involved gave their consent thereto.

It must be noted that the discretion given to the Court in such cases assumes onerous importance and its exercise becomes extremely difficult because of the irrevocable character of death penalty. One of the principles which we think is clear is that the case is such where two views ordinarily could be taken, imposition of death sentence would not be appropriate, but where there is no other option and it is shown that reformation is not possible, death sentence may be imposed.

Sec. 354(3) of the Code of Criminal Procedure requires that when the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons thereof.

We do not think that the reasons assigned by the Courts below disclose any special reason to uphold the death penalty. The discretion granted to the Courts must be exercised very cautiously especially because of the irrevocable character to death penalty. Requirements of law to assign special reasons should not be construed to be an empty formality.

We have previously noted that the judicial principles for imposition of death penalty are far from being uniform. Without going into the merits and demerits of such discretion and subjectivity, we must nevertheless reiterate the basic principle, stated repeatedly by this Court, that life imprisonment is the rule and death penalty an exception. Each case must, therefore, be analyzed and the appropriateness of punishment determined on a case-by-case basis with death sentence not to be awarded save in the *'rarest of rare'* case where reform is not possible. Keeping in mind at least this principle we do not think that any of the factors in the present case discussed above warrants the award of the death penalty. There are no special reasons to record the death penalty and the mitigating factors in the present case, discussed previously, are, in our opinion, sufficient to place it out of the *"rarest of rare"* category.

For the reasons aforementioned, we are of the opinion that this is not a case where death penalty should be imposed. The appellant, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous imprisonment for life. *Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra,* 2009 (6) SCC 498 : 2009 (7) JT 248 : 2009 (9) SCR 90 : 2009 (7) Scale 341 : 2009 (4) Supreme 235 : 2009 (5) SLT 166.

Death sentence—Imposition—Considerations.—In a death sentence matter, it is not only the nature of the crime but the background of the criminal, his psychology, his social conditions and his mindset for committing the offence are also relevant. See also *Ravji alias Ram Chandra v. State of Rajasthan,* [1996 (2) SCC 175 : AIR 1996 SCW 132], this Court held as under:

> "...The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal"...."

Dilip Premnarayan Tiwari & Anr vs State of Maharashtra, 2009 AIR SCW 7592 : AIR 2010 SC 361 : 2010 CriLJ 905 (SC) : 2009 (15) JT 1 (SC) : 2009 (14) Scale 489 (SC) : 2009 (8) Supreme 108 (SC) : 2009 (9) SLT 1 (SC) : 2010 (1) Crimes 3 (SC).

Both the sides were armed with deadly weapons, the case is not worth consideration, for award of a sentence graver than the life imprisonment, that is to say the death penalty. *Rahul Singh vs. State of H.P.*, 2010 (3) Cri LJ 3117 (HP).

Imposition of death sentence—Absence of guidelines in IPC.—In absence of guidelines laid down in IPC, generally judicial discretion of Court is guided by principle that punishment should be commensurate with gravity of offence having regard to aggravating and mitigating circumstances *vis-a-vis* an accused in each case. In such situation, obligation of Court in making choice of death sentence for person who is found guilty of murder becomes more onerous indeed. *State of Punjab vs. Manjit Singh*, AIR 2009 SC 2888 : 2009(8) Scale 622 : 2009(8) JT 482. : 2009(5) SLT 480.

Imposition of Death sentence—Social issues—Multiple murders, outcome of inter-caste marriage.—Sushma was the younger sister of this accused and it is a common experience that when the younger sister commits something unusual and in this case it was an inter-caste, inter-community marriage out of the secret love affair, then in the society it is the elder brother who justifiably or otherwise is held responsible for not stopping such affair. It is held as the family defeat. At times, he has to suffer taunts and snide remarks even from the persons who really have no business to poke their nose into the affairs of the family. This was further aggravated because of the so-called higher status of a Brahmin family on the part of Dilip and so-called non-Brahmin status of Prabhu. It has come on record that Sushma was moved to Andheri at the house of Shashidharan and this ought to have added as a spark which resulted in tornado. Dilip undoubtedly was a young person not even having crossed his 25 years of life and not having any criminal antecedent. If he became the victim of his wrong but genuine caste considerations, it would not justify the death sentence. The murders were the outcome of social issue like a marriage with a person of so-called lower caste. However, a time has come when we have to consider these social issues as relevant, while considering the death sentence in the circumstances as these. The caste is a concept which grips a person before his birth and does not leave him even after his death. The vicious grip of the caste, community, religion, though totally unjustified, is a stark reality. The psyche of the offender in the background of a social issue like an inter-caste-community marriage, though wholly unjustified would have to be considered in the peculiar circumstances of this case.

No doubt, the murder was brutal. However, it has been pointed out that this was not a diabolic murder nor had the murderers acted in depravity of their minds by disfiguring the bodies. The incident must have taken place barely within 10-15 minutes when they came, assaulted the family members and left. True it is that the two ladies who were assaulted were helpless and so were Krishnan and Prabhu. But when we weigh all the circumstances, particularly, about the mindset of Dilip, the cruel acts on the part of the accused would not justify the death sentence. The disturbed mental feeling or the constant feeling of injustice has been considered by this Court as a mitigating circumstance in *Om Prakash v. State of Haryana*, 1999 (3) SCC 19, where the accused had committed the murder of seven persons. That is also an indicator to the fact that mere number of persons killed is not by itself a circumstance justifying the death sentence. In a death sentence matter, it is not only the nature of the crime but the background of the criminal, his psychology, his social conditions and his mindset for committing the offence are also relevant. *See also Ravji alias Ram Chandra v. State of Rajasthan*, 1996 (2) SCC 175.

Once this Apex Court decide not to award the death sentence to accused No. 1. Dilip, the accused No. 3, Manoj also deserves not to be given death sentence. Even he is a person without any criminal antecedents and he appears to have joined the company of Dilip only out of his commitment as he was shown to be a resident of the same house. We, therefore, do not think that even he deserves death penalty. Accused No. 2. Sunil has comparatively a lesser role. Admittedly, he has not assaulted Krishnan or Prabhu, to begin with. Who has assaulted Prabhu and Abhayraj is still not clear, as it could also be that in the assaults the leading role could have been taken by the unknown accused. In that view, he also does not deserve the death sentence. The question is then how are these accused persons to be dealt with. Ordinarily, they would be liable to be awarded the life imprisonment. *Dilip Premnarayan Tiwari & Anr. vs State of Maharashtra*, 2009 AIR SCW 7592 : AIR 2010 SC 361 : 2010 CriLJ 905 (SC) : 2009 (15) JT 1 (SC) : 2009 (14) Scale 489 (SC) : 2009 (8) Supreme 108 (SC) : 2009 (9) SLT 1 (SC) : 2010 (1) Crimes 3 (SC).

Imposition of Death sentence—When permissible?.—It needs to be reiterated that the choice of the death sentence has to be made only in the rarest of the rare cases and that where culpability of the accused has assumed depravity or where the accused is found to be an ardent criminal and menace to the society and; where the crime is committed in an organized manner and is gruesome, cold-blooded, heinous and atrocious; where innocent and unarmed persons are attacked and murdered without any provocation. *State of Punjab vs. Manjit Singh*, AIR 2009 SC 2888 : 2009 (8) JT 482 : 2009 (8) Scale 622 : 2009 (9) SCR 864 : 2009 (5) SLT 480.

Death sentence—Many persons murdered not by itself sufficient to justify death sentence.—When we weigh all the circumstances, particularly, about the mindset of Dilip, the cruel acts on the part of the accused would not justify the death sentence. The disturbed mental feeling or the constant feeling of injustice has been considered by this Court as a mitigating circumstance in *Om Prakash v. State of Haryana*. [1999 (3) SCC 19] where the accused had committed the murder of seven persons. That is also an indicator to the fact that mere number of persons killed is not by itself a circumstance justifying the death sentence. In fact in one other case reported as *Ram Pal v. State of U.P.* 2003 (7) SCC 141, total 21 persons were killed as the accused trapped them in a house and burnt the house. *Dilip Premnarayan Tiwari & Anr vs State of Maharashtra*. 2009 AIR SCW 7592 : AIR 2010 SC 361 : 2010 CriLJ 905 (SC) : 2009 (15) JT 1 (SC) : 2009 (14) Scale 489 (SC) : 2009 (8) Supreme 108 (SC) : 2009 (9) SLT 1 (SC) : 2010 (1) Crimes 3 (SC).

Death sentence—Number of deaths—Not determinative factor for awarding death sentence.—So far State's appeal as regards sentence is concerned, it is to be noted that number of deaths in a case would not be the determinative factor for awarding the death sentence. Even in the case of single victim death sentence can be awarded taking into consideration the circumstances of the case. In the instant case looking to the background facts it cannot be said that the High Court by altering the sentence from death to life has acted inappropriately. *Aqeel Ahmad v. State of U. P.*, AIR 2009 SC 1271 : 2008 (17) SCR 1330 (SC) : 2009 (1) JT 136 (SC) : 2008 (16) Scale 251 (SC) : 2009 (2) SLT 11 (SC).

Death sentence—Rarest of rare cases.—Extreme poverty had driven the appellant to commit the gruesome murder of three of his very near and dear family members - his wife, minor son and daughter.

There is nothing on record to show that appellant is a habitual offender. He appears to be a peace loving, law abiding citizen but as he was poverty stricken, he thought in his wisdom to completely eliminate his family so that all problems would come to an end. Precisely, this appears to be the reason for him to consume some poisonous substances, after committing the offence of murder. No witness has complained about his bad or intolerable behaviour in the past. Many people had visited his house after the incident is indicative of the fact that he had cordial relations with all. He is now about 35 years of age and there appear to be fairly good chances of the appellant getting reformed and becoming a good citizen.

Thus, looking to the matter from all angles and after giving our serious consideration to the whole matter, we are of the opinion that it is not a fit case where it would fall within the category of "rarest of rare case" and, therefore, death sentence as awarded to him by learned trial Judge and confirmed by High Court deserves to be set aside and quashed and is accordingly done so by us instead he is held guilty of commission of offence under Sec. 302 of the IPC on three counts and is awarded life imprisonment for the same. *Sushil Kumar vs. State of Punjab*, AIR 2010 SC 832.

82. Evidence and proof.—The fact of murder was admitted of no doubt. The main evidence for the prosecution and the sole evidence connecting the accused with the murder was that of two brothers whose evidence was uncorroborated in material particulars and unreliable. The villagers were well aware of the identity of the murderers, but whether it was because the real murderers were public favourites or the deceased was unpopular no evidence was forthcoming. AIR 1929 Pat 527 : 1929 Cr C 287. Even in the absence of medical evidence a conclusion that a person was poisoned could be a good conclusion. When the other evidence read with the medical evidence points to such a conclusion it is necessary to consider the question of motive. 6 OWN 681 : 119 Ind Cas 870 : 30 Cr LJ 1118 : AIR 1929 Oudh 516. Where the accused were proved to have removed to corpse partly with the intention of shielding themselves and partly with the intention of screening the offenders and there was no definite evidence to the effect that they were present at or bad taken part in murder, *held* that they could only be convicted under Section 201. IPC. 6 OWN 1017. Where the accused were seen in number and the assessors were of opinion that some of them were not guilty while others were held to be guilty although the evidence against them was nearly the same and it appeared that the evidence was most unsatisfactory and the truth had been kept back. *Held*, that under those circumstances it was not proper to convict some of the accused under Section 302, IPC. 30 PLR 536. The evidence against the accused who was charged with murder was as follows :—It was proved that the accused had conceived an enmity against the deceased. It was further proved that the accused was seen by two witnesses, on the night of the alleged murder digging in the rectangle of the field where the body of the deceased was subsequently discovered. To those witnesses the accused explained that he was digging out the stump of a tree. It was also proved that the accused gave false information when there was a search for the deceased. And it was further proved that there was human blood upon the loin cloth belonging to the accused, although it had apparently been washed. *Held*, that on these evidence the accused can be well convicted under Section 302, IPC. 64 IA 134 : 18 Lah 371 : 168 Ind Cas 432 : 41 CWN 805 : 1937 OWN 540 : 39, PLR 426 : 38 Cr LJ 573 : 1937 MWN 633 : 1937 OLR 297 : 46 LW 33 : 1937 ALR 401 : 1937 PWN 503 : 31 SLR 300 : 39 Bom LR

960 : AIR 1937 PC 179 : (1937) 2 MLJ 684 PC. Where the evidence for prosecution points affirmatively no further than man slaughter, the law would not enlarge the proof and transform the case into one presumptively of murder. 163 Ind Cas 681 : 9 RPC 51 : 44 LW 253 : 1936 ALJ 869 : 40 CWN 1164 : 37 Cr LJ 914 : 1936 Cr C 757 : 1936 MWN 889 : 38 Bom LR 1101 : A1R 1936 PC 242. Where there is no evidences to show that the accused caused the particular injuries, out of the several injuries caused to the deceased which were sufficient in the ordinary course of nature to cause death, the accused is not guilty of murder but only of causing grievous hurt. 164 Ind Cas 967 : 37 Cr LJ 1022 : 9 RR 151 : 1936 Cr C 854 : AIR 1936 Rang 444. Where the accused was mentioned in the first report and it is proved that he had some motive for attacking the deceased and that he caused the fatal injuries, he can properly be convicted of an offence punishable under Section 302, IPC. 164 Ind Cas 154 : 37 Cr LJ 932 : 1936 OWN 603. Under Section 114 of the Evidence Act, the Court is entitled, if it appears reasonable in all the circumstances of the case, to draw an inference that an accused person committed a murder or took part in its commission, from the facts that he is found in possession of property proved to have been in the possession of the murdered person at the time of the murder. AIR 1949 Nag 277 : ILR 1949 Nag 200 : 50 Cr LJ 713. The burden is on the prosecution to establish that the act alleged to constitute murder was really the act of a person other than the deceased. AIR 1940 Mad 1 : 41 Cr LJ 269. When the conviction is based on circumstantial evidence, it must point conclusively to the guilt of the accused, and must practically exclude the possibility of murder having been committed by any other person. 40 Cr LJ 764 : 14 Luck 635 ; AIR 1938 Mad 226 : 40 Cr LJ 596. Solitary evidence of a servant coupled with the ill-feeling between the accused and the deceased is not sufficient for conviction. AIR 1938 Cal 220 : 39 Cr LJ 541. Conviction cannot be based on the evidence of a child. AIR 1938 Sind 97 : 39 Cr LJ 618. There is no presumption of law that a ligature strangulation may or must be presumed to be homicidal and not suicidal, 41 Cr LJ 389 : AIR 1940 Mad 1. No conviction can be based on the conduct of the accused. *Ibid.* The decision as to resolution to kill more often rest on legitimate inferences from the proved circumstances and the conduct of the accused. AIR 1944 PC 42 : 46 Cr LJ 394. The evidence that the accused was seen in the company of the deceased prior to murder is not sufficient to establish the charge of murder against him. AIR 1944 Cal 249 : 46 Cr LJ 131. Production of ornaments of the deceased, shortly after murder, is not sufficient to convict him under this section. AIR 1943 Bom 458 : 45 Cr LJ 221 ; *see* also AIR 1944 Mad 482 : 46 Cr LJ 227 ; AIR 1944 Lah 206 : 45 Cr LJ 660 : AIR 1942 Lah 271 : 44 Cr LJ 77 ; but *see* AIR 1942 Mad 69 : ILR 1942 Mad 148 : 44 Cr LJ 299. Conviction is not proper on the evidence of relations of the deceased alone, where there is inimical feelings between the party of the accused ~~and~~ that of the deceased. AIR 1942 Pesh 29 : 42 Cr LJ 498. Where the guilt of the accused has been proved beyond reasonable doubt by circumstantial evidence he can be convicted under this section. AIR 1941 Mad 120 : ILR 1941 Mad 340 : 42 Cr LJ 770 : see AIR 1942 Pesh 29 (2) : 43 Cr LJ 498 ; AIR 1942 Oudh 192 : 43 Cr LJ 243.

In the instant case, it was held that the evidence was liable to rejected as unreliable, first because of non-explanation of injuries on the person of the accused, secondly, because it was extremely partisan in character, thirdly because it was full of improbabilities, inconsistencies, contradictory and improvements on material particulars and lastly because it was sought to be supported by contrived and artificial discoveries. *Parshuram Bhiva Patel* v. *State of Maharashtra*, 2005 Cr LJ 3627 (Bom) : 2006(1) Bom CR (Cri) 112 : 2005(4) Bom LR 151.

The solitary eye-witness stated that he had seen accused inflicting knife injuries on deceased and drowned him in riverlet by pressing his neck in water. His conduct in neither raising alarm to attract attention of inhabitants of nearby houses nor telling about the incident to anybody at home was highly unnatural and abnormal. Medical evidence also did not support the version. It was held that the evidence of solitary eye-witness was not trustworthy and reliable and, therefore, conviction on the basis of it was liable to be set aside. *Guman Singh* v. *State of MP*, 2005 Cr LJ 4284 (MP) : 2005(4) MPHT 329.

It is not incumbent upon the prosecution to produce all the persons who happened to have gathered at the scene of murder on hearing the out cries. The production of two or three of the respectable and leading members of the place would be sufficient. But mere fact that there were some litigation between the witness and the accused does not reduce the credibility of the witness. Enmity is a double-edged weapon and what would be a reason for the murder might well be a reason for fabrication of a false case. 10 Lah LJ 229 : 112 Ind Cas 215 : 29 Cr LJ 999. Where the accused was proved to have had knowledge of the murder and he also produced certain ornaments belonging to the deceased and a confession of guilt made by the accused to the *lumbardar* on his being guaranteed immunity was also relied on. *Held*, that the evidence was sufficient to support a conviction under Section 201, and not under Section 302, IPC. 111 Ind Cas 449 : 29 Cr LJ 865 : 29 PLR 486.

The trial of an accused person does not necessarily and, if he pleads guilty but may and should be taken in cases of murder as if the plea had been one of not guilty and case decided upon the whole of the evidence including the accused's plea. It is not in accordance with the usual practice to accept a plea of guilty in a case when the natural consequence would be a sentence of death. AIR 1928 Cal 775. In the absence of any notice an accused cannot be convicted merely on his own uncorroborated confession, which he retracted at the first opportunity alleging that the confession was put into his mouth by the police who tortured him in order to include him to turn an approver 104 Ind Cas 247 : 28 Cr LJ 807 : AIR 1927 Lah 682. The fact that the accused was one of the two persons with whom the deceased was last seen alive, and the fact that he pointed out the spot where the dead body was ultimately found, are not sufficient to draw the inference that the accused was none of the actual murderers. No doubt grave suspicion attaches to him in this connection, but grave suspicion is not sufficient. 103 Ind Cas 97 : 28 Cr LJ 641 : AIR 1927 Lah 541. In a case of murder by person, mere motive of accused to cause death, of deceased, without dispense with proof. 134 Ind Cas 357 : 1932 Cr C 664 : 34 Cr LJ 754 : AIR 1944 All 294. Death must be proved to be due to arsenic poisoning administered by accused. Evidence of *post mortem* doctor that from appearance of stomach and intestines he was of opinion that death was due to arsenia poison is sufficient. AIR 1933 All 847; *see* also 142 Ind Cas 714 : 16 NLJ 35 : 1933 Cr C 1261 : 34 Cr LJ 398; AIR 1933 Nag 303. Withholding available evidence by prosecution, though likely to be treated as flaw in evidence, still each case depends upon its facts. 137 Ind Cas 691 : 33 Cr LJ 497 : 33 PLR 580 : 1932 Cr C 664 : AIR 1932 Lah 500.

Where the accused was charged of murder and convicted on evidence consisting mainly of statements made by witness suggesting that his demeanour was some what too claim when attention was drawn to the fact that his hut of grass. The scene of the occurrence was burning *Held, in* appeal that the trial judge has attached disproportionate weight to the circumstantial evidence and the conviction must be set aside as the offence had not been adequately proved. 28 PLR 27 : 99 Ind Cas 246 : 8 Lah LJ 559 : 28 Cr LJ 116 : A1R 1927 Lah 51, it is unsafe to convict a man for murder merely because a bloody axe is found in his house, when the evidence is that other people have access to the house 91 Ind Cas 1002 : 27 Cr LJ 186 : 9 NLJ 80 : AIR 1929 Nag 229. The fundamental rule by which the effect of circumstantial evidence is to be estimated is well established. In order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. 96 Ind Cas 849 : 27 Cr LJ 993. The rule as to circumstantial evidence is that it must be consistent and consistent only with the guilt of the accused if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit, AIR 1941 Bom 139 : 42 Cr LJ 697 : ILR 1941 Bom. 215 ; *see* also AIR 1941 Mad 1 : 42 Cr LJ 677 : AIR 1941 Cal 106 : ILR (1940) 2 Cal 258 : 42 Cr LJ 385 AIR 1939 Cal 539 : 40 Cr LJ 792 ; AIR 1941 Mad 416 : 42 Cr LJ 466 : ILR 1940 Mad, 1028 ; AIR 1941 Mad. 208 : 42 Cr LJ 654 ; AIR 1929 Lah 194 : 40 Cr LJ 697 : 1928 MWN 24 ; AIR 1928 Nag 52 : 29 Cr LJ 105 ; AIR 1927 Lah 127 : 28 Cr LJ 472 : 38 Cr LJ 472 : A1R 1927 Rang 8.

When a Court is not convinced that a man is dead it is impossible to convict any one of his murder. Where, however, the Court is convinced that the man was dead. death sentence may be upheld even if the body has not been found. To sustain a conviction for murder the Court must be satisfied that murder had been committed and then that the accused had committed it. 93 Ind Cas 252 : 27 Cr LJ 460 : AIR 1926 Oudh 224 ; AIR 1925 Lah 805. Where a charge is for murder of theft or both is not legitimate to presume the accused guilty of the more serious offence of murder. merely because the accused is unable or unwilling to explain the possession of stolen property. 93 Ind Cas 42 : 27 Cr LJ 294 : AIR 1925 Mad, 628. If one is satisfied that murder was committed the appropriate punishment should follow. The discovery of the body is not a material circumstance. It is murder which is the thing to be regarded, that is to say. the killing of a human being by one or more human beings without just cause, or excuse. The absence of the body is a circumstance which makes it necessary to proceed with the greatest care and caution, and one must never confirm a sentence of death, unless one feels completely satisfied about it. If there is such an element of doubt as to render a judge in the least degree uneasy. The proper course is not to change the nature of sentence from death to transportation of life, but to acquit the man altogether. 23 ALJ 821 : 89 Ind Cas 905 : 26 Cr LJ 1351 : AIR 1925 All 627 (FB). Where the Civil Surgeon and the Sub-Assistant Surgeon were unable to say what poision was actually administered and there was no evidence on the record to show that poison had been administered. *Held*, the evidence on the record was quite insufficient to establish the charge. 85 Ind Cas 817 : 26 Cr LJ 593 : AIR 1925 Lah 325. The mere fact that an accused person appears to have known where the corpse was buried does not prove that he was murderer. 89 Ind Cas 601 : 26 Cr LJ 1429. Casual witness deposing that accused informed his intention of murder should not be believed. 122 Ind Cas 587 : 31 Cr LJ 438 : 1931 Cr C 457 : AIR 1931 Pat 169. Weak evidence does not justify transportation for life but acquittal. 142 Ind Cas 841 : 13 PLT 702 : 11 Pat 807 : 1933 Cr C 253 : 34 Cr LJ 427 : AIR 1933 Pat 100 ; *see* also AIR 1933 Pat 180 : 34 Cr LJ 395 : 1933 Cr C 511 : 142 Ind Cas 613 : 14 PLT 96 ; AIR 1931 Pat 169 : 31 Cr LJ 438 : 122 Ind Cas 587. Retracted confession alone of accused is not sufficient to justify conviction of co-accused. AIR 1932 Oudh 321 : 33 Cr LJ 502 : 9 OWN 327 : 137 Ind Cas 665. To justify conviction on approver's evidence it is sufficient if corroboration is merely circumstantial evidence of accused's connection with crime. AIR 1932 Lah 621 : 33 Cr LJ 916. Conviction is not proper on dying declaration of deceased and doubtful support given to it by incredible witness. AIR 1957 Rang 451 ; AIR 1940 Pesh 40 : 42 Cr LJ 254. Merely delay in making the report is not sufficient to make a case of murder doubtful, when there are eye-witness whose statements are not vitiated by material contradiction, and improbabilities when sufficient motive has been established and when the accused has absconded immediately after the occurrence for about three years. 162 Ind Cas 500 : 37 Cr LJ 619 : 1956 Cr C 514 : AIR 1956 Pesh 106.

In a case of murder it is unsafe to rely upon the evidence of witness, who have resiled from their previous statement. If a Judge wants to rely upon the testimony of such witness the whole of the statement should be filed and not merely certain portions. The Court must be able to come to a conclusion after writing the evidence, 22 LW 405 : AIR 1925 Mad 879. Where a person pleads guilty to a charge of murder, but adds he did it out of jealousy, a conviction should take place only after hearing all the evidence, as some ground may be seen for applying Section 204, IPC, 22 ALJ 587 : 89 Ind Cas 260 : 26 Cr LJ 1516 : AIR 1925 All 647. Where the confession does not amount to an admission of murder, conviction under this section on such confession is not proper, AIR 1941 Mad 258 : 42 Cr LJ 654. Absence of marks of injury on the persons of the accused and his party shows that they were the aggressors. AIR 1942 Pesh 29 : 45 Cr LJ 491. As regards duty of the Judge as to expert evidence of foot-print, *vide* AIR 1941 Mad 88 : 42 Cr LJ 416. As regards evidence that the murdered child was born alive, *vide* AIR 1940 Mad 295 : 51 Cr LJ 569. Where the medical evidence showed that the body of the deceased bore two wounds of a penetrating nature one of which completely perforated the heart and the other penetrating the abdomen on the left side had divided the intestines. *Held,* it must be deemed that the intention of the accused was if not to cause death at least to cause such bodily injury as was likely to cause death. 7 Lah LJ 582 : 26 PLR 829. A conviction based on purely circumstantial evidence must be treated with the greatest caution and subjected to the closest scrutiny. The existence of the motive, an opportunity and the exclusion of any alternative motive could not be sufficient to support a conviction without at least some other evidence. In such cases a sentence which is irrevocable should not be passed, 76 Ind Cas 97 : 25 Cr LJ 97. The mere fact that the appellant left his house with a weapon in his hand after the deceased had left it on the night of the murder is not a very material point in connecting him with murder. AIR 1929 Lah 539. Where the prosecution theory in a murder case was presumably built on the opinion first expressed by an expert witness (Civil Surgeon) when the accused had no proper opportunity to cross-examine but who subsequently modified his opinion, the benefit of doubt was given to the accused, AIR 1923 Lah 189. Where the body though decomposed was identified by the help of clothes, height and age of the deceased and accused made confessions before witness and *Tahsildar* before whom she was produced for remand and who though had not recorded the confession under Section 164, Cr PC. deposed to it, held, that the appellant was guilty of the offence under Section 302 that there was no reason to doubt the testimony of the disinterested witness and the unanimous verdict of the assessors. AIR 1923 Lah 40.

Even if it be held satisfactorily proved that accused did give information which led to the recovery of the dead-body, that fact alone would not be sufficient to convict him with the murder, because a person may very well know where the body of murdered man has been buried without himself having joined in committing the murder 75 Ind Cas 693 : AIR 1923 Lah 415. Where the Civil Surgeon and the Sub-Assistant Surgeon .were unable to say what poison was actually administered and there was no evidence on the record to show that poison had been administered, held the evidence on the record was quite insufficient to establish the charge 1923 Lah 225. Where the body of a dead person is not clearly indentified to be that of the particular deceased a conviction cannot be based on the remaining evidence. 5 Lah LJ 417. Where a person sees a murder committed and gives no information thereof, his evidence is little better than that of an accomplice, 5 Lah LJ 322 : 1925 Lah 91. Accompanying the murderers with the deceased and returning the next day without the deceased and subsequent disappearance of accused were held to be not sufficient to prove accused's complicity in the crime of murder. AIR 1922 Lah 173. Where there is no sufficient corroboration of the approver's story the accused cannot be convicted. AIR 1922 Lah 311. Where the accused was convicted on the uncorroborated evidence of an interested witness who was a collateral though not a relative of the deceased, whose family had enmity with the accused. *Held.* it would not be safe to sustain the conviction upon the evidence of such a solitary witness. AIR 1922 Lah 76. It is safer to follow the established rule that "the fouler the crime was, the clearer and the plainer the proof ought to be". I Pat LT 684. In a case in which murder and robbery form part of one transaction, the recent and unexplained possession of the stolen property by the accused is not only presumptive evidence against him on the charge of robbery but it is also evidence against him on the charge of murder. 53 Ind Cas 841 : 20 Cr LJ 753. Before a plea of guilty is accepted in a case in which the accused is charged with murder the record should clearly show that the accused understood and admitted such facts as would bring the offence within the definition of murder and that he does not plead any of the Exceptions set out in the Penal Code. 20 Gr UJ 540 : 51 Ind Cas. 780 : 1919 UBR 137. The mere fact that an accused person is able successfully to point out the *corpus delicti* or the plunder or so forth is no proof that he was the murderer. But when an accused person is able successfully to point out not one spot but several there is a presumption that he had something to do with murder. 18 PR 1917 Cr.

Prosecution alleged the motive on the part of respondent to commit the crime as based on demands of dowry which had remained unfulfilled. This version appears to be an afterthought. It found no mention whatsoever in the first complaint lodged by father of deceased at the police station. Other evidence regarding demand of dowry etc is also scanty and does not inspire confidence. The first post-mortem report had disclosed that the cause of death was asphyxia as a result of throttling. In his evidence however, it was admitted that there was no mark of ligature or any other external injury or mark present on the neck or any other part of the body. In the second post-mortem examination conducted by the Board, it was also noticed that there was no mark or external injury present on the dead body and in the opinion of the board the cause of death was given to be asphyxia as a result of aluminum phospide poisoning and strangulation. The prosecution lead no evidence to establish that aluminum phosphide poison, which can led to fatal consequences, had ever been procured by the respondent or was in his possession or was even administered by him even if it may be presumed that he had an opportunity to administer the same, had he been in possession of it. The prosecution apparently gave up its case of death by poison and did not pursue it for reasons best known to it. It, instead, rested its case on death being caused by asphyxia due to strangulation. The absence of any external injury or marks of ligature creates a doubt about the correctness of the theory of death by strangulation. Some of the symptoms noticed by the doctors are common both if death is caused due to asphyxia caused by poisoning as well as asphyxia caused due to strangulation. There is, thus, a considerable doubt about the cause of death of the deceased. The respondent in his statement under section 313, Cr.P.C. categorically stated that the dead body of the deceased was inside the house and was not lying in front of the house. The site plan also showed that the dead body was found to be inside the house. These factors also created a doubt about the truthfulness of the prosecution case as also about the fairness of the investigating agency. Acquittal of accused was upheld. *State of Haryana v. Ashok Kumar* 2001 CriLJ 3298 : 2001 (2) East Cri C 67 : 2001 (2) SLT 469 : 2001 (42) ACC 89 : 2001 (2) A Cr R 1189 : 2001 (3) Crimes 179 : 2001 (2) BLJR 1588.

In a case of murder in which there is no direct evidence against the prisoner but only the kind of evidence that is called circumstantial, the jury have a two-fold task. The jury must first make up their minds what portions of the circumstantial evidence have been established and then when they have got that clear, they must ask themselves. "Is this sufficient proof? Do the facts proved exclude the possibility that the deed was done by some other persons ?" The jury ought not to convict if they merely think that the accused's guilt is probable. If the jury have doubts as to his guilt, he should have the benefit of the same, 7 PR 1917 Cr. Finding a number of small spots of human blood on a *dhoti* and *longyi* of accused is of very slight probative value. 65 Ind Cas 758 : 9 RR 218 : 1936 Cr C 968 AIR 1936 Rang 468. A person professing to be an eye witness is not to be believed when he has denied having recognised the culprit at the time of committing the crime, 22 PWR 1916 Cr : 17 Cr LJ 279 : 34 Ind Cas 999. A tribunal in a case of murder has to be satisfied not of the probability but of certainly beyond all reasonable doubt, that is to say doubt which would operate on the mind of a reasonable man, that accused is guilty. 17 Cr LJ 102 : 32 Ind Cas 828. It is not an invariable rule that in all cases the High Court should be convinced that there is very satisfactory proof for motive before upholding a conviction for murder passed by a Sessions Judge. 17 Cr LJ 389 : 35 Ind Cas 81.

When an accused person charged with murder is able successfully to point out not one but several spots concerned in the commission of the offence there is a presumption that he had something to do with the murder. 36 Ind Cas 838. The case against a prisoner, accused of murder of his wife, rested entirely upon the fact that he slept with his wife alone on the night of the occurrence, and in the morning she was found dead, her body showing that death was caused by strangulation. One of the witnesses deposed that the witness was, and on the previous afternoon he was seen by the other wife of the accused, who told her husband of it. This was alleged to be the cause of the murder. But the evidence was not corroborated, *held*, that although the case was one of grave suspicion, yet it was not one upon which the Court would be justified in convicting the accused. 29 Cal 483 : 6 CWN 596. Where the only evidence, against the accused, person is a bundle of cloth, which is proved and which is identified as having been stolen from a person proved to have been murdered, and there is no admissible evidence against him, upon the record to connect him more directly with the murder it is impossible to do more than convict him under. Section 411. Penal Code. 220 PLR 1913 : 19 Ind Cas 707 : 13 PWR 1913 Cr : 14 Cr LJ 275.

The fact that an accused person has been found with a gun in his hand immediately after a gun was fired and a man was killed on the spot from which the gun was fired may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. If there are two persons who answer the above descriptions, the circumstantial evidence loses its weight very substantially. Where there is no evidence which of them fired the fatal shot, and when there is no finding that they had a common intention and acted in concert and that the gun was fired in furtherance of their common intention, the legal inference from these findings must be neither of them is guilty of murder. 11 CWN 1085 : 6 Cr LJ 304. The accused set out one afternoon with his wife who had been unfaithful to him, from one village to another village. The woman was not subsequently seen alive by any one. The woman did not return to the village nor was she seen with the accused when he visited a village near about the same night or any of the places which he later on visited. The body of the woman was discovered between the two villages. The accused did not say a word about his wife from that day till his arrest. *Held*, under the circumstances of the case that there was strong circumstantial evidence that he was responsible for the death of his wife. 1936 Cr C 651 : AIR 1936 Lah 580. The fact that the accused assisted in burying the body of the murdered man and gave no explanation of this damning fact cannot, of course, prove the issue of murder, but the fact that a criminal does not explain very suspicious circumstances against him is certainly circumstantial evidence which may be taken into consideration against him. 17 Lah 547 : 38 PLR 1018.

Where the evidence against an accused person convicted of murder of a woman was that of a girl of fifteen and of a boy of thirteen years, who deposed to have seen the accused thrown the deceased down more than once, and who did not. for a long time after the event, say a word about it to any body to whom they would have naturally reported it, had it been true, *held*, acquitting the accused, that the evidence was most improbable and was not free from reasonable suspicion. 2 MLT 496 : 7 Cr LJ 216. To establish a charge of aiding and abetting another in murdering a third party, it must be proved that the alleged abettor knew of the principal's intention to murder the deceased, not merely that such abettor helped the principal in what he did. 1 UBR (1902-1903), Penal Code 5. Retracted confession can be sufficiently corroborated by presumptive evidence of murder. 43 PWR 1910 Cr : 8 Ind Cas 815 : 17 PLR 1911 : 11 Cr LJ 717. A conviction on circumstantial evidence cannot be based unless and until all the inferences to be drawn from the whole history of the case point so strongly to the commission of the crime by the accused that the defence theory appears, on the face of it, impossible or highly improbable. The general rule is that, in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. 16 FWR 1911 (Cr) : 12 Cr LJ 412 : 11 Ind Cas 596.

When the testimony of the prosecution witnesses was not only doubtful but there was no chance to consent circumstances it establish charges and the ocular evidence did not corroborate time of occurrence as then in medical evidence, the accused was held entitled to benefit of doubt. *Aman Saren* v. *State of Jharkhand*, 2006 Cr LJ (NOC) 127 (Jha).

In cases in which murder and robbery have been shown to form part of one transaction, it has been held that recent and unexplained possession of the stolen property, while it could be presumptive evidence against a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder. (1911) 2 MWN 478 : 21 MLJ 1071 : 12 Cr LJ 564.

The Accused during course of alteration assaulted deceased and even gave a threat to kill him in regard to land dispute. On next day he was found lying in injured state in a ravine near a culvert of village. Evidence that accused had earlier quarreled with deceased did not inspire the confidence. Oral dying declaration made by accused to his niece did not inspire the confidence as due to grievous head injury he was unable to speak. Apart from this FIR was also filed late and this showed that the possibility could not be ruled out that accused was roped in falsely on account of mere suspicion. The conviction of accused was set aside. *Chandra Mohan Singh* v. *State*, 2003 Cr LJ 3988 (SC) : AIR 2003 (SC) 1555 : 2003(2) SCC 492 : 2003(1) JT 377 : 2003(1) Supreme 659.

In a murder case, the Session Court on available evidence convicted the accused under Section 302/34 but the High Court acquitted them as prosecution could not prove its case beyond reasonable doubt. On appeal to Supreme Court it was found that eye-witnesses had given different version of weapons used and FIR was ante-timed. It was held that acquittal of accused in circumstances was a reasonable possible view. *State of UP* v. *Dharamraj*, 2003 Cr LJ 1522 (SC) : AIR 2003 (SC) 1555 : 2003(2) SCC 492 : 2003(1) JT 377 : 2003(1) Supreme 659.

Where most of prosecution witnesses turned hostile and doctor who conducted post-mortem was not examined and chemical report of blood found on clothes seized was not produced conviction on the basis of incomplete chain of circumstantial evidence conviction was held not sustainable. *State of Bihar* v. *Arjun Muni*, 2005 (3) East Cr C 39 (Pat).

In absence of any clinching and conclusive evidence and also complete chain of circumstantial evidence against accused, conviction not sustainable. *Shakil Ahmad* v. *State of UP*, 2004 Cr LJ 91 (All) : 2003(3) Crimes 26.

In the instant case of murder of wife the significant circumstance is the fact that the respondent had given a wrong information about the cause of death of the deceased. The medical evidence conclusively established the fact that the deceased was battered by hard and blunt object and her neck was pressed with such force that event the hyoid bone was fractured. However, the statement made by father of deceased to the Sarpanch that his son had informed him that the deceased had died after consuming pesticide, was not admissible in evidence, being hit by the rule against hearsay. It was held that the circumstance, therefore cannot, be relied upon by the prosecution to prove that the respondent had given a false explanation for the death of the deceased. *State of AP* v. *Patnam Anandam*, 2005 Cr LJ 894 : AIR 2005 SC 764 : 2005 SCC (Cri) 1225 : 2005(1) Crimes 126 (SC) : 2005(1) Supreme 97 : 2005(9) SCC 237.

In a case of murder, it is very important that the body of the person murdered should be produced and fully identified. LBR (1872-1892) 325. In a case of murder the non discovery of the body of the deceased only becomes a matter of primary importance where there is no evidence showing how the body has been disposed of, 38 PLR 43. In a case of murder by opium poisoning, the prosecution evidence that the accused put some sugar into the vessel in which milk was given to the deceased and stirred the milk with his finger after putting the sugar into it, and the deceased died a few hours afterwards, is not sufficient for convicting the accused, particularly when the motive for murder is not strong and the habit of eating opium is common among the people to which the deceased belonged. 25 PWR 191 Cr : 12 Cr LJ 484 : 12 Ind Cas 92 : 241 PLR 1911. Identification, unless conclusive, cannot be made the basis of a conviction, specially when the identifiers are nervously upset and do not mention the striking features of the accused in their first information. The greatest suspicion against the accused will not suffice to convict them of a crime unless evidence establishes it beyond all doubt, 16 Cr LJ 25 : 16 Ind Cas 329. Where an accused was charged with murder and the only evidence against her was her admission that she threw the child under the impression that it was dead at the time. Held, that the admission should be taken in its entirety. Unless there is good reason for the contrary. 9 MLT 316 : 9 Ind Cas 790 : 12 Cr LJ 142 : 1911 MWN 199. Where the accused admitting that the deceased was at his house immediately before his death, declared that his respiration stopped owing to a fall from the roof and that he took the body and threw it into a tank, where it was afterwards found and he also produced the ornaments worn by the child on the morning on which he was missing. Held, that this was not sufficient to find accused guilty of murder, especially when the medical evidence showed that the deceased might have been either intentionally or accidentally strangled and that the accused could only be found guilty of an offence under Section 411. 8 CWN 22 : 1 Cr LJ 10. Where one is charged with the murder of another, three facts have to be established. First of all, that the person alleged to be murdered is dead; secondly, that he died by the means alleged on the part of the prosecution, and thirdly, that the accused intentionally took that part in causing the death which is attributed to him by the prosecution, 7 Bom LR 985 : 3 Cr LJ 85. In a trial for murder the Judge who convicts must do so on a degree of moral certainty as to the guilt of the accused, which, in his opinion, will justify him in passing the extreme sentence of the law. If he is not morally certain of the guilt of the accused so as to pass such a sentence, he is bound to acquit. 6 CPLR Cr 3. The weakness or falsity of an *alibi is* not sufficient ground for holding that the case for prosecution, in a charge for murder, is thereby imposed. 166 Ind Cas 605 : 9 RR 279 : 38 Cr LJ 276 : AIR 1937 Rang 10.

The accused was alleged to have committed the murder of deceased in a rented room which he had hired inspite of the fact that he was having his own house in the town. The deceased and accused together had visited the room two days prior to recovery of dead body. Thereafter accused was found missing but on being arrested helped the police in recovery of gold bangles belonging to the deceased. It was held that circumstance were sufficient to convict the accused. *Rajendra Kumar* v. *State of Rajasthan*, 2003 Cr LJ 4344 (SC) : AIR 2003 (SC) 3196 : 2003(10) SCC 21 : 2003(4) Crimes 141 (SC) : 2003(6) Supreme 822.

The accused was alleged to have killed his wife by hitting a granite stone on her head and face. There was no eye-witness but circumstances showed that accused was inimical towards the deceased due to suspicion about her chastity. The articles recovered form the person of deceased were recognised by the accused but he could furnish no explanation for presence of human blood on them. It was held that prosecution succeeded in establishing guilt of the accused and his conviction was held proper. *K. Kunhaman* v. *State*, 2003 Cr LJ 245 (Ker) : 2003(2) Crimes 39 (Ker) : 2002(4) Cur Cri R 475.

In a Supreme Court case, the conviction of accused was upheld where the circumstances proved that the accused had killed his wife as they were not leading congenial marital life and the conduct of accused subsequent to the incident was worth nothing. *Mandhari* v. *State of Chhattisgarh*, 2002 Cr LJ 2630 (SC) : AIR 2002 (SC) 1961 : 2002(4) SCC 308 : 2002(2) Crimes 277 (SC) : 2002(3) Supreme 447.

In a Gauhati case the deceased was killed while keeping watch on his 'Muga' crop in the field. The accused was not present at the scene of occurrence as he was watching a video show. No eye-witness was produced and possibility was not ruled out that accused had seen the dead body on return from video show and had informed the family members of the deceased. So chain of various circumstances was not complete and accused was held entitled to the benefits of doubt. *Sri Kamal Bora* v. *State*, 2003 Cr LJ 3275 (Gau) : 2003(4) Crimes 118 : 2003(2) Gauhati LR 595.

The wife of deceased had extra marital relations with the accused and one day both killed the deceased. There was no eye-witness but only circumstantial evidence to support the prosecution case. The presence of accused at place of occurrence was proved but he had set up false plea of alibi. Similarly accused wife stated that her husband was killed by her mother-in-law with the help of her relatives but she never lodged a report with the police station. It was held that such false explanation could be used as additional link in chain of circumstances to prove the guilt of accused persons who were rightly convicted under Sections 302/34. *Purchi* v. *State*, 2003 Cr LJ 712 (Raj) : 2003(1) WLC 609.

The suspect in crime was taken into police custody where as per evidence of another suspect deceased was brutally assaulted and next day his dead body with head injury was recovered. The accused failed to explain how they parted company of deceased and theory of escaping of deceased from custody put forward by accused was found to be totally false and was only an excuse made by accused to conceal true facts. The links between chain of circumstances proved beyond doubt and conviction of accused for offence under Sections 330, 346 and 302 with aid of Section 34 was held proper. *Sahadevan* v. *State*, 2003 Cr LJ 424 (SC) : AIR 2003 (SC) 215 : 2003(1) SCC 534 : 2003(1) Crimes 80 (SC) : 2003 SCC (Cr) 382.

In another Supreme Court case father and brother were alleged to have killed the deceased. The evidence of widow of deceased implicated all family members imputing them certain overt acts which was unbelievable and this fact alone was to cast serious doubt on reliability of her evidence. There was no strong motive to put an end to life of son/brother and vindictiveness and tendency to implicate innocent persons was apparent from the conduct of widow. The conviction of accused was set aside. *State of Orissa* v. *Babaji Charan Mohanti*, 2003 Cr LJ 3744 (SC) : AIR 2003 (SC) 3926 : 2003 SCC (10) 57 : 2003(3) Crimes 265 (SC) : 2003(5) Supreme 411.

Dying declaration made by deceased in a case was not found reliable as it was made before a witness who never disclosed it to any body and medical evidence was also found doubtful. None of the facts produced in the case connected the accused with the alleged crime. The conviction based on unreliable circumstantial evidence was set aside. *Shyam Lal* v. *State*, 2003 Cr LJ (NOC) 173 (HP). See *Mahesh Chandra* v. *State of MP*, 2005 Cr LJ 2480 (MP).

To prove by circumstantial evidence, four things are essential : (1) that the circumstances from which the conclusion is to be drawn should be fully established ; (2) that all the facts should be consistent with the hypothesis ; (3) that the circumstances should be of a conclusive nature and tendency ; and (4) that the circumstances should, to a moral certainly, actually exclude every hypothesis but the one proposed to be proved. AWN 1881, 139 ; *see* also 1914 MWN 718 : 16 Cr LJ 195 : 16 Cr LJ 89 : 26 Ind Cas 1001. The Court declined to confirm a capital sentence, but passed the minor sentence in a case when the conviction rested merely on circumstantial evidence. 3 PR 1867 Cr. Where person was convicted on a charge of murder, on the evidence of a single witness, which was once before discredited, and which now remained uncorroborated, the guilt of the accused is not proved beyond reasonable doubt and he is entitled is to an acquittal. (1911) 2 MWN 6 : 12 Cr LJ 488 : 12 Ind Cas 96. Where the complaint to the police and the evidence of the accused are contradictory, the accused are entitled to benefit of doubt. (1911) 2 MWN 14 : 12 Cr LJ 497 : 12 Ind Cas 217. It is very unsafe to rely upon a witness who materially improves his former statement. 43 PWR 1914 CR. : 16 Cr LJ 75 : 26 Ind Cas 667. In certain cases of injuries-such as wounds caused by blunt instruments, resulting in death, to support a conviction for murder, it must be proved that bodily injury was intended to be inflicted and that the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. 1 Weir 300. In a case of murder where the evidence was most improbable and was not free from reasonable suspicion an accused should be acquitted, 2 MLT 466 : 7 Cr LJ 216. Unexplained possession of the jewellery of the murdered child, shortly after murder, taken with the direct evidence of another child of 10 years of age is good evidence of murder, 6 MLT 123 : 4 Ind Cas 1051 : 11 Cr LJ 157 ; *see* also 1913 MWN 145 : 18 Ind Cas 337 : 14 Cr LJ 49. Where the evidence against a person convicted of murder consists only of a statement made by a brother of the deceased that he saw him run away after the commission of the offence and where against that evidence there is a strong array of circumstantial evidence in favour of the accused, *e.g.*, omission of his name in the first report, the missing jewels not being traced out, the accused not absconding after the alleged offence, a reasonable doubt arises the benefit of which must be given to the accused. (1911) 2 MWN 373 : 12 Ind Cas 577 : 12 Cr LJ 551- In a trial for murder the evidence of one person is sufficient for convicting the accused, if that evidence establishes that guilt of the accused beyond reasonable doubt 166 Ind Cas 840 : 9 RR 279 : 38 Cr LJ 299 : AIR 1937 Rang 8. But in such case where the rest of the evidence has to be rejected, it would be more prudent course to give the accused the benefit of the doubt than to convict him on a solitary statement of a singly witness, 164 Ind Cas 1656 : 37 Cr LJ 1029 : 38 PLR 274 : 1936 Cr C 769 : AIR 1936 Lah 778. Where the evidence of the eye-witnesses is unsatisfactory, the recovery of a knife stained with human blood at the instance of the accused does not strengthen the case, against him. 38 PLR 215. Where in a case of murder, the *post mortem* report is wholly inconsistent with the approver's evidence, the statement of the approver is to be discarded. 17 Lah 541 : 38 PLR 54. Evidence consisting of one unsatisfactory eye-witness corroborated by two equally unsatisfactory witnesses is not enough on which to base a conviction for murder. 157 Ind Cas 735 : 36 Cr LJ 1195 : 37 PLR 83 : 1935 Cr C 648 : AIR 1935 Lah 433.

In a case there was no eye-witness of the incident and the case hinged on the following circumstances: (a) lest seen; (b) on the night of incident. PW saw the accused bringing fodder on a bullock in the village; (c) on date of incident the accused was seen with an axe in his hand coming from the field of deceased; (d) motive and recovery of the corpse of the deceased or the pointing out of the accused. In respect of circumstance last seen the Court observed that the circumstance of last seen had precious little value because in the instant case the prosecution had not been able to fix as to when the murder of the deceased had taken place. In respect of circumstance (b) the Court held that this circumstance would not incriminate the accused because there was no nexus between it and the murder of the deceased. As regard circumstance (c) the Court held that the circumstances had no weightage particularly when only the skeleton of dead body was recovered. Motive was also held not proved. In view of above conviction under Section 302 was held not proper. However offence under Section No. missing was made as the dead body of deceased was recovered on pointing out of the accused from his own house. *Sopan Punjaram Mule v. State of Maharashtra* 2002 Cri LJ 376 (Bom) : 2002 All MR (Cri) 331.

The accused was alleged to have murdered his wife in foreign country at the night of honeymoon and dismembered and mutilated body parts were recovered from different places but major parts of body *i.e.* thighs were not recovered. There were irregularities in investigation, discrepancies in evidence and crime weapon was not recovered. The chain of circumstances relied upon by the prosecution was broken at various stages. It was held that irresistible conclusion as to guilt of accused could not be drawn. The fact that accused returned to his in-laws house two days after the incident would also be a pointer towards his innocence. The benefit of doubt was extended to the accused person. *(Dr.) Mahendra Singh* v. *State*, 2003 Cr LJ 1908 (Delhi) : 2003(102) DLT 592 : 2003(66) DRJ 616.

In a Supreme Court case, the accused was alleged to have killed the deceased in the greed of ornaments worn by her. The ornaments were not properly identified. Evidence relating to recovery of ornaments were not at all worth accepting. The accused alongwith deceased left to his village on 8th January and death of deceased was alleged to have taken place on 8th January but medical report stated that death had taken place between 10th and 13th January and fact which doctor considered was that in winter decomposition of body taken more time. If therefore, became clear that death had not taken place on 10th January. As per opinion of doctor the death could be earliest on 10th January and latest on 13th January. There was no material to show as to what transpired between these dates. The greed for ornament was not proved as ornaments in possession of accused could not reliably be identified. The chain of the circumstances was incomplete and accused was held entitled to the acquittal. *Bharat* v. *State of MP*, 2003 Cr LJ 1297 : AIR 2003 SC 1433 : 2003 SCC (Cri) 738 : 2003(3) Crimes 79 (SC) : 2003(3) SCC 166.

The site plan disclosed that near the dead body was found a torn shirt pocket and two white buttons. The colour of the shirt pocket found had not been disclosed in the panchnama. It was, therefore, difficult to connect the torn shirt pocket with the shirt which was recovered at the instance of the respondent. This apart, it was found that no evidence had been adduced by the prosecution to establish that the piece of cloth found at the place of occurrence was really a part of the shirt which was recovered at the instance of the respondent. No witness had said so. Moreover, the circumstance that the pocket of the shirt worn by the accused at the time of committing the offence was found at the scene of occurrence, was not even put to the respondent in his examination under. *State of AP* v. *Patnam Anandam*, 2005 Cr LJ 894 : AIR 2005 SC 764 : 2005 SCC (Cri) 1225 : 2005(2) SCC 363 : 2005(1) Supreme 211.

When an accused exculpates himself in his confession, it cannot be used as against his co-accused in an offence of murder. (1911) 2 MWN 375 : 12 Cr LJ 562. Where there is clear *prima facie* case of murder, the Session Judge cannot, on a plea of guilty by the accused, convict him of culpable homicide not amounting to murder, while there is no proof adduced of grave and sudden provocation. Rat Un CrC 410. In. grave cases such as murder, the record of a confession, among other records should be in plain and legible writing. Rat Un Cr C 837 : Cr Reg 50 of 1896. A confession nominally made to a third party, for instance, to a *Zaildar*, in the presence of the police and after the arrival of the *Thanadar* who at the time of the confession was sitting a few yards off, is also inadmissible in evidence under Section 25, Evidence Act. 14 PR 1911 Cr : 12 Ind Cas 973 : 12 Cr LJ 597. In this case. the accused, who were convicted of murder, were acquitted by the Chief Court on the ground that the evidence did not exclude very reasonable hypothesis but that of the guilt of the accused. 5 PR 1872 Cr. It is most unsafe to rely on circumstantial evidence where separate pieces are apparently connected and not fitting in with rational conduct of men. AIR 1931 Pat 169. Casual witness deposing that accused informed his intention of murder should not be believed. *Ibid.* Evidence as to motive should not be considered at first. Proper course is to examine evidence as to commission of crime first. Time of *post mortem* should be recorded to determine time of death. AIR 1931 Oudh 119. Mere pressing of mouth of deceased does not amount to murder when death is due to blows dealt before hand by another person. AIR 1930 All 45. Possession of stolen goods recently after murder is material evidence to support conviction. AIR 1930 Cal 379. Conviction should not be based on probabilities and suspicions. AIR 1930 Oudh 460. Where prosecution witness was found untruthful as to greater part of evidence, accused should not be convicted on the residue without corroboration. AIR 1930 Oudh 460. Where the only evidence of identification is a dying deposition and the incident took place in a moonless night, an accused should not be convicted under Section 302. AIR 1930 Oudh 60.

When men who expected a *lathi* fight use their *lathis* with the result that a man is killed it must be taken, in the absence of special circumstances, that they know that they were doing an act so imminently dangerous that it must in all probability cause such bodily injury as is likely to cause death. 27 ALJ 244 : 116 Ind Cas 19 : 30 Cr LJ 559 : AIR 1929 All 160. If a person receives grievous injuries and is detained in hospital and as a result of these injuries *pneumonia* supervenes and the victim dies, the perpetrators of the attack upon him are guilty of murder, 110 Ind Cas 230 : 22 Cr LJ 678 : AIR 1928 Lah 851. Where a person ordered his men to beat the other party and in consequence of which order the people of that party were beaten and as a result some men were killed, that person is undoubtedly guilty of abetment of murder. AIR 1928 Cal

752 ; AIR 1928 Pat 100. If some persons assist an accused to murder a certain man, whether by themselves assaulting him or by preventing his friends from assisting him they are guilty of the same offence as is committed by the accused. whereas, if they merely go to the spot with some innocent intention, and the accused suddenly commits a murder without their assistance and possibly contrary to their wishes, they can only be guilty of the offence, if any, which they themselves commit, and they should be sentenced without regard to the fact that their companion committed murder. 104 Ind Cas 242 : 28 Cr LJ 802 : AIR 1927 Oudh 321. Where the appellant and his son attacked the deceased who succumbed to the injuries, and it was put forward in defence of the appellant that the sole common intention of the appellant was that his son was to cause grievous hurt to the deceased by the use of a spear and long bamboo, and that thereafter when the appellant's actions ceased, the son proceeded to stab deceased to death while appellant stood aside and took no further part in the matter. *Held*, confirming the conviction under Section 302, IPC, that the intention and actions of appellant and his son could not be divided into two parts and the appellant was rightly convicted under Section 302, read with Section 34, 27 Cr LJ 827 : 95 Ind Cas 603 : 5 Bur LJ 12. A person charged with offence of murder can be convicted under Section 201, Penal Code, without a further charge be made against him under that section, and such a conviction is warranted by Section 237, of the Criminal Procedure Code, 7 Lah 84 : 94 Ind Cas 901 : 27 Cr LJ 709 : 27 PLR 583 : AIR 1926 Lah 88. The conviction for murder was set aside and the accused was sentenced for culpable homicide at not amounting to murder by the High Court. 27 PLR 6 : 1926 Lah LJ 51. Where offences under Sections 149 and 302, I.P. Code, are committed against three different persons there should be separate heads of charge and not a single head of charge against the accused, 44 CLJ 253 : AIR 1927 Cal 17.

By standers encouraging acts of murder are guilty. 85 Ind Cas 130 : 47 All 276 : 26 Cr LJ 450. Swinging sideways blows of a *lathi* causing rupture of the lever resulting in death in an offence under Section 325, and not under Section 302, AIR 1925 Oudh 134. Even though there is no evidence to suggest that the accused physically assisted the actual murderer in killing the deceased, but there is evidence that the accused went all the way from their house to the scene of murder and were present at the time when and the place where the murder was committed and gave moral support to the crime which was committed in their interests, the accused are guilty under Section 302. I.P. Code. 22 ALJ 1075. In the course of a fight between the parties one of the men in the first party was shot by a gun from the second party and died. It was not found whether due to the gun going off itself during the struggle for its possession. *Held*, that the accused must be given the benefit of the doubt and they were not guilty of murder. 6 Lah LJ 271 : 1924 Lah 720. An accused is guilty under this section, where he caused the death of his 14 years old wife, who was physically weak and epileptic, by such beating which may not be sufficient to cause the death, of a person of sound health but which he knew would cause the death of person of such a weak state of health. AIR 1923 All 545. Where the accused joined in beating the deceased when he was on the ground with *lathis* and inflicted such serious injury to him that he died two days afterwards. *Held*, that the accused must be deemed to have known that they were causing injury likely to cause death and death having resulted they were guilty of murder. 45 All 727 : 21 ALJ 623 : 74 Ind Cas 858 : 24 Cr LJ 826 ; *see* also 69 Ind Cas 439 : 23 Cr LJ 711 : 1923 Lah 68 ; 73 Ind Cas 961 : 24 Cr LJ 721 : AIR 1924 Mad 41. Where a number of persons armed with deadly weapons set upon a man and killed him, their common intention can be presumed to be to cause death or such bodily injury as would make them guilty of murder. 69 Ind Cas 449 : 23 Cr LJ 721. Where the disease which actually causes death is Meningitis, Peritonitis, Titanus, Pneumonia, *etc.*, and it is a natural and probable result of the injury, the person who inflicts the injury must be held responsible for the disease arising from the injury. AIR 1937 Rang 429. The deceased died of septic poisoning in respect of wounds inflicted by the accused some two months previously. The wounds were not inflicted on any vital part. *Held*, the case was on the border line and though the accused must be held to have intended to cause bodily injury which was likely to cause death, degree of probability was not high enough to justify a conviction under Section 302, IPC, but it was an offence under the first part of Section 304, 2 Bur LJ 239. Where the accused expected to find the deceased to come to a particular place to prosecute his intrigue with a girl who was betrothed with one of them and were lying in wait armed with spears and intended to murder him, if he did, the provocation is not sudden and the accused were not deprived of their power of self-control, so that the accused in such a case are guilty of murder. 35 Cr LJ 1476 : 1934 Cr C 459 : AIR 1934 Lah 239.

Where it was doubtful whether appellant poisoned her husband and from the circumstance it was equally possible that somebody else had done the foul deed, the benefit of doubt was given to the accused. AIR 1923 Lah 537. In a case where as a result merely of a boyish quarrel just a short time before the accused stabbed the deceased with a pen-knife four inches in length there can be no conviction for murder or culpable homicide not amounting to murder, when the *corpus delicti is* not established. The offence of which the accused is guilty is voluntarily causing grievous hurt by an instrument used for cutting, 1922 Lah 26. Where one man sets up touching another with a heavy *lathi*, and still more when two or more do so, it is more than likely that one blow at least will land on the head of the man attacked, however careful his assailants may be to avoid the head and that he will die of a fractured skull in consequence, 64 Ind Cas 838 : 23 Cr LJ 54 ; *see* also 20 ALJ 900 : LR 3A 161 Cr. Where a wife who was carrying on a liaison with a stranger wanted to marry the stranger and acting on his advice put some sugar containing arsenic in the food prepared by her for her husband under the impression that the sugar would make her husband submissible to her will and the husband died of the effects of the arsenic. *Held*, that the wife not having been aware that she was administering a poison to her husband, was not guilty of murder. 4 Lah LJ 445. Where it is impossible from the nature of the injuries inflicted, to come to any other conclusion than that the persons who committed the crime, if they were more than one had a clear and determined intention of doing the victim to death, it is immaterial which of the participants in the crime struck the fatal blow. 6 Pat LJ 241-2 Pat LT 565 : 61 Ind Cas 785 : 22 Cr LJ 443. In a case of murder by *Dhatura* poisoning, it is to be determined with what object it is administered. Its use may be merely in order to facilitate the commission of robbery. It does not *per se* and necessarily import contemplation to the victims death as a means towards or as incidental to the main end of that offence. The point is to be decided with regard to the circumstances of each particular case and the best indication of the intention of the offender can be gathered from the amount of *Dhatura* which he administered. If a very large quantity of *Dhatura* is administered the offender shall be presumed to intend to cause death of the victim for the successful termination of his crime. 4 PLR 1920 ; 19 PR Cr 1919 : 51 Ind Cas 670 : 20 Cr. LJ 510. Where no adequate motive for murder was proved a perusal of medical evidence showed that although there were two confused wounds on the head, a bruise on the forehead and a bruise on the neck there was no fracture of any bones of the skull, nor apparently any injury caused to the brain. Nor was there any fracture of any bone of the body. From the medical evidence it appeared that it was merely intended to give deceased a serve beating. The medical witness was of opinion that death probably resulted from direct violence. *Held*, that the accused cannot be held to have intended to cause the death. 1 Lah LJ 247.

An appellant was found to have killed his step-father, who was an infirm old man and an invalid, and who consented to being killed, the appellant's motive being to get three innocent men hanged. *Held*, that the 5th Exception to Section 300, applied to the case and that he could not be convicted under Section 302, but only under Section 304, Part I, Penal Code. 45 PR 1917 Cr. Where it was found that the accused caused the death of the deceased by stabbing him with the intention of causing such injury as was likely to cause death. The most that the accused could be convicted of on such finding was culpable homicide not amounting to murder and the conviction of murder was wrong. 17 Cr LJ 544 : 36 Ind Cas 592. Where a man gives *Dhatura* to another in such a large quantity as to result in his death within three or four hours, although he may not have had any intention to kill, he must be held to have known that his act in giving a dangerous substance in such a quantity was likely to cause death. 6 ALJ 129 : 31 All 148 : 9 Cr LJ 383 : 1 Ind Cas 765. When their Lordships are of opinion that by some disregard of the form of legal process, or by some violation of the principles of natural justice or otherwise, some substantial and grave injustice has been done, then, whatever doubts they may have of the appellant's innocence, or whatever suspicion they may entertain of his guilt, or however great may be their reluctance to interfere with, or overrule the decisions of the Indian Courts in criminal matters. Their lordships think they are bound to advise His Majesty that the conviction should not be allowed to stand. 17 CWN 1110 PC : 14 MLT 263 : 1913 MWN 806 : 15 Bom LR 910 : 25 MLJ 518 : 14 Cr LJ 577. The appellant's cattle were doing considerable damage to the crops belonging to complainants who drove them to the cattle-pound. While they were in the way to the pound the accused came armed with *lathis*, to rescue the cattle. At the command given by one of them the others assaulted the deceased and beat him with the result that he died. *Held*, that the offence was committed in pursuance of the common object and each one of the accused was guilty of an offence under Section 302, I. P. Code, 13 ALJ 410 : 29 Ind Cas 91.

A gang of persons making preparations to commit dacoity was discovered in the limits of a certain village and was pursued by villagers who seized and arrested two accused who were members of the gang. Shortly afterwards a dacoit at large fired a gun and killed one of the villagers. The accused were thereupon tried for the offence of murder under Section 302, read with Sections 149 and 34, Penal Code. *Held*, that the accused were not guilty of murder, for the separation of the two accused from the gang having been prior to the murder there could be no common object, and neither Section 149 nor Section 34 applied. 17 Bom LJ 906 : 8 Cr C 118. Charges under Sections 302 and 201, Penal Code, cannot be combined. 2 Weir 301. If men will use such a formidable and dangerous weapon as a *lathi* with such violence and on such part of the body as causes death immediately or soon afterwards, they should be convicted of murder and not merely culpable homicide not amounting to murder. AWN 1890, 74. Although it is true that it is for person who has taken the life of another to show that the homicide was accidental, or that it did not amount to murder, yet it is necessary in order to throw the burden of exculpating himself on the accused in a case of murder, that the witnesses for the prosecution should have told a story which can be believed in itself and that, the Judge is satisfied that they are not concealing circumstances which would go to reduce the offence if disclosed. AWN 1897, 21. Where four persons attacked one man, who, in consequence of the attack, died subsequently, held, that the assailants are guilty under Section 302, IPC, if the common intention of the assailants was to cause death or bodily injury likely to cause death or sufficient in the ordinary cause of nature to cause death. 13 Cr LJ 159 : 13 Ind Cas 847. A person who inflicts injury on he person of another which ends fatally and which the former should have known was likely to cause death, is guilty of culpable homicide amounting to murder though he had no wish to cause or any motive to do so. 14 Cr LJ 115 : 118 Ind Cas 657 : 1913 MWN 556 ; *see* also 5 WR Cr 32 ; 2 LBR 125 : 1 Cr LJ 184 ; 4 WR Cr 33. The causing of death by an act done with the intention of causing death cannot alternately be offence or murder or the offence of culpable homicide not amounting to murder, neither Section 236, Cr PC, nor Section 73, IPC, being applicable to the case. 11 PR 1887 Cr. Where the accused, a menial servant being ordered to attend his masters, when they had announced their intention of committing murder, accompanied them with the intention of rendering such assistance as might be required of him and his master entered the house and killed the deceased, the servant standing at the door of the house, held, that the accused was guilty of murder. 1 Weir 296.

Where the prisoner killed his sister and hurt himself with the intention of throwing the blame on a faction opposed to that to which he belonged, *held*, that he was guilty of murder. 8 B H C Cr 109. Where a child did not die on account of the exposure except in remote degree, the mother that exposed the child would not be guilty of murder, but only of an offence under Section 317, Penal Code. 10 WR Cr 52. Murder is excluded from the exception in Section 94 IPC, as to acts done under compulsion of threats causing apprehension of instant death. UBR (1892-1896), Vol. 1 201. Where action resulting in death is continuous and is impossible to be resolved into different actions inspired by motives, the accused is guilty of murder. AIR 1931 Lah 27. If husband discovers wife in act of adultery and kills her he is guilty of manslaughter only and not murder. This rule cannot be extended when the relationship is not of husband and wife. AIR 1930 Cal 37. Blow with spear on fleshy part of body is not necessarily fatal and offence does not fall under Section 302, but under Section 326. AIR 1930 Lah 950. Where the accused had grudge against deceased and assaulted him with a stabbing weapon, he is guilty of murder. AIR 1930 Lah 534. Failure of prosecution to establish additional motives is not fatal defect in prosecutions case. AIR 1930 Lah 490. Person striking with weapon like *lathi* on vulnerable part of the body as head must be deemed to have intended to cause such injury as he knew likely to cause death. AIR 1930 Lah 490. *Panchayat* was convened to consider act of stealing by accused. One of the *panchayats* insisted that the matter should be reported to the police. Accused struck heavy blow at him and thereby caused death. The accused was held guilty of murder. AIR 1930 Lah 60. In the absence of extenuating circumstances, a person who inflicts injury with knife intends nothing short of inflicting death and as such commits the offence of murder. AIR 1930 Mad 972. Woman of middle age administering arsenic must accept full responsibility of her action. AIR 1930 Oudh 502. Where it is not known who delivered the fatal blow, the accused should be held guilty of abetment of murder. AIR 1930 Pat 194.

When medical evidence supported prosecution version and one of accused was acquitted no infercence could be drawn that prosecution version against appellant was doubtful. *Naurangi Lal* v. *State of U.P.*, (1995) 3 Crimes 64 (All) (DB) : 1996 Cr. LJ 81 : 1995 All LJ 1625 : 1996 ACC 96 (sum) : 1995 UP Cr R 395 (All.).

When evidence of eye-witnesses testifying injuries caused by *kulhari* and, *sword*, was corroborated by medical evidence, and these weapons were found stained with blood, conviction upheld. *Ram Chandra* v. *State of Rajasthan*, (1995) 2 RCD 307 (Raj).

When eye-witnesses evidence is corroborated by medical evidence and accused was attributed with specific injury, accused's participation is established. *Dayaram* v. *State of M.P.*, 1995 Cr LR 272 (MP).

In absence of any injury on person of mother-in-law that would have been caused in over powering young daughter-in-law mother can not be convicted for murder. *Vinod Bhalla* v. *State of M.P.*, 1992 MPLJ 580.

Where medical evidence showed that as a result of one shot by accused, some injuries at the face of the deceased were caused, that by themselves were not sufficient to cause death, conviction held not sustainable. *Jarnail Singh* v. *State of Punjab*, 1996 Cr LJ 1139 (SC) : 1996 AIR (SC) 755 : 1996 (10 SCC 527 : 1995 (8) JT 279 : 1995 (6) Scale 563 : 1996 (1) Supreme 1 : 1996 (1) CCR 131 (SC) : 1996 SCC (Cr) 146 : 1996 (2) SCJ 130.

Accused firing shots resulting in death of deceased and same corroborated by eye-witnesses, independent witnesses as well as by medical evidence, conviction justified. *Arjun Ram* v. *State of Rajasthan*, (1995) 3 Crimes 130 (Raj).

When ocular evidence is supported by medical evidence, enquiry as to whether injury is sufficient to cause death in ordinary course of nature, is objective and differential. *Swain* v. *State*, (1992) 2 Ker LJ 724 (DB).

When throttling is supported by medical evidence, conviction upheld. *Deepak Naragauappa Teware* v. *State of Maharashtra*, (1995) 1 B CR C 223 (Bom).

Witness's statement cannot be discarded because of oneness of caste or friendship. *Akshay Kumar Gaur* v. *State of U.P.*, (1995) 32 ACC 93 (Alld).

When there, is medical evidence that person suffering single stab injury in abdomen, need not necessarily die and death caused after 3 days due to complications. case falls under Section 304, Part II, IPC. *Ramaswamy* v. *State of T.N.*, 1995 SCC (Cri 143 (SC) : 1993 Cr. LJ 3253 : 1994 Supp (3) SCC 680.

The evidence of witnesses who allege that they overheard the accused relating to the killing of the deceased, cannot by itself be substantive evidence for the purpose of convicting the accused of such serious offence. AIR 1951 HP 19.

In a murder case when the prosecution evidence is held to be untrustworthy or unsafe of credence and the dying declarations to have been received in circumstances which do not inspire confidence, the Court would be most reluctant to base the conviction of the accused only on the recovery of the *kripan* and the clothes, particularly when the investigating agency also does not appear to have conducted themselves in a straight forward manner. Such recovery of articles should not be held to be a strong corroborative piece of evidence. 64 Punj LR 1064 : ILR (1962) 2 Punj 855 : 1963 (1) Cr LJ 469 : AIR 1963 Punj 170 ; 1961 Ker 546. Some links missing in the circumstantial evidence held sufficient not to warrant conviction. Delay in post-mortem examination of dead bodies is not material factor which should seriously tell against authenticity of prosecution story. 63 Punj LR 742. Offence was held to be proved from circumstantial evidence. ILR (1963) 2 Ker 26 : 1963 (2) Cr LJ 458 but *see* (1963) 2 S CJ 165 : AIR 1963 SC 1113.

Where injuries present on body of accused were not explained in F.I.R., the recovery of weapon alone was not sufficient to connect accused with the crime. *Mehtab Singh* alias *Kala Singh* v. *State of Rajasthan*, (1995) 2 RCD 351 (Raj).

The F.I.R. was promptly lodged. The statement of the eye-witnesses and independent witnesses were consistent throughout the investigation and trial. The evidence-witnesses were corroborated by medical and forensic evidences. Hence the conviction was confirmed. *Mod Singh* v. *State of Rajasthan*, 1994 RCC 572 (Raj).

When both eye-witnesses were thoroughly cross-examined and evidence was not shattered. Ocular account was corroborated by medical evidence. Gun shots fired by appellant killed the deceased. Small contradictions between the ocural account and the medical evidence were held immaterial. Hence conviction upheld. *Lal Diwan* v. *State of U.P.*, (1995) 3 Crimes 343 : 1995 ALJ 1456 (Alld).

Firing was from some height and deceased was found on low ground. It was the contention of the accused that it was accidental. Pellets entered the neck region downwards obliquely. Medical evidence showed that the firing was not from the same level. Hence conviction was justified. *Ramswaroop* v. *State of M.P.*, 1994 Cr LR (MP) 166.

Eye-witnesses consistently stating about presence and participation of accused in offence. Same thing is being corroborated by medical evidence. Indeed minor variations in version of one witness but not material—Delay in F.I.R. was explained—Conviction was confirmed. *Ballu Singh* v. *State of Punjab*, 1994 SCC (Cri) 1147.

Where yardstick should be probabilities, its intrinsic worth and the intention of the witness. Notwithstanding the fact that the witness happens to be an impartial or non-interested witness. *Najukrao* v. *State of Maharashtra*, (1995) 1 Crimes 75 : 1995 Cr LR 93 (Bom).

The testimony of complainant was not corroborated by medical evidence and was full of contradictions. The testimony of the injured witnesses proved the participation of some of the accused persons in the incident. Hence conviction of 6 accused persons reduced to one under Sections 326/149 and others acquitted. *Kapoora* v. *State of Rajasthan*, 1995 R Cr C 498 (Raj).

Delayed disclosure by the eye-witnesses about the commission of the crime by the accused—Threat as explanation for delayed disclosure found unreliable—Testimony of such witnesses, held not worthy of any credit. *Daba Munda* alias *Jaga* v. *State*, (1995)1 Crimes 814 (Ori).

Evidence of accomplice turned approver being improved from stage to stage requires thorough scrutiny—Section 114(b) guarding against acceptance of such evidence, unless corroborated in material particulars. *Mahabir* v. *State of U.P.* (1995) 2 Crimes 575 (All) (DB).

Once it is established that eye-witness belong to a hostile faction and it is also clear that they are suppressing material portion of the occurrence, it is not possible to accept their evidence as to how exactly the fight took place doubtless if a consistent story has been put forward, it may be possible for a Court even to accept the testimony of partisan witness specially when the village is divided into factions. 29 Cut LT 15 : 1963 (1) Cr LJ 700. For proof of murder charge *see* 29 Cut LT 290 : ILR 1961 Cut 806 : 1963 (1) Cr LJ 213 : AIR 1963 Ori 33 ; ILR 1963 Cut 511 ; 1963 Ker LR 47 ; *see* also 1964 Cur LJ 435 (Punj) (for medical evidence) 1965 (2) Cr LJ 63 : AIR 1965 AP 251. (murder and robbery-circumstantial evidence). When two persons were charged with murder, one of them admitting to be joint participant facilitating murder by the other and explaining that he was threatened with death by other accused it was held that the same did not exonerate him. (1963) 5 Ori JD 372 : 1964 (1) Cr LJ 680 : AIR 1964 Ori 144.

The testimony of eye-witnesses can not be doubted only because they happened to be relatives of the deceased. 1964 (2) Cr LJ 585 : AIR 1964 Trip 54.

The inference or presumption upon the charge of murder can be safely drawn when the accused is in explained possession of jewels or articles of the victim after the crime, and when in addition, there is some evidence at least connecting the movements of the accused with those of the victim either before or after the crime and in some other manner or another establishing a nexus between the accused and offence. 1963 (2) Cr LJ 651 : AIR 1963 Mad 476 ; *see* also 1963 Jab LJ 137 : 1964 (1) Cr LJ 596 ; 1963 Ker LT 292 : 1964 Mad LJ (Cr) 347 : 1964 (1) Cr LJ 493 (circumstantial evidence must be wholly inconsistent with innocence of the accused) ; 29 Cut LJ 537, (opinion of doctor not conclusive—Absence of a single circumstance connecting the accused with the alleged murder) ; (1964) 6 Ori JD 257 ; (1963) 5 Ori JD 372 : 1964 (1) Cr LJ 680 : 11 Cut LT 17 : AIR 1964 Ori 149 ; 1979 Cr LJ 1322 : AIR 1979 SC 1711.

Accused was sister of deceased's husband. There was no evidence if ever demand was made by accused. The prosecution could not produce any evidence to show harassment or dowry demand or any evidence against accused. Accused was held entitled to acquittal. *Hulsi (Smt)* v. *State of Rajasthan*, 1995 Cr LR 234 (Raj).

Where there was no eye-witness, the recovery of wrist watch from accused is ot sufficient to connect the accused with the offence. *Niranjan Lal* v. *State of Haryana*, (1994) 2 Recent CR 620 (P & H) (DB).

ASI recording the statement of the deceased—Recorded statement corroborating the version tendered by the eye-witnesses—Wounds on the person of deceased lending support and corroboration to the version of eye-witnesses. Dagger with blood-stains of deceased recovered at the instance of accused—No incised wounds found on the person of the accused and his two brothers—Prosecution case getting support from the injuries on the person of the accused—No independent witness available around the place of occurrence. It was held that the deceased was assaulted by accused assisted by his two brothers. *Raj Singh State* v. *(Delhi Administration)*, (1995) 3 Crimes 484 (Del).

Accused inflicting knife injuries on chest of the deceased—Evidence of two eye-witnesses corroborating each other which implicate accused—Evidence was creditworthy—Medical evidence also corroborating ocular evidence—Prosecution case fully proved. Hence conviction was confirmed. *Dilip Purushottam Pokade* v. *State of Maharashtra*, 1994 B Cr C 79 (Bom).

Accused assaulted deceased with axe on head—Three eye-witnesses versions found trustworthy—Medical evidence corroborating ocular evidence—Motive also established—Axe too recovered at the instance of accused—Offence was proved beyond reasonable doubt. *Parshuram Tukaram Kini* v. *State of Maharastra*, 1994 B Cr C 165 (Bom).

On attempting to outrage modesty of deceased by accused, deceased beat him with broomstick—Thereupon accused beating the deceased with stick on her neck and ribs. Causing injuries on her vital parts—Evidence of prosecution corroborated by fingerprint report and medical evidence. Conviction under Section 302 justified. *Komati Rajam* v. *State of A.P.*, (1994) 1 APLJ 47 (SN) : (1994) 1 APLJ 366 : (1994) 1 ALT 639 : (1994) 2 Crimes 511 (AP) (DB).

Where so far as the evidence as to the causing of homicidal death is concerned, it appears to be shaky, though it may be presumed that if husband and wife were living together and if the homicidal death of the wife occurs in the residential house of the husband, in the absence of any other explanation, or in the absence of any evidence of murder having been caused by somebody else, it may be presumed that the death may have been caused by the husband himself. Though it is also true that *Sidhi*, the place of employment of accused husband, is not unapproachable, it connected with metal road nearly 90 K.Ms. away from the place of incident, and a person could reach *Sidhi* in the morning leaving Rewa during or after mid-night. Even in a motor-cycle, it will take only two hours to reach *Sidhi*, but no evidence has been collected on this point as to whether the husband was in the house in the evening or during the night, or that he left Rewa in or about midnight. Under the circumstances, it cannot be accepted beyond reasonable doubt that husband was present in the house during the mid-night and returned back to *Sidhi* after committing murder. Accused is, thus, entitled to benefit of doubt. *Vinod Bhalla* v. *State of M.P.*, 1992 Cr LJ 3527 (MP) (DB).

Accused not only inflicting sharp edged injury but repeating fatal blow and injury upon the person of the deceased—Injuries attributed to him by prosecution-witnesses and corroboration by medical evidence. Conviction for offence under Section 302, I.P.C. held proper. *Chetan* v. *State of Rajasthan*, (1995) 2 CCR 554 : 1995 RCrC 237 (Raj).

Where accused coming with stretched knife and stabbing on chest of deceased before bettle shop—Prosecution supported by P.W. 11 eye-witness. Other eye-witnesses turned hostile in spite of their statements recorded under Section 164, Cr. P.C. P.W. 11 was corroborated by F.I.R., Medical evidence and seizure of blood stained clothes and knife from accused. Hence conviction upheld. *Rajendra* v. *State of M.P.*, (1994) 2 Crimes 552 (M.P.).

Weapon of offence recovered at the instance of accused appellant—Clothes of the accused were blood stained—No injury found on the accused. There was appreciation of the evidence and recovery of weapon were held unreliable. Bloodstains on clothes of accused held possible if he had fallen slightly away from the body of the deceased—There was absence of motive of offence. The only circumstances that both accused and deceased alone went on in search of goats held not sufficient to convict accused. Conviction set aside. *Balkrushna* v. *State of Maharashtra*, (1994) 1 Crimes 96 (Bom).

Prosecution evidence fully corroborated and consistent and evidence of eye-witnesses finding corroboration from medical—evidence fully reliable and trustworthy—Complainant and accused persons being on inimical terms—Prosecution witnesses also having relationship with the deceased. Held, is not safe to reject testimony of prosecution-witnesses on these grounds. Concurrent finding of both lower Courts. Conviction legally sustainable. *Arjun* v. *State of Rajasthan*, (1994) 3 Crimes 383 (SC) : AIR 1994 SC 2507 : 1994 (5) JT 410 : 1994 Supp (3) SCC 189 : 1994 (3) Scale 280 (2) : 1994 (2) UJ 418 : 1995 Cr. LJ 410 : 1994 (3) CCR 685 (SC) : 1994 SCC (Cr) 1685.

Conviction. held, should not be recorded on the basis of evidence of partly reliable solitary witness. *Badda* v. *State of M.P.*, (1995) 1 CCR 540 (MP).

Where oral evidence was corroborated with the medical evidence- conviction of the accused was held, justified. *Satish Sah* v. *State of Bihar*, 1995 Cr LJ 213 : 1995 BLJ 156 (Pat).

Where appellant being on inimical terms with deceased. Offence-weapon sickle recovered at instance of appellant-accused—Testimony of sole eye-witness fully corroborated by medical evidence and report of chemical analyser—Guilt of accused proved beyond reasonable doubt. Hence conviction was upheld. *Pandurang Mohan Dhaitadak* v. State *of Maharashtra*, 1994 B Cr C 551(Bom).

Interested and chance-witnesses—Their presence at the scene of occurrence highly improbable—Improvement in their statement during trial from their earlier statement—Their testimony held unreliable. *Kachra* v. *State of Rajasthan*, 1995 Cr LR (Raj) 392 : (1995) 2 RCD 547 (Raj) (DB).

Hostile witness confronted with statement recorded by police but not by Magistrate has to be rejected. *Ashok Gavade* v. *State of Goa.*, (1995) 1 Bom CR 363 : (1995) 1 B Cr C 41 (Bom) (DB).

The evidence of eye-witnesses cannot be doubted on the ground that stomach of deceased was found empty as death occurred long after incident. Medical evidence showed that deceased was assaulted with blunt end of the axe and not sharp edge of the weapon. The accused would not have intended to cause death. Offence therefore falls under Section 304 Part II, IPC and not under Section 302, IPC. Conviction and sentence modified accordingly. *Macha Rajam* v. *State of A.P.*, (1995) 1 Andh LT (Cr) 403 (AP) (DB).

Medical evidence supporting prosecution-version. Acquittal of one the accused—No inference that prosecution-version against accused is doubtful. *Held* prosecution version being quite truthful the conviction based thereon sustainable. *Naurangi Lal* v. *State of U.P.*, (1995) 3 Crimes 64 (All) (DB).

Out of 12 accused persons only the accused was convicted while others were acquitted—Conviction based on testimony of two eye-witnesses. These eye-witnesses could not ascribe parts played by other accused persons and their specific role not deposed with clarity and there being also improvements in their testimonies. Their testimony thus not reliable. 'Benefit of doubt given to appellant. *Hema Ram* v. *State of Rajasthan*, 1995 Cr LR 527 : 1995 Crimes 253 : (1995) 2 RCD 283 (Raj).

Eye-witnesses and medical report corroborated each other—Death caused by knife injury. Offence under Section 302, IPC made out *Kamta Prasad* v. *State U.P.*, 1994 JIC 136 (SC) : 1994 All LJ 306 : 1994 SCC (Cr) 290 : 1994 (1) East Cr C (NOC) 22 : 1994 Cr LJ 1202 : AIR 1994 SC 1519.

Evidence of the eye-witnesses does not become automatically unreliable simply because motive has not been proved. *Promoda Kumar Mantri* v. *State* of *Orissa*, (1995) 3 Crimes 510 (Ori).

It is quite evident that child statement was not recorded promptly by investigating officer and possibility of her being tutored cannot be ruled out. It is not safe to place implicit reliance on her testimony unless there is corroboration from any other independent evidence. *Chander Prakash* alias *Chander* v. *State*, (1995) 58 DLT 238 (Del).

Eye-witness's testimony remaining unshaken—Presence of the eye-witness very much natural in her house—Eye-witness's version finding corroboration from the evidence of other prosecution-witnesses—Medical evidence corroborating the evidence of the eye-witness—Prosecution proving the case against the accused-appellant beyond reasonable manner of doubt—Injury inflicted by the dagger in the chest of the deceased. There was no repetition of the blow and there was neither any intention to kill nor premeditation. It is held that conviction converted into one for offence under Section 304, Part I. *Lala* v. *State of Rajasthan*, 1995 Cr LR 403 : (1995) 2 RCD 511 (Raj).

When testimony of the witness believed in part and disbelieved in part part—Conviction on the basis of such testimony. As and improper. *Ramesh Maruti Patil* v. *State of Maharashtra*, 1995 SCC (Cr) 149 (SC) : 1994 AIR (SC) 28 : 1994 Cr. LJ 8.

The evidence of related and interested witnesses cannot be thrown away. It is to be scrutinised scrupulously before accepting the same. *Kashmira Singh S/o Jeet Singh* v. *State of Delhi*, 1995 JCC 208 (Del).

Where evidence as regards occurrence consistent and cogent—Nothing in cross-examination to discredit the evidence of the prosecution witnesses—Evidence also amply corroborated by medical evidence—Death caused due to hand injury—Offence held punishable under Sec. 302, IPC. *Sununga Malik* v. *State*, (1995) 2 CCR 285 (Ori).

Testimony of accused containing mere suggestion—Mere possibility that murder could have taken place 2 or 3 hours earlier will not render evidence of eye-witness unworthy of credence. Further omissions, additions or overt act should be weighed along with other evidence. Hence conviction was confirmed. *Krishan Pal Singh* v. *State of U.P.*, 1994 (31) ACC 29.

Accused armed with "*song*", inserted "*song*" in the head of deceased and turned it several times. He also inflicted several blows with "*song*" on body of deceased—Eye-witnesses is found reliable and corroborative with medical evidence—Abrasions on body of deceased possible by fall and struggle on surface of "*moram*" sand which was place of occurrence.—Hence, conviction is justified. *Gorey Lal* v. *State of U.P.*, (1994) 1 Crimes 168 : (1994) 2 Crimes 560 : 1994 ACC 420 : 1994 Cr LJ 1337 (All).

When injuries inflicted with sharp edged weapon and ocular account is corroborated from medical evidence and FIR, conviction upheld. *Piara Singh* v. *State of Punjab*, (1995) 3 CC Crimes 42 (P & H).

When evidence of eye-witnesses gets corroborated by FIR and medical evidence, conviction upheld. *Amarjit Singh* v. *State of Punjab*, (1995) 3 Crimes, 409 (P & H).

Conviction is justified when ocular evidence is corroborated by medical evidence. *Inder Singh* v. *State of Punjab*, (1995) 1 Crimes 654 (SC).

When medical evidence does not corroborate with evidence of witnesses, accused liable to be acquitted. *Bhavi Ram* v. *State of Rajasthan*, (1995) 2 RCD 93 (Raj).

Eye-witness being the brother of deceased and the deceased both went out on motorcycle when incident occurred—His presence not doubtful—He gave every detail of incident when accused crushed deceased. His evidence fully corroborated—Medical evidence also consistent with prosecution case—Delay in filing FIR explained—Accused intentionally caused such bodily injuries knowingly as likely to cause death. Hence conviction under Section 302, was sustainable. *State of Haryana* v. *Manoj Kumar*, (1994) 1 Crimes 102 (SC) : (1994) 1 East Cr C 88 : 1994 JIC 148 : 1994 (1) SCC 495 : 1994 SCC (Cr) 93 : AIR 1994 SC 147.

Empty stomach of deceased cannot make prosecution case untrustworthy as deceased being host was expected to wait for his dinner—Conviction proper. *Suba Singh* v. *State of Punjab*, (1995) 1 CCR 31 : 1995 SCC (Cr) 376 (SC).

Stick blow on the head of the deceased as a result deceased dying on the spot two persons witnessing the incident—Their evidence not suffering from serious infirmity and slight inconsistency found. Witnesses though related, evidence given cannot be discarded as that of the partisan witness—Nothing on record to show that the witness had any enmity with the accused. Hence conviction was upheld. *Joginder Singh* v. *State of Punjab*, (1995) 3 Crimes 557 : (1995) 2 CC Cases 230 (P & H).

Wife of the deceased only eye-witness—Material contradictions in her evidence and no independent witness for recovery—Not a single pellet hitting the wife of the deceased though she was coming along with him—Medical evidence also not corroborating wife's version. False implication cannot be ruled out. Hence prosecution fails to prove its case beyond reasonable doubt. Conviction and sentence set aside. *Satyanarayan Dev* v. *State of Rajasthan*, 1995 Cr LR 293 : (1995) 3 CCR 359 (Raj) (DB).

Where there is direct and acceptable evidence and injuries are inflicted on vital part of body with iron rod, conviction upheld. *Laxman* v. *State of Karnataka*, 1997 (1) Crimes 388 (Kant).

When evidence of two eye-witnesses was found trustworthy and corroborated by medical evidence and ballistic expert report, conviction was held proper. *Harbhajan Singh* v. *State of Punjab*, 1997 (1) Crimes 253 (SC) : 1997 AIR (SC) 1183 : 1997 (3) JT 278 : 1997 (2) Scale 528 : 1997 (1) CCR 263 (SC) : 1997 CrLJ 1638 : 1997 (2) Supreme 719.

When the statement of eye-witnesses is convincing and corroborated with post-mortem report. The fact that no eye-witness went to police station to lodge report or did not narrate incident to any one, is not sufficient to discard their testimony. *Shrirang Shankar Lokhande* v. *State of Maharashtra*, 1997 (1) Crimes 479 (Bom).

Trial Court to base its conclusion solely on evidence adduced during trial and not on investigation or result thereof. *Vijinder* v. *State of Delhi*, 1997 (1) Crimes 158 (SC) : 1997 (6) SCC 171 : 1997 (3) JT 131 : 1997 (2) Scale 127 : 1997 (2) Supreme 329 : 1997 (1) SCJ 322 : 1997 91) CCR 212 (SC) : 1997 SCC (Cr) 857.

Conviction based on inadmissible evidence is not legally sustainable. *Vijinder* v. *State of Delhi,* 1997 (1) Crimes 1997 (1) Crimes 158 (SC) : 1997 (6) SCC 171 : 1997 (3) JT 131 : 1997 (2) Scale 127 : 1997 (2) Supreme 329 : 1997 (1) SCJ 322 : 1997 91) CCR 212 (SC) : 1997 SCC (Cr) 857.

The blood of the accused was of '*B*' group and the recoveries made from the place of the incident like bloodstained earth, pieces of stones etc. as also the clothes of the deceased bore '*A*' group. This obviously meant that while trying to assault the deceased blood of '*A*' group fell on the nail clippings of the accused. The trial judge was of the view that the blood of '*A*' group may have fallen on the nails of the respondent while he was taking out the corpse of the deceased from the well, as stated by him in his statement under Section 313, Cr. P.C. It was held that the trial judge was in error in rejecting this circumstance because, apart from the statement of the respondent recorded under Section 313 Cr. P. C. made by him at the fag end of the trial, there was no other evidence on record to show that he had taken out the corpse of the deceased from the well. *State of Maharashtra* v. *Vilas Pandurang Patil, 1999* Cri LJ 1062 (Bom) : *Maghanan v. State,* 2006 Cr LJ 36 (Mad).

There is no requirement of law that pellets be sent to ballistic expert to determine as to whether pellets were fired from exhibited gun or not. On the contrary, where the pellets are recovered from body, the prosecution case that deceased died of gun shot injuries is established, failure of prosecution to send parties for examination by ballistic expert would not render prosecution case incredible. *State of HP* v. *Mast Ram,* 2004 Cr LJ 4973 : AIR 2004 SC 5056 : 2004(8) SCC 660 : 2004(6) Supreme 534 : 2004(4) Crimes 27 (SC).

It was stated that deceased was walking ahead of them—Accused challenged deceased, the gun was aimed at and fired at him—In such circumstances, absence of pellet injuries on persons of eye-witnesses—Can be no ground to render presence of eye-witnesses at place of occurrence doubtful. *State of Himachal Pradesh* v. *Mast Ram,* 2004 Cr LJ 4973 (E) : AIR 2004 SC 5056 : 2004(8) SCC 660 : 2004(6) Supreme 534 : 2004(4) Crimes 27 (SC).

Widow of deceased categorically stated that she heard about incident from some persons and sent for eye-witnesses to go and find out body of her husband. Held, it was quite natural for eye-witnesses to remain silent after witnessing assault. Presence of eye-witnesses at alleged spot of occurrence was rendered doubtful, and therefore, the version of eye-witness was improbable. *State of Rajasthan* v. *Bhanwar Singh,* 2004 Cr LJ 4886 : AIR 2004 SC 4660 : 2004(5) Scale 711.

The fact that accused also suffered injuries which were not negligible showed that there would have been some scufflé and exchange of blows, but the details thereof were not forthcoming version of eye-witness about the manner of attack by the four accused persons and the non-explanation of injuries raised some doubt on the credibility of his entire version. At the same time his version about the incident was found inconsistent with dying declaration. It was held that the eye-witness could not be relied upon. *Sree Vijaya Kumar* v. *State,* 2005 Cr LJ 3085 : 2005 SCC (Cri) 1896 : 2005(3) Crimes 55 : 2005(10) SCC 737 : 2005(4) Supreme 662.

Non-mentioning of names in FIR would not impeach their credibility when it is a case of free fight. *Nagalla Mukha Lingam* v. *State of AP,* 2005 Cr LJ 2583 : 2005 (11) SCC 242 : 2005(2) Crimes 165 : 2006 SCC (Cr) 105 : 2005(3) Supreme 624.

Factor which casts a doubt on the evidence of PWs 4 and 5 is that there were no blood stains on their clothes, though allegedly, they placed the deceased on cot and carried him to the hospital. Moreover, soon after his brother was declared dead, PW 4 did not go to the police station which was quite close to the hospital to lodge a report. That is not a natural course of conduct. Hence, evidence of such witness cannot be believed. *Hem Raj and others* v. *State of Haryana*, 2005 Cr LJ 2152 : (2005) ACR 374 : AIR 2005 SC 2110 : 2005 SCC (Cri) 1646 : 2005 (2) Crimes 45 (SC) : 2005(10) SCC 614 : 2005(2) Crimes 45 (SC) : 2005(3) Supreme 2005 SCC (Cr) 1646.

Accused during quarrel suddenly took axe and gave solitary blow on back of head of deceased resulting into his death. There was no pre-meditated or pre-arranged plan to attack deceased. Medical evidence did not show that injury inflicted by itself would be sufficient in ordinary course of nature to cause death. Accused could be imputed with knowledge that injury inflicted by him was likely to cause death. Conviction was altered from Section 300 to one under Section 304, Part II—Accused sentenced to undergo 5 years R.I. coupled with fine of Rs. 7,000/-. *Shivappa Bundappa Kolkar* v. *State of Karnataka*, 2004 Cr LJ 4966 : AIR 2004 SC 5047 : 2004(4) Crimes 159 : 2004(7) Supreme 240 : 2004(8) Scale 382.

Version of the eye-witnesses who were all present at the camp at the crucial time was quite consistent and reliable. They had given an account of the incident lasting for a few minutes leading to the death of three police personnel. They had also spoken to the motive, *viz.*, the reprimand and adverse entries made in the register. There was no reason for the fellow policemen to invent a story to implicate the accused against whom none of them had any animosity. Some discrepancies in regard to the position from which the accused aimed his firearm at the victims were pointed out. It was then pointed out that no one else was injured, though according to the prosecution, the accused resorted to indiscriminate firing. It was further commented that PW 3 who was on sentry duty with a gun should have fired at the appellant if he was the real culprit. Then, it was contended that no witness from the village was examined by the prosecution, though the incident took place in the vicinity of the village. Similar contentions were negatived by the High Court. We do not think. By any reasonable standards, the said factors would make a dent on the overwhelming prosecution evidence. So also, certain omissions of the investigating officer had been projected to attack the prosecution version. For instance, it was pointed out that the ballistic expert was not examined to elicit the fact that the empty cartridges recovered could had been fired from the particulars sten-gun and the pellets found in the bodies of Ram Pandey and Bhagirath Singh were traceable to the particular sten-gun. Moreover, the bloodstained earth and the shirt of accused was sent for chemical analysis and the reports obtained. These lapses in the investigation, for whatever reason it be, did not to any material extent, affect the veracity of the most natural eye-witnesses who gave a consistent version and who came forward with this version at the earliest opportunity. *Gyasuddin Khan* v. *State of Bihar*, AIR 2004 SC 210 : 2004 Cr LJ 395 : 2004 (1) Crimes 90 (SC) : 2003(8) Supreme 499 : 2004(1) Recent 402.

Though the absence of blood stains found on clothes of son of the deceased indicated that he had not tried to protect his father or carry his dead body, it was not itself sufficient to reject evidence, especially when the son of the deceased had file complaint promptly and was present throughout investigation. The fact that the son though educated, complaint was written down by his brother-in-law could not also be a ground to suspect his presence. *Jai Shree Yadav* v. *State of UP*, 2004 Cr LJ 4826 : AIR 2004 SC 4443 : 2004 All LJ 3232 : 2004(6) JT 519 : 2004(3) Crimes 286 : 2004(6) Supreme 236.

83. Inconsistency between ocular and medical evidence.—Inconsistency between ocular and medical evidence of a very minor nature cannot be ground to reject evidence of witnesses found otherwise consistent. *Anwar* v. *State of Haryana*, 1997 (2) Scale 322 (SC). See also *Man Singh* v. *State of Haryana*, 2005 Cr LJ 3369 (P&H); *Wakil Khan* v. *State of MP*, 2005 Cr LJ 3410 : 2006(1) MPLJ 259.

Medical evidence contrary to oral evidence—Effect of.—Sessions Judge has, in several places this Apex Court noticed the argument on behalf of the accused that the doctor's evidence did not support the use of a shot gun and that the gun shot wound was perfectly in consonance with the use of a shot gun and that the gun shot wound was perfectly in consonance with the use of rifle. Faced with this situation, the Sessions Judge had no option but to hold that Madan Lal who was an old man, had seen the weapon from some distance and it was possible that he had been unable to distinguish between a rifle and a shot gun and in the light of the fact that he had every reason to be present on the spot, the eye witness account was to be preferred over the doctor's evidence. We are of the opinion that this is perhaps over simplifying and stretching the matter too far in favour of the prosecution as Madan Lal had identified the murder weapon as a 'pakki' weapon which in Punjab's rural dialect always means a 'rifle'. Moreover, the possibility of a mistake is difficult to swallow for the very significant reason that Madan Lal and his son Anil Kumar P.W. 4 were the owners of a shot gun and a rifle respectively.

The Sessions Judge was also influenced by the fact that the four spent cartridge cases that had been recovered from the place of incident by P.W. 9 ASI Devinder Singh on 30.11.1999 and sent to the Forensic Science Laboratory were found to have been fired from the licensed shot gun belonging to Rajinder Singh. We find this observation to be contrary to the record as it is clear from the report of the Forensic Science Laboratory (Exh. PV) that it had observed that no conclusive opinion could be given as to use of Rajinder Singh's shot gun on account of sufficient identifying characteristics on the cartridges.

The eye witness account does not support the medical evidence and *vice versa*, we are of the opinion that some serious doubt is cast on the prosecution story.

A bare look at these injuries would reveal that they could not have been self inflicted and it is not even the suggestion of the prosecution that it was so. The High Court has, accordingly, held that the prosecution story was clearly suspicious.

There is yet another circumstance on this aspect which creates suspicion. As per the defence version, the injuries had been caused by Madan Lal and his son Anil Kumar to the members of the accused party and a reference to this fact has been made by P.W. 9 ASI Devinder Singh in his investigation two senior police officers D.W. 1 Manminder Singh, DSP and D.W. 5 SP Narinder Pal Singh too had come to the conclusion that the defence put up by the accused was in fact the correct one and that they had been the victims of an attack, rather than the other way around.

We also observe that a shot gun and a rifle (both licensed) belonging to Madan Lal and Anil Kumar had been taken into possession had been recovered about 120 feet away from the spot on 30.11.1999 they had not been sent to the forensic laboratory for comparison with Anil Kumar's weapon. Mr. Sushil Kumar is, therefore, justified in submitting that the investigation in this matter was tainted and the defence version had not even been taken into consideration by the Investigating Officer, more particularly when two senior officers had given a report favourable to the accused. The judgment of the High Court calls for no interference. The appeal is dismissed. *State of Punjab vs. Rajinder Singh*, 2009 (12) JT 277 : 2009 (12) Scale 174 : 2009 (13) SCR 609.

Ocular and medical evidence—Inconsistency—Effect of.—Incident allegedly seen by deceased's brother-in-law and his son aged 10 years. Presence of eye-witness son on spot of occurrence found to be highly improbable. Discrepancies in statements of both witnesses highlighted by High Court could not be said to be trivial.

The High Court noticed discrepancies in the evidence of PWs. 3 and 4. PW. 3 was related to the deceased while PW. 4 was his son who was aged about 10 years at the time of occurrence. The High Court noticed that motive is not of much importance when credible evidence is available. If found that the motive highlighted was too feeble to be of any consequence. Apart from that the High Court found presence of PW. 3 to be highly improbable. It noticed that there was no sign of dragging at the place of occurrence as was stated by PWs. 3 and 4 and also there was no injury which could be co-related with dragging. All the injuries noticed were either incised injuries or on account of firearm. The High Court found that both PWs. 3 and 4 stated that respondent Dinesh and co-accused Vinod, who died, during trial fired one shot each from the guns held by them. The doctor who conducted post-mortem found that there was only one fire arm injury. To make up discrepancy PWs. 3 and 4 stated that certain empty cartridges and two live cartridges were found at the place of occurrence by the Investigating Officer. But the Investigating Officer stated that he did not find either any empty cartridge or live cartridge at the scene of occurrence. It is to be further noted that both PWs. 3 and 4 stated that while the deceased was being restrained by one hand each by the two accused persons, they shot him from the other hand. In other words, their version was that the accused persons fired at the deceased from a very short distance. The doctor's evidence clearly ruled out this aspect. He noticed that only skin deep injury was there and not any penetrating wound. PW. 3 had stated that all the knife injuries were inflicted when the deceased was in a lying posture and according to Rajesh Kumar (PW. 4) even at that time both the accused persons were catching hands of the deceased. The doctor found that all the injuries found on the deceased were incised wounds and not a single puncture wound was found on the deceased. The doctor further stated that there was no possibility of the incised injuries Nos. 1 to 13 being caused to the deceased while he was lying on the ground.

The discrepancies highlighted by the High Court cannot be stated to be trival. The conclusions arrived at by the High Court clearly establish material infirmities and contradictions on the evidence of the two vital witnesses PWs. 3 and 4. It is true that PW. 4 was a child of about 10 years. But the Court had found him to be in a position to depose. But the High Court has found that the presence of PW. 3 at the spot is highly improbable in view of certain aspects highlighted. One of them was his claim to have accompanied the deceased to the house of one Barati Lal for delivering milk in a Milk Can. In his cross-examination he admitted that he does not know where the house of the Barati Lal is. According to him, he and the deceased were returning after delivering the milk in a Can and the Can was tied to the cycle on which both of them were travelling. The Investigating Officer admitted that there was no Can lying at the place of occurrence and in fact no seizure of any Milk Can has been made. Apart from that the medical evidence clearly rules out the manner of infliction of injuries as deposed. Though ocular testimony of witnesses had greater evidentiary value vis-à-vis medical evidence, but when medical evidence totally improbablises the ocular testimony, that becomes a relevant factor in the process of evaluation of evidence. In the instant case the medical evidence totally improbablises the version regarding the manner of assault by both the accused persons as noted above. *State of Uttar Pradesh vs. Dinesh*, 2009 (11) SCC 566 : 2009 (3) JT 106 : 2009 (3) Scale 345 : 2009 (2) SCR 1175.

Medical evidence vis-a-vis ocular evidence. The medical evidence corroborates the prosecution case. The circumference of well was about three meters. Dr. Sarvesh Bihari Mathur (PW. 7), the autopsy surgeon, found the eyes of the deceased half open and the nails of hand and feet bluish. He further found Kuti Sansaria which is goose-skin/goose-flesh in the foot-base (Talwa). Small particles of sand were found in the wind pipe. Lungs were found to have air bubbles. There existed blood on the left hand side of the heart and the right side was found to be empty. According to him, the death took place 12 hours before the post mortem examination. The cause of death, in his opinion, was due to drowning which caused asphyxia. In his cross-examination, he stated that it might be possible that the deceased had committed suicide. But that was only a possibility. If the evidence of the eye-witnesses is to be believed and found to be reliable and we do not find any reason as to why they should not be so held, only because autopsy surgeon talked of some other possibility, as it would not lead to the conclusion that the medical evidence did not corroborate the prosecution case.

Apart from the statements made by PW1-wife and PW4-minor son which are sufficient to bring home the charges as against the appellant herein, we may also notice that although PW3 was declared hostile, he also, to some extent, supported the prosecution case. Indisputably, the said witness had gone back from his statement made before the Investigating Officer under Sec. 161 of the Code of Criminal Procedure. In his deposition, however, Surajbhan stated that he had seen a crowd and had also witnessed that Ratiram was being taken out of the well. Although according to him he had not seen Narpat, Rajendra and Richhpal dropping Ratiram into the well, in his cross-examination he stated as under :

> "On the place of incidence large crowd was assembled and some of them were speaking that Narpat and Rajendra had thrown Ratiram into well. I don't know the names of those persons so I cannot tell about them."

Thus, the fact that immediately after the death a crowd had assembled and people were talking about the death having been caused to the deceased by Narpat and Rajendra to some extent, supported the prosecution case. Both, Munna and Surajbhan were named as witnesses in the FIR. Although they were declared hostile, a part of their statement can be taken into consideration for the purpose of finding out as to whether the appellants are guilty of commission of the said offences or not. *Rajendra vs. State of Uttar Pradesh*, AIR 2009 SC 2558 : 2009 (2) Crimes 150 (SC) : 2009 (5) JT 305 : 2009 (5) Scale 423 : 2009 (5) SCR 589 : 2009 (3) Supreme 77 : 2009 (3) SLT 263.

The accused was alleged to have caused the death of deceased for having an affair with his concubine. The accused himself went and confessed his crime before village Administrative officer whose evidence was found reliable. This was corroborated by the fact that the deceased was last seen in the company of accused and his fingerprints were found on the articles which were recovered from the scene of offence. The conviction of accused was held proper. *Kodamala Prabhakar* v. *The State*, 2003 Cr LJ (NOC) 243 (AP) : 2003(1) ALD (CRL) 779 : 2003(2) Andh LT (Cri) AP 169.

It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the storys consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness-box; their power of observation *etc.* Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation. *Chhotanney vs. State of Uttar Pradesh, AIR 2009 SC* 2013 : 2009 (2) Crimes 139 (SC) : 2009 (11) SCC 71 : 2009 (3) JT 175 : 2009 (2) SCR 756 : 2009 (3) Scale 171 : 2009 (2) Supreme 443 see also *State of Madhya Pradesh vs. Sughar Singh*, AIR 2009 SC 586 : 2008 (15) SCC 442 : 2008 (12) JT 152 : 2008 (15) SCR 725 : 2008 (14) Scale 214 : 2008 (9) SLT 639.

In a Gauhati case the accused and deceased were last seen together and thereafter the deceased was found dead in the quarter which was allotted to wife of accused. The offensive weapon was discovered at the instance of accused. As per medical report the injuries were capable of causing death in the ordinary course of nature. The conviction of accused was held proper. *Naringham Shyam Kanhai Singh* v. *State*, 2003 Cr LJ 1435 (Gau) : 2002(2) Gauhati LR 348.

We have seen the medical evidence of doctor, who had conducted the Post mortem and had took the ten injuries suffered by the deceased. Much was said that the eye-witness had not described the assault, so that it could suggest causing ten injuries. A fact cannot be forgotten that here was a witness of the tender age and he was not expected to explain each and every injury. He has deposed about the participation of A-1 and A-2 and the crucial part played by A-3 and A-4. The cross examination of the Doctor is absolutely perfunctory. The evidence of Investigating Officer supports the evidence of PWs. 1 and 2, who are the panch witnesses. PW-2 has proved the discovery at the hands of A-1, who is dead, as also the discovery made by A-4. In his evidence, the Investigating Officer has also said about the articles being sent to the Chemical Examiner at Bangalore and had also referred to the queries seeking the opinion of the Doctor as to whether the external injuries could be caused by the aforementioned weapons seized by him. *Lastly*, the other Investigating Officer PW-18 Gurrapagouda also suggested that he had arrested the A-1 and A-2, apart from the fact that he had referred to the various panchanamas including the seizure panchanama of the blood stained clothes *etc*. There is nothing in the cross examination of this Investigating Officer either. Therefore, we ourselves are satisfied that the offence was completely and totally proved as against the four accused persons. We are fully satisfied that this was a case, where the appreciation of the evidence at the hand of the trial Court was erroneous and faulty and that by the High Court was correct. *Mallappa Siddappa Alakanur vs. State of Karnataka*, AIR 2009 SC 2959 : 2009 (3) Crimes 230 (SC) : 2009 (9) JT 33 : 2009 (9) Scale 159 : 2009 (5) Supreme 242 : 2009 (10) SCR 196 : 2009 (6) SLT 33.

The accused desired to marry deceased but she did not want to do so. Circumstances should that she died of homicidal death. The motive of accused for commission of crime was established and also accused and deceased were last seen together. It was held that accused was liable to be convicted for the murder. *Matu Munda* v. *State*, 2003 Cr LJ (NOC)162 (Orissa) : 2003(25) OCR 22 Ori.

Ocular and medical evidence—Inconsistency—Effect of. Incident allegedly seen by deceased's brother-in-law and his son aged 10 years. Presence of eye-witness son on spot of occurrence found to be highly improbable. Discrepancies in statements of both witnesses highlighted by High Court could not be said to be trivial.

The High Court noticed discrepancies in the evidence of PWs. 3 and 4. PW. 3 was related to the deceased while PW. 4 was his son who was aged about 10 years at the time of occurrence. The High Court noticed that motive is not of much importance when credible evidence is available. If found that the motive highlighted was too feeble to be of any consequence. Apart from that the High Court found presence of PW. 3 to be highly improbable. It noticed that there was no sign of dragging at the place of occurrence as was stated by PWs. 3 and 4 and also there was no injury which could be co-related with dragging. All the injuries noticed were either incised injuries or on account of firearm. The High Court found that both PWs. 3 and 4 stated that respondent Dinesh and co-accused Vinod, who died, during trial fired one shot each from the guns held by them. The doctor who conducted post-mortem found that there was only one fire arm injury. To make up discrepancy PWs. 3 and 4 stated that certain empty cartridges and two live cartridges were found at the place of occurrence by the Investigating Officer. But the Investigating Officer stated that he did not find either any empty cartridge or live cartridge at the scene of occurrence. It is to be further noted that both PWs. 3 and 4 stated that while the deceased was being restrained by one hand each by the two accused persons, they shot him from the other hand. In other words, their version was that the accused persons fired at the deceased from a very short distance. The doctor's evidence clearly ruled out this aspect. He noticed that only skin deep injury was there and not any penetrating wound. PW. 3 had stated that all the knife injuries were inflicted when the deceased was in a lying posture and according to Rajesh Kumar (PW. 4) even at that time both the accused persons were catching hands of the deceased. The doctor found that all the injuries found on the deceased were incised wounds and not a single puncture wound was found on the deceased. The doctor further stated that there was no possibility of the incised injuries Nos. 1 to 13 being caused to the deceased while he was lying on the ground.

The discrepancies highlighted by the High Court cannot be stated to be trival. The conclusions arrived at by the High Court clearly establish material infirmities and contradictions on the evidence of the two vital witnesses PWs. 3 and 4. It is true that PW. 4 was a child of about 10 years. But the Court had found him to be in a position to depose. But the High Court has found that the presence of PW. 3 at the spot is highly improbable in view of certain aspects highlighted. One of them was his claim to have accompanied the deceased to the house of one Barati Lal for delivering milk in a Milk Can. In his cross-examination he admitted that he does not know where the house of the Barati Lal is. According to him, he and the deceased were returning after delivering the milk in a Can and the Can was tied to the cycle on which both of them were travelling. The Investigating Officer admitted that there was no Can lying at the place of occurrence and in fact no seizure of any Milk Can has been made. Apart from that the medical evidence clearly rules out the manner of infliction of injuries as deposed. Though ocular testimony of witnesses had greater evidentiary value vis-à-vis medical evidence, but when medical evidence totally improbablises the ocular testimony, that becomes a relevant factor in the process of evaluation of evidence. In the instant case the medical evidence totally improbablises the version regarding the manner of assault by both the accused persons as noted above. Above being the position, we find no merit in this appeal. *State of Uttar Pradesh vs. Dinesh,* 2009 (11) SCC 566 : 2009 (3) JT 106 : 2009 (3) Scale 345 : 2009 (2) SCR 1175.

In a Rajasthan case, the accused and deceased were last seen together and thereafter she was found dead. The proximity of time and place ruled out possibility of any person other than the accused being the culprit of the crime. The conviction of accused was held proper. *Govind Ram* v. *State,* 2003 Cr LJ 4189 (Raj) : 2003 (47) All Cri C 730.

Sessions Judge has, in several places this Apex Court noticed the argument on behalf of the accused that the doctor's evidence did not support the use of a shot gun and that the gun shot wound was perfectly in consonance with the use of a shot gun and that the gun shot wound was perfectly in consonance with the use of rifle. Faced with this situation, the Sessions Judge had no option but to hold that Madan Lal who was an old man, had seen the weapon from some distance and it was possible that he had been unable to distinguish between a rifle and a shot gun and in the light of the fact that he had every reason to be present on the spot, the eye witness account was to be preferred over the doctor's evidence. We are of the opinion that this is perhaps over simplifying and stretching the matter too far in favour of the prosecution as Madan Lal had identified the murder weapon as a 'pakki' weapon which in Punjab's rural dialect always means a 'rifle'. Moreover, the possibility of a mistake is difficult to swallow for the very significant reason that Madan Lal and his son Anil Kumar P.W. 4 were the owners of a shot gun and a rifle respectively.

The Sessions Judge was also influenced by the fact that the four spent cartridge cases that had been recovered from the place of incident by P.W. 9 ASI Devinder Singh on 30.11.1999 and sent to the Forensic Science Laboratory were found to have been fired from the licensed shot gun belonging to Rajinder Singh. We find this observation to be contrary to the record as it is clear from the report of the Forensic Science Laboratory (Exh. PV) that it had observed that no conclusive opinion could be given as to use of Rajinder Singh's shot gun on account of sufficient identifying characteristics on the cartridges.

The eye witness account does not support the medical evidence and *vice versa*, we are of the opinion that some serious doubt is cast on the prosecution story.

A bare look at these injuries would reveal that they could not have been self inflicted and it is not even the suggestion of the prosecution that it was so. The High Court has, accordingly, held that the prosecution story was clearly suspicious.

There is yet another circumstance on this aspect which creates suspicion. As per the defence version, the injuries had been caused by Madan Lal and his son Anil Kumar to the members of the accused party and a reference to this fact has been made by P.W. 9 ASI Devinder Singh in his investigation two senior police officers D.W. 1 Manminder Singh, DSP and D.W. 5 SP Narinder Pal Singh too had come to the conclusion that the defence put up by the accused was in fact the correct one and that they had been the victims of an attack, rather than the other way around.

We also observe that a shot gun and a rifle (both licensed) belonging to Madan Lal and Anil Kumar had been taken into possession had been recovered about 120 feet away from the spot on 30.11.1999 they had not been sent to the forensic laboratory for comparison with Anil Kumar's weapon. Mr. Sushil Kumar is, therefore, justified in submitting that the investigation in this matter was tainted and the defence version had not even been taken into consideration by the Investigating Officer, more particularly when two senior officers had given a report favourable to the accused.

The judgment of the High Court calls for no interference. The appeal is dismissed. *State of Punjab vs. Rajinder Singh*, 2009 (12) JT 277 : 2009 (12) Scale 174 : 2009 (13) SCR 609.

84. Inconsistent/Doubtful/Insufficient Evidence.—Where according to the version of the eyewitnesses, the deceased was running forward while the assailants shot him from behind but the firearm injuries sustained by the deceased could well have been shot face-to-face. This aspect is not enough to doubt the correctness of the testimony of the eyewitnesses, for, it is quite possible as per the reflex action the running deceased would have turned back either to see whether he has gone out of the range of peril or to know the nearness of it. The mere fact that PW 2 eyewitness said that the deceased was running forward and the assailants shot them from behind cannot rule out the possibility of such twirling of the deceased when the guns were fired. *Pandurang Kalu Patil and another v. State of Maharashtra*, 2002 Cri LJ 1007 (S.C.) : 2002 AIR (SC) 733 : 2002 (1) SCR 338 : 2002 (2) SCC 490 : 2002 (1) JT 229 : 2002 (1) Scale 290 : 2002 (1) Supreme 233 : 2002 (1) SCJ 378 : 2002 (3) SRJ 172 : 2002 SCC (Cr) 371 : 2002 (1) Crimes 270 (SC) : 2002 (1) CCR 92 (SC) : 2002 (1) JCC 380 : 2002 (1) Recent CR 499 : 2002 (3) CRJ 448.

Doubtful evidence—Eyewitnesses being brother and friend of deceased believed. Even though it is accepted that there were two eye witnesses; one was the brother of the deceased and the other was friend and there was an attempt to protect the accused there is no credible evidence to show involvement of the accused persons in the concerned crime. That being so, their conviction would not be proper. High Court has precisely held so. That being the position, we are not inclined to interfere in this appeal. *State of Punjab vs. Ginder Singh*, AIR 2009 SC 1930 : 2009 (11) SCC 353 : 2009 (3) JT 454 : 2009 (2) Scale 446.

On the date of occurrence, according to the prosecution witnesses, it was raining and the dead body was kept under the Chappar. The prosecution failed to obtain an explanation from the Autopsy Surgeon as to how he had opined that death had taken place 3-4 days prior to his post-mortem examination although he examined the dead body within 41 hours from the time of occurrence.

It is furthermore evident that all the prosecution witnesses stated that all the accused persons had fired from the respective firearms. According to them at least 7 shots were fired; 3 shots had hit the person of the deceased. If that be so, more than one gun must have been used. Appellant, as noticed hereinbefore, is said to have been fired a shot from his licensed gun. Its use, however, has not been established by the prosecution as the report of the ballistic expert is silent in that regard. The empties which were found at the spot had not been examined by any ballistic expert. The empties which were recovered from the dead body were not matched with the gun allegedly used.

We may notice that two metallic pellets were recovered from the dead body. Empties had not been shown to the expert; even the attention of the Autopsy Surgeon was not drawn thereto. Although shots were said to have been fired from a distance of 2-3 paces, no blackening or charring was found to be present. If the shots were fired from a close range, it was expected that blackening and charring would have been noticed by the Autopsy Surgeon at the entry point.

Learned Sessions Judge and the High Court, with respect, failed to apply their mind as regards the time of lodging of the FIR. Hirdey Narain Shukla, the Head Constable attached with Police Station who was examined as PW-3 before the learned trial Judge stated that the FIR was lodged at 4.45 a.m. and he had recorded the same immediately. According to him, the special reports were sent by 6.00 a.m. through a constable. However, the Investigating Officer did not say so. As we have noticed hereinbefore, he, in his evidence, categorically stated that he had recorded the FIR at 9.30 p.m. No evidence had been brought on records to show that investigation had started on 16.08.1979. A site plan was prepared but it does not bear any date. The prosecution has not explained as to why the FIR was sent to the Court of Chief Judicial Magistrate on 17.08.1979 and why the dead body was not sent for post-mortem on 16.08.1979 itself.

The High Court, in our opinion, committed a serious error insofar as it proceeded on the basis that shots fired by the appellant caused the fatal injury. The High Court did not analyze the evidence on record as to who caused the other firearm injuries. If the prosecution witnesses, who were said to be the eye-witnesses, were to be believed, 6 out of 7 accused could not have been acquitted and particularly those who had direct enmity with Mewa Ram and his sons. Although Suraj Pal (PW-2) son of Ganga Singh denied the suggestion that scribe of the FIR who was admittedly a resident of different village (said to be at a distance of 10 kilometers) from the place of occurrence, the prosecution had not explained as to why he was not examined. If he was present in the village it was expected that he also had witnessed the occurrence, as his son was said to be an eye-witness. It is difficult to believe that in case of this nature the investigation did not start immediately. Inquest report, preparation of seizure memo etc., which were to be carried routinely, and as such there was no reason as to why they were not brought on record.

While examining the original records of the case, we have noticed that some interpolations have made in the records maintained at the Police Station. The High Court, in our opinion, committed a serious error in drawing an inference that appellant had rightly been held guilty for commission of offence of murder of Ram Rakshpal as animosity between the parties was proved. It failed to notice that there is nothing on record to show that the appellant had been bearing any animosity against the deceased. On the other hand, other accused were having animosity towards the deceased. Mewa Ram and his family.

Furthermore, the High Court did not pose unto itself the correct question, namely, the time of lodging the FIR, *i.e.*, whether it had in fact been lodged at 4.45 a.m. or 4.45 p.m. If it was lodged at 4.45 p.m. the entire edifice of the prosecution case would fall to the ground.

Delay in lodging the First Information Report has a great importance in a case of this nature. Enmity between the parties stands admitted. The prosecution case proceeded on the basis that immediately after occurrence and after shifting the dead body under a shed, the informant got the First Information Report scribed by Ganga Sahai and immediately thereafter proceeded on foot to the Police Station. If this part of the story is correct, the prosecution's case would not be subject to much doubt. But if the scribe of the First Information Report was residing in a separate village which is 10 kms. away from the place of occurrence, and it was at that place the FIR was scribed whereafter PW-1 arrived at the Police Station, it would impossible for him to reach by 4.30 in the morning. The prosecution did not examine the scribe of the First Information Report although his son has been examined as an eye-witness. If he was residing at the relevant time in the village where the incident had taken place, it was expected that either he had witnessed the occurrence or had reached the place of occurrence immediately after the accused fled away. The prosecution, therefore, should have made attempts to clarify this anomaly.

Indisputably, there exists a discrepancy as regards timing of the lodging of the First Information Report PW-3, Head Constable Hriday Narain Shukla, testified that it was lodged at 4.45 a.m. Records, however, show otherwise. In the FIR, it is shown to have been lodged at 4.45 p.m. As noticed hereinbefore, there are some interpolations but according to the Investigating Officer, he recorded the First Information Report at 9.30 p.m. on 16.08.1979.

Moreover, if the Fist Information Report was lodged early in the morning, there was absolutely no reason as to why the investigation did not start immediately thereafter. If Head Constable Hriday Narain Shukla is correct that the copies of the First Information Report had been sent to all concerned including the Court, there was absolutely no reason as to why the same would reach the Court on the next date. We also fail to comprehend as to why the dead body was sent for post mortem only on 17th instead of 15th itself. The seizure memo does not contain any date. The original inquest report is not on record.

Furthermore, except the appellant all other accused have been acquitted. The High Court, therefore, did not rely upon the prosecution case in its entirety. While doing so, unfortunately, the High Court did not consider these vital aspects of the matter which were crucial for determination of the issue.

For the aforementioned reasons, the impugned judgment of the High Court cannot be sustained and it is set aside accordingly. *Om Prakash vs. State of U.P.*, AIR 2009 SC 944 : 2009 (1) Crimes 183 (SC) : 2008 (17) SCR 475 : 2008 (13) JT 466 : 2008 (16) Scale 158 : 2009 Cr LJ 782.

Insufficient evidence—Effect of. First eye-witness is none other than the wife of the deceased and she stated in her evidence that she along with her husband and mother-in-law after finishing her evening meal was watching Television in the house. At that time A-4 and A-5 (later identified) having entered the house stood at the entrance. The deceased on seeing both of them moved towards them asking them as to what they wanted and immediately A-4 shot her husband with a pistol in his hand. The bullet injured on the left side rib area. Thereafter both the appellant and A-4 fled away from the scene of occurrence. This is what she stated even in the first information report.

PW-2 while narrating the incident more or less gave the same version but however, stated that both the appellant as well as A-4 were carrying pistols. But in the cross-examination she expressed her ignorance to whether both of them were carrying lethal weapons.

PW-26, the Investigating Officer in his evidence admitted that PW-2 did not make any statement during inquiry that both the persons who had entered her house were carrying guns. In the circumstances it becomes highly doubtful as to whether the appellant herein was also carrying a pistol and entered into the house of the deceased.

The trial Court upon appreciation of the evidence found that the appellant did not trespass into the house of the deceased along with A-4 with intention to kill and accordingly acquitted the appellant of the charge under Sec. 302 read with 34 IPC. The High Court reversing the findings of the trial Court found the appellant guilty of the charge on the basis that the appellant along with A-4 trespassed into the house of the deceased in furtherance of their common intention to kill the deceased. That is not the case of the prosecution.

The case of the prosecution was that the appellant along with A-4 with an intention to commit the dacoity had trespassed into the house of the deceased, the deceased had resisted them and out of fear of being over powered A-4 shot the deceased with pistol due to which the deceased sustained grievous injuries leading to his ultimate death. There is no allegation against the appellant that he along with A-4 trespassed into the house of the deceased in furtherance of their common intention to commit murder of the deceased. The common intention according to prosecution was to commit dacoity which is held not proved.

In the present case the High Court in our considered opinion ought not to have disturbed the order of acquittal recorded by the trial Court exonerating the appellant of the charge under Sec. 302 read with 34 IPC. There is no evidence available on record that appellant along with A-4 entered into the house of the deceased armed with pistol. The evidence of PW-2 that the appellant was also armed with pistol is highly doubtful for she admitted in the cross-examination stating that she was not sure as to whether both the accused were carrying weapon. The first information report and evidence of PW-1 and Investigating Officer, PW-26 do not support the half-hearted and vague statement of PW-2. It would be unsafe to rely upon the evidence of PW-2. *Arun vs. State* AIR 2009 SC 1256 : 2008 (15) SCC 501 : 2008 (16) Scale 361 : 2008 (12) JT 571 : 2008 (1) Supreme 355 : 2009 (1) SLT 492 : 2008 (17) SCR 279 : 2009 (1) JCC 609.

So far as accused No. 2 is concerned, we are of the opinion that the High Court. although should have dealt with the matter at some more details, but keeping in view the fact that it recorded a judgment of acquittal, it is difficult to opine that another view is not possible. He was arrested 15 days after the occurrence from a railway platform. The fact that he was the driver of the car was sought to be proved by witnesses. however, stated that he was arrested on the same day which was not a fact. PW-11 also could not testify the identity of accused. No identification parade was held, which could have been held, unlike the case of accused No. 1. He was not in the hospital or at some other place. No recovery has been made from him. The evidence of PW-9 is shaky as she stated that she had not seen the tenants, whom the accused used to visit by coming in an Ambassador car. *Pantangi Balarama Venkata Ganesh vs. State of Andhra Pradesh*. AIR 2009 SC 3129 : 2009 CrLJ 4144 (SC) : 2009 (10) Scale 69 : 2009 (5) Supreme 506 : 2009 (6) SLT 364 : 2009 (11) SCR 636 : 2009 (3) JCC 2470.

Some inconsistency in evidence can be ignored when witnesses belonged to a deprived Section of society. PW. 1 stated that he had come to the place of incident as his uncle, the deceased, was a candidate in the election. His presence is, therefore, absolutely natural. PW. 5 stated that she was vegetable vendor and had come to the site in order to sell her wares. Mr. Rao, has, however, sought to demolish her testimony by observing that she had started from her house at about 7.00 a.m. (as stated by her) and had reached the murder site after selling vegetables to several people and realising this difficulty she had changed the time to 6.00 a.m. To suit the circumstance that the murder too had committed at 7.00 a.m. We are of the opinion that inconsistency can be ignored as the witnesses belonged to a deprived Sec. of society and her statement was being recorded after 8 years of the incident. It also cannot be ignored that PW. 5 was hawking vegetables and it would, therefore, have been logical for her to have chosen the polling site for a visit as that would have ensured a crowd, and a crowd would have meant good business. Mr. Rao has also pointed out that PW. 5 belonged to the Congress party which was the party of the deceased as well whereas the appellants belonged to the Telugu Desam Party and as such she could not be said to be an impartial witness. The matter has been extensively dealt with by the High Court and we believe that had there been any motive to implicate any body on the basis of party affiliations, the main role in the entire incident would have been ascribed to A. 6 who was the rival candidate. On the contrary A. 6 has been given a very minor role in the entire incident and this was one of factors that had let to his acquittal by the trial Court and the confirmation of that order by the High Court as well.

A perusal of the injuries would reveal that Injury No. 1 has been caused by A. 1. Injury No. 2 either by A. 2 or A. 3, Injury No. 3 by A. 1, Injury Nos. 4 and 5 by A. 1 with a stone and there are three or four additional injuries (on which emphasis has been laid by Mr. Rao) as they remain unexplained. Even assuming, however, that three injuries out of eight are unexplained, this one circumstance alone would not destroy the flow of the other evidence. It is clear that the incident had happened in the course of the Mandal Parishad Elections with several people being involved and a large group of spectators being present at the spot. In this scenario we feel that it would have been well nigh impossible for any witness to have given a mathematical or precise description of all the injuries that had been caused and that too in a melee. The fact remains that the injuries found on the dead body correspond fully with the weapons that had been used. As a matter of fact Injury Nos. 4 and 5 which appeared to be inflicted with a stone allegedly in the hands of A.1 clearly prove the veracity of the story as it would have been inconceivable for a witness to have imagined that a stone, (a very unusual weapon for a pre-planned attack) would be used as A. 1 was also armed with a knife which he used after the injury had been caused with a stone. We are thus of the opinion that the medical evidence does not in any way contradict the ocular evidence.

We have also gone through the so called improvements/ inconsistencies in the statements given by PW. 1 and PW. 5 to the police *vis-a-vis* their statements in Court. It must be emphasized that the incident happened in the year 1995 whereas the evidence was recorded after about 8 years. Some discrepancies are, therefore, bound to occur. The question to be noted is as to whether the discrepancies or improvements are such which go to the root of the matter and affect veracity of the prosecution's story. We are of the opinion that the evidence herein does not fall within this slippery category. It is clear from the FIR recorded by PW. 1 and his statement in Court that PW. 5 had been present at the time of the incident. The other discrepancies that have been pointed out are to no avail keeping in view the over all picture. We are, therefore, of the opinion that the High Court was fully justified in interfering in the matter and was well within its jurisdiction to do so, even in the light of the judgments cited by Mr. Rao. The appeals are, accordingly, dismissed. *Gamina Bala Koteswara Rao vs. State of Andhra Pradesh*, 2009 (4) Crimes 87 (SC) : 2009 (10) SCC 636 : 2009 (12) JT 416 : 2009 (12) Scale 611 : 2009 (14) SCR 1 : 2009 (6) Supreme 718 : 2009 (7) SLT 745.

Doubtful evidence—Murder with common intention. *Firstly*, the combined effect of the evidence of PW. 4, Exh. C1 and the evidence of PW. 17 and PWs. 1 and 3 is that there is marked contradiction between the statements of the witnesses and the documents. If in Exh. C1 it was stated that an unidentified body was brought to the hospital, it is not explained as to how and why PW. 4 the police constable did not tell the doctor that the identity was known. The modes of investigation of the police would be indifferent directions if an unidentified body is brought and when a known person's body is brought. It is strange that PW. 4 who is supposed to have known the name of the deceased from PWs. 1 and 3 chose not to tell the name of the deceased to the Doctor. Further PW. 17's statement is full of contradictions. Initially he denied to have received Exh. C1, but later on he accepted to have received the same. Even thereafter he did not offer any explanation as to how and why it was stated in the Doctor's intimation that an unidentified body was brought. This could have been clarified had the doctor being examined. For reasons known to the prosecution, he was not examined as a witness. Though the High Court noted that there was no dispute that the FIR was lodged at 10.45 PM, that is factually incorrect. In fact from the very beginning the accused persons have been taking the stand that the FIR was not lodged at 10.45 PM as claimed, otherwise it would not have reached the Court which is situated at a distance of 250 yards after about 15 hours. No explanation has been offered as to why this delay had occurred. Had any explanation been offered by the prosecution the Court could have considered acceptability or otherwise of the explanation. That has not been done. Though ignorance of PW. 1 about the scooter number, model and other relevant factors may not in all cases be suspicious circumstances, but in the present case this assumes importance.

Above being the position, the inevitable conclusion is that prosecution has failed to establish the accusations, and appellants are entitled to acquittal which we direct. The appellants be released forthwith from custody unless required to be in custody in any other case. The appeal is allowed. *N.H. Muhammed Afras vs. State of Kerala*, AIR 2009 SC 731 : 2008 (15) SCC 315 : 2008 (14) Scale 683 : 2008 (13) JT 30 : 2008 (16) SCR 560 : 2008 (9) SLT 619.

Insufficient evidence—Bride burning—Allegations against husband. The three circumstances brought on record by the prosecution and highlighted by the trial Court and High Court are as follows : (i) Deceased Sofiya met with an unnatural death; (ii) Deceased Sofiya had died in the room which was solely and exclusively occupied by her and her husband *i.e.* accused; (iii) The appellant has not offered any explanation in respect of the incident in which deceased Sofiya had sustained burns."

We have gone through the evidence on record and we find that the High Court has arrived at some conclusions which, in our opinion, are based on surmises and conjectures, without there being any evidence to support the conclusion. That being so, we find that the charge against the appellant has not been established. *Sohel Mehaboob Shaikh vs. State of Maharashtra*, AIR 2009 SC 2702 : 2009 (12) SCC 588 : 2009 (5) Scale 704 : 2009 (8) JT 297 : 2009 (6) SCR 483 : 2009 (5) SLT 248 : 2009 (3) JCC 2310.

85. Last seen together.—Where appellant husband killing wife who was deceased. They were married two years ago—Only had circumstantial evidence—Relations between them was not normal—Last seen together before they went to sleep—Next morning wife found dead covered with quilt on bed—No possibility of suicide. The accused was absconding. Hence conviction was upheld. *Kuldip Sharma* v. *State*, (1995) 4 Crimes 225 (SC).

Last seen theory—When not reliable. There are three main incriminating circumstances against the accused. The first piece of evidence is the suggestion that the third person who was urinating close by the bridge was Gopal Sah, the second, the extra judicial confession made by Dasrath Sah and the third, the recovery of alleged murder weapon – a sickle. We are of the opinion that this evidence is, to say the least, unacceptable. It has come in the statement of PW. 8 Kameshwar Choudhary that he had seen Dasrath Sah alonog with the deceased near the bridge and that another person was urinating close by. It is the suggestion and inference that this person was Gopal Sah.

We find that in this situation the statement of PW. 5 Mohd. Nadaf that he had seen the three convicted accused moving swiftly away from the direction of the site of the murder at about 7.30 p.m. or that he had seen the appellant Gopal Sah with a sickle in hand is hardly sufficient to hold him guilty of murder. We are, further, of the opinion that an extra judicial confession is, on the face of it, a weak piece of evidence and the Courts are reluctant in the absence of a chain of cogent circumstances to rely on this evidence for the purpose of recording a conviction. In any case, we find that the confession made by Dasrath Sah can, if at all, be used against him and not against his co-accused. The statement of the Investigating Officer with respect to the place where the two murder weapons had been allegedly thrown makes the recovery itself tenuous. Moreover, as the sickle allegedly in the hands of Gopal Sah had been recovered from a pond three months after the murder, no evidentiary value whatsoever can be attached to this circumstance as well.

As the appeal of Bhushan Sah had been dismissed on merits, the appeal of Gopal Sah must meet the same fate must now be examined. We observe that Bhushan Sah's appeal had been dismissed in limine on the ground of limitation as also on merits but we have chosen to hear the present appeal after leave had been granted by this Court long before Bhushan's special leave petition had been filed. We, even otherwise, are of the opinion that the evidence involving Bhushan Sah is qualitatively and quantitatively different from the evidence against Gopal Sah, as would be apparent from the circumstances noted above, not only with respect to the last seen but also relating to the recovery of various items from his house which could be said to be relatable to the murder. We must, therefore, conclude that the dismissal of the special leave petition of Bhushan Sah *in limine*, would not by itself be a ground to dismiss the appeal of Gopal Sah.

Held that the judgment of the trial Court and the High Court in so far as Gopal Sah is concerned to be unsustainable. He is accordingly acquitted of all charges. The appeal is allowed in the above terms. *Gopal Sah vs. State of Bihar*, 2008 (16) Scale 224 : 2009 (1) SLT 369 : 2009 (1) JCC 322.

The dead body was found on 20.01.1996 whereas accused persons were stated to have been seen in the company of the deceased on 08/09.01.1996. PW. 9, the wife of the deceased admitted that the parties separated on 09.01.1996. The missing person's report was lodged on 12.01.1996 by PW. 11 the nephew of the deceased.

The only evidence which appears to have been pressed into service by the prosecution was that the injections were recovered from a lane near the house of the accused.

It is to be noted that the High Court recorded a finding as if it was proved through the prosecution evidence and medical evidence and the report of Doctor that the cause of death of the deceased was 'Organo Phosphorous' which was administered to him. This finding is apparently wrong. The doctor's opinion as is evident from Exh. P. 15-1 that the cause of death was not possible to be noted because the body was decomposed.

According to the FSL report Exh. P4 medicine called Diazepam "Tranquilizer" was found in the stomach intestine, lever, heart, kidney and lungs *etc.* In view of the shaky nature of the evidence adduced it would be unsafe to convict the appellants. The conviction as recorded by the trial Court and upheld by the High Court stand quashed. *Ramesh Bhai vs. State of Rajasthan*, 2009 CrLJ 2991 : 2009 (2) Crimes 337 (SC) : 2009 (12) SCC 603 : 2009 (6) Scale 320 : 2009 (7) JT 439 : 2009 (3) Supreme 722 : 2009 (4) SLT 659 : 2009 (6) SCR 949.

The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen together alive and when deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.

In the present case there is no such close proximity of time and place. From the evidence as stated, such inference cannot be drawn. The prosecution has led the evidence that the appellant and the deceased went together on 16-4-1987 whereas the dead body of the deceased was recovered on 18-4-1987. There is a long gap between the two. The prosecution has taken a consistent case that the deceased was lastly seen alive in the company of the appellant at about 8 p.m. on 16-4-1987. Informant had stated that appellant and deceased went together at about 5 p.m. and after some time the deceased came back to home. At about 8 p.m. the appellant again came to his house and took his son. Thereafter, his son did not return home. Whereas mother of deceased had not stated that the appellant came twice to her house on the date of incident. She had only stated that the appellant took her son from the house at about 5 p.m. There is a variation between the statement of two. Thus, the evidence of the prosecution is self-contradictory and cannot be relied upon. Similarly it is in the evidence that informant father and mother of the deceased were not present at home at the time when the deceased was allegedly taken by appellant. Thus, the evidence of last seen is self-contradictory. It is also in the evidence that the deceased was involved in the theft of wood and ginger. It reveals that he had the bad antecedents in the village. Thus, the evidence of the prosecution did not constitute a circumstance which draws an incriminating inference against the accused alone and connect him with the crime. *Gopal Singh and Anr. v. State of Uttaranchal*, 2007 CriLJ 1972 (Uttaranchal).

Various articles belonging to deceased were recovered at the instance of accused and there was no satisfactory explanation as to how accused came to be in possession of these articles. Accused persons were also found in the company of deceased at various places immediately preceding day of death of deceased. Their conviction was held proper. *Kanti Lal* v. *State of Rajasthan*, 2004 Cr LJ 2487 : AIR 2004 SC 2536 : 2004(3) Supreme 377 : 2004(2) Crimes 420 (SC) : 2004 SCC (Cr) 1760.

The deceased was last seen in the company of accused persons by two independent witnesses but their evidence did not stand test of scrutiny and it could not be believed that they had actually seen deceased in company of accused. Extra-judicial confession made by one of accused was found not reliable. Thus case against accused was built on suspicion with no clinching and conclusive evidence. It was held that conviction was liable to be set aside. *Shakil Ahmad* v. *State*, 2004 Cr LJ 91 (All) : 2003(3) Crimes 26 : 2003 All LJ 2528 : 2003(47) All Cri C 141 : 2003(2) All Cri R.

Last seen theory—Applicability of. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. *Tipparam Prabhakar vs. State of Andhra Pradesh*, 2009 CrLJ 3032 : 2009 (6) JT 205 : 2009 (6) Scale 375 : 2009 (7) SCR 142 : 2009 (5) SLT 94.

The accused and his wife (deceased) were living in a shed and were last seen there. However Court refused to accept this much evidence as witnesses stated that accused an deceased were talking in Malayalam whereas they were Tamilians and in normal course used to talk in their mother tongue. The conviction of accused was set aside. *Arunachalam Kodaloor* v. *State*, 2003 Cr LJ 3980 (Ker) : 2003(2) Ker LJ 225 : 2003(4) All Cri R 842.

Where evidence of witnesses showed that the deceased boy aged 4-5 years was last seen together with accused, it was held that in view of cogent evidence linking accused from time when deceased boy was missing to proximate time of his death, conviction was held justified. *Ramdayal* v. *State of Rajasthan*, 2005 Cr LJ 1496 (Raj) : 2005 Cri LR (Raj) Rai 428 : 2005(1) Raj Cri C 469 : 2005(2) WLC 47.

When identity of deceased not established and last seen together also not proved. Hence conviction set aside. *Jagroop Singh* v. *State of Rajasthan*, 1994 Cr LR 87 (Raj).

Where conviction based on the testimony of "last seen together" justified and motive not proved—Conviction cannot be upheld. *Bhoma Acharya* v. *State of Rajasthan*, 1994 Cr LR (Raj) 132 : 1994 R Cr C 52.

The accused and deceased were last seen together and thereafter the deceased was found dead in the quarter which was allotted to wife of accused. The offensive weapon was discovered at the instance of accused. As per medical report the injuries were capable of causing death in the ordinary course of nature. The conviction of accused was held proper. *Naringham Shyam Kanhai Singh* v. *State*, 2003 Cr LJ 1435 (Gau) : 2002(2) Gauhati LR 348.

The evidence relating to the last seen aspect is concerned witness stated that the accused and the deceased slept together in the room. Strangely PW. 9 stated that the deceased slept alone and the appellant had not come to his house. PW. 1 is the sister of the deceased. PW. 8 the *de-facto* complainant *i.e.* the father of the deceased resiled from the statement made during investigation and stated that he had not told anybody that appellant was sleeping with the deceased. In view of the diametrically opposite version as to whether the accused and the deceased were seen together in the house it would be unsafe to direct his conviction. The prosecution has failed to prove the accusations. That being so, the conviction of the appellant is set aside and he is acquitted of the charges. Since he is in custody let him be released forthwith unless required to be in custody in any other case. *Arun Bhakta vs. State of West Bengal*, AIR 2009 SC 1228 : 2008 (15) Scale 145 : 2009 (12) JT 513 : 2008 (17) SCR 73 : 2008 (2) JCC 300.

The accused desired to marry deceased but she did not want to do so. Circumstances should that she died of homicidal death. The motive of accused for commission of crime was established and also accused and deceased were last seen together. It was held that accused was liable to be convicted for the murder. *Matu Munda* v. *State*, 2003 Cr LJ (NOC)162 (Orissa) : 2003(25) OCR 22 Ori.

In a Rajasthan case, the accused and deceased were last seen together and thereafter she was found dead. The proximity of time and place ruled out possibility of any person other than the accused being the culprit of the crime. The conviction of accused was held proper. *Govind Ram* v. *State*, 2003 Cr LJ 4189 (Raj) : 2003(47) All Cri C 730.

86. Benefit of doubt.—The accused were charged under Section 302/34 and acquitted by trial Court but High Court set aside the acquittal of the appellant and had convicted him under Section 302 as other accused had died during the pendency of suit. On appeal to Supreme Court it was found that two pieces of evidence in regard to the same fact were uncontroverted and uncorroborated. The accused was, therefore, acquitted by giving him benefit of doubt and conviction order of High Court was set aside. *Bhim Singh* v. *State of Haryana*, 2003 Cr LJ 857 (SC) : AIR 2003 (SC) 693 : 2002(10) SCC 461 : 2003(1) Crimes 419 (SC) : 2003(1) Supreme 386 : 2003 SCC (Cr) 1469.

In a Supreme Court case, the prosecution had not succeeded fully in proving the guilt of the accused. The independent evidence was not sufficient to prove that he had actively participated in the conspiracy. The conduct exhibited by the accused would cast serious suspicion on him, but that by itself was not sufficient to find him guilty of the offence under Section 302 read with Section 34, and 120B, IPC. It was held that the accused was entitled to get the benefit of doubt. *Sidharth* v. *State of Bihar*, 2005 Cr LJ 4499 : AIR 2005 SC 4352 : 2005(4) Crimes 135 (SC) : 2005(12) JT 310 : 2005(7) Scale 700.

In a Calcutta case there was no specific evidence that on fateful night the accused had assaulted the deceased wife and chain of circumstances unmistakably pointing to the guilt of accused was not established. The conviction was set aside by giving benefit of doubt. *Shambhu Nath Bar* v. *State*, 2003 Cr LJ 975 (Cal) : 2003 (1) Cal HN 443 : 2003 (2) Cal LT 389.

In a case where a man is on trial for his life every ambiguity in the law of procedure should be resolved in his favour. AIR 1941 Nag 94 : 42 Cr LJ 154. *See* the following cases where the accused was given benefit of doubt. 1942 MWN 815 ; AIR 1941 Mad 238 : 42 Cr LJ 654 ; AIR 1939 Lah 428: 40 Cr LJ 928 ; 40 Cr LJ 435 : AIR 1938 Lah 787 ; 40 PLR 542 ; 39 Cr LJ 561 : AIR 1938 Rang 156 ; AIR 1938 Sind 63 : 39 Cr LJ 460 : 1936 Pat 486 : 37 Cr LJ 986 ; AIR 1974 SC. SC 190 : 1978 Cr LJ 1869 (conviction based on circumstantial evidence and dying declaration : AIR 1982 SC 1023 : 1982 Cr LJ 987 (a complete chain of circumstantial evidence established guilt) ; *see* also 1980 Cr LJ (SC) 666 : 1981 Cr LJ (SC) 123 ; AIR 1985 SC 766 : 1985 Cr LJ 530 (non-completion of the chain).

The suggestion about some enemies of 'A' committing murder under cover of darkness was fit to be rejected out right because enemies of accused would be friends of deceased 'A' and they would not commit murder of 'A'. The reason does not appear to be sound. Therefore the appeal deserves to be partly allowed while dismissing the appeal of appellant's and maintaining his conviction and sentence and appeal of 'AS' deserves to be allowed as he is entitled to benefit of doubt. *Sirajuddin* v. *State*, 1995 UP Cr R 23 (All).

Delay in filing F.I.R. explained. Delay was not fatal. Both parties took liquor and after altercation accused gave iron pipe blows to deceased. Details of blows not given by eye-witnesses whose evidence thus wholly unreliable—Defence pleas find support from medical and other evidence including evidence of chemical examiner that deceased was dead drunk. Medical evidence reliable and contradicts ocular account of eye-witnesses—Recovery of blood-stained clothes from person of accused after three days of occurrence not reliable Recovery of iron pipe from open space which is accessible to all cannot be relied upon. Hence prosecution case not proved. Accused given benefit of doubt and acquitted. *Dharmender* alias *Chiniya* v. *State of Haryana*, (1995) 2 CC Cases 177 : (1995) 3 Crimes 815 : 1995 Cr LJ 3119 (P&H).

Where eye-witnesses was not reliable. There was contradiction on the point of time and place of apprehension of appellant. The firearm recovered was not sent to Ballistic Expert for opinion regarding its condition and its use in commission of offence. Prosecution fails to prove the case beyond reasonable doubt. Therefore conviction and sentence set aside and acquittal by giving benefit of doubt. *Krishan* v. *State of Haryana*, (1995) 2 Crimes 630 (P & H).

On the fateful night appellant was sleeping with the deceased and blood-stained clothes were found. But there was no other corroborative evidence. Hence conviction was not justified and benefit of doubt given. *(Smt.) Kanku.* v. *State of Rajasthan*, (1994) 2 Crimes 527 : 1994 Cr LJ 2077 (Raj).

The site plan was not fitting in with prosecution-story. Medical evidence not at all helping prosecution. There were no reliable ocular evidences that accused was seen firing gun-shot at deceased. Accused, therefore, entitled to benefit of doubt. Conviction and sentence set aside. *Ram Prasad Meena* v. *State of Rajasthan*, (1995) 2 WLC (Raj) 584.

Where the allegation of wife murdering husband on very first night of marriage was unnatural and against human conduct. Hence accused is held entitled to benefit of doubt and accused released. *Smt. Jamni* v. *State*, (1995) 2 WLC (Raj) 84: (1995) 3 Crimes 350 : 1995 Cr LJ 3071 : (1995) 1 RCD 325. (Raj).

Where prosecution failed to establish his guilt. Therefore accused can claim for benefit of doubt. *Surekha Narayan Bharade* v. *State of Maharashtra*, (1995) 1 B Cr C 285 (Bom).

There was serious inconsistency between the evidence of eye-witnesses and medical evidence. It was not safe to rely on such witnesses. Hence conviction on the basis of ocular evidence was not sustainable. Accused appellants are thus entitled to benefit of doubt. *Attru* alias *Attar Khan & Ors* v. *State of Haryana*, (1995) 1 CC Cases 293 (P&H).

Merely on the basis of seizure and discovery at his instance his conviction was held not sustainable and hence benefit of doubt was given to the accused. *Bhurya* alias *Subhan* v. *State of Maharashtra*, (1995) 3 Crimes 62 (Bom).

Where prosecution not able to prove the charge under Sections 304/34, I.P.C. against any of the accused persons beyond all reasonable doubt as such entitled to benefit of doubt. *Ram Chandra Sharma* v. *State of Bihar*, (1995) 1 East Cr C 684 (Ranchi Bench).

In a case the young lady was strangulated in her in-laws house within few months of her marriage. She was not suffering from any disease but medical report was not sure as to cause of death and possibility of partial hanging could not be ruled out. The accused was acquitted by giving him benefits of doubt. *Babu* v. *State*, 2003 Cr LJ 1174 (Bom) : 2002 All MR (Cri) 2204.

In a M.P. case there were two sets of evidence showing how deceased was injured. Eye witness told that injuries were caused by accused by striking with stone whereas doctor in his cross-examination said that deceased had told him that she was beaten by her husband. Two sets of versions created strong suspicion about role attributed to accused. It was held that in the absence of proof for any motive the accused was entitled to the benefit of doubt. *Ram Singh Dhobi* v. *State*, 2003 Cr LJ (NOC) 248 (MP).

Where one of them is child-witness—Witnesses residing 150 yards away from the incident. Hence benefit of doubt given. *Dhoba* v. *State of Orissa*, (1994) 2 Crimes 823 (Ori).

Where no infirmities in evidence against A-1 and A-2 seizure of iron rod and possession of key not proved. Hence A-1 and A-2 are entitled to get benefit of doubt. *Kannaboina Vittal Rao* alias *Vittal* v. *State of Andhra Pradesh* rep. by *Public Prosecutor*, (1994) 2 ALT (Cri) 482 (AP) (DB).

Appellants not found guilty of offence of murder—As regards the injured he suffered four injuries individually simple but cumulatively sufficient in the ordinary course of nature to cause death—Injuries meeting death after 3 days—No intention to kill. Offence covered by Section 302, I.P.C.—No overt act attributed to wife of appellant. Hence given benefit of doubt. Therefore appellant convicted under Section 304, I.P.C. *Daula Ram* v. *State of Rajasthan*, 1995 Cr. LR 368 (Raj).

The child witness and hostile witnesses have not been believed. Two witnesses have supported the prosecution story and it is also corroborated by medical evidence—But the case of accused stands on different footing. His participation is doubtful.—Hence entitled to benefit of doubt. Conviction of others upheld. *Nagusing* v. *State of M.P.*, 1995 Cr LR (MP) 127 (MP).

Where major contradictions in *anti mortem* examination and *post mortem* examination regarding injuries received by the deceased. Hence it made the prosecution case doubtful. *Sohanpal* v. *State of U.P.*, 1995 JIC 341 : 1995 (32) ACC 43 : 1995 ALJ 838 (Alld).

Incident occurred very near to the house of the deceased. Eye-witnesses were brothers of the deceased. They left place of occurrence after witnessing incident and did not stay there near dead-body—Incident having taking place at 2.30 a.m., wife of deceased not going to place of incident till 6 a.m. though she was informed immediately—Conduct of these persons creates doubt about prosecution story. Involvement of accused persons doubtful—Some other persons might have caused death and some had grudge against deceased person for his alleged intimacy with a harijan lady—No person of Hari Janwada which being very near to the place of occurrence examined. Therefore involvement of accused in crime not proved hence they are acquitted giving benefit of doubt. *Shanker Rao* v. *State of A.P.*, (1994) 1 ALT (Cri) 690 (DB) (AP).

Where accused physically weak—Defence version under Section 313. Cr. P.C. denying extra-judicial admission of guilt and that real culprits were not before Court. It is held, that accused falsely implicated and given benefit of doubt. Conviction set aside. *Parvatibai Baban Shinde* v. *State of Maharashtra*, 1994 Cri LJ 1253 (Bom).

Where offence of murder committed by two accused. Benefit of doubt is given to one as case not fully provide against him while conviction of other accused. Appeal is dismissed by High Court—Further contention of accidental firing—Case against appellant based on evidence of eye-witnesses being natural ones and fully corroborated by evidence of doctor and post-mortem report. Delay in filing F.I.R. fully explained by prosecution. Hence interference was not warranted. The case of accidental firing as sought to be contended cannot be accepted. It has been rightly held by the Courts below that the presence of the eye-witnesses at the place of occurrence was natural and their depositions were not liable to be discarded. It also appears that the depositions of the eye-witnesses stand amply corroborated from the evidence of the doctor and also the post-mortem report. The delay in lodging the First Information Report has been explained by the father of the deceased and such explanation has been rightly accepted by the High Court and Supreme Court did not find any cogent reason to take a contrary view. The High Court in discarding the case of accidental fire on account of the alleged tussle between the deceased and the appellant appear to be quite reasonable. There is also force in the submission of Mr. *B* that simply because prosecution case against accused No. 1 was not accepted to be fully proved, the case against the appellant should not be dismissed. In the aforesaid circumstances, Court finds no reason to take a contrary view in the matter and the appeal, therefore, fails and is dismissed. *Pupinder Pal Singh* v. *State of Punjab*, (1994) 1 Crimes 1010 at p. 1016 (SC) : 1994(3) JT 14 : 1994(1) Scale 865.

When guilt not proved beyond reasonable doubt, conviction is not sustainable. *Rameshwar Ram* v. State *of Bihar*, 1997 (1) Crimes 552 (Pat) : 1994 (3) JT 14 : 1994 (1) Scale 865 : 1994 92) UJ 40 : 1994 (31) ATC 1153.

In *Hori Lal* v. *State* 2000 Cri LJ 3804 (All), in a dacoity with murder case the deceased was killed in firing by dacoits. Out of 15 or 16 dacoits only accused was arrested and tried. The defence pleaded false implication of accused. It appeared highly doubtful in the Court that the witnesses had sufficient opportunity to identify the accused in torch light amongst the dacoits and, therefore, the Court did not rule out the possibility of their nominating the accused on account of some enmity or under suspicion. The witnesses failed to state with which weapon the accused was armed and that he fired any shot either on the deceased or injured woman. The FIR was not lodged promptly. The incident occurred at about in the night and three police constables of a nearby out post had also arrived at the scene of occurrence within two hours of the incident and they stayed at his house throughout the night and when he went to lodge the report they were left behind at this house. The said police constables were also found present at the scene of occurrence when the first informant came back with the police after lodging the FIR. When three police constables had arrived in the night itself why FIR was made next morning was shrounded in mystery which gave rise to a suspicion that perhaps some consultation and confabulation were being made and the possibility of the accused being named on account of the same could not be ruled out. The accused was held entitled to be acquitted on benefit of doubt.

Merely because benefit of doubt has been extended to some accused, other accused persons will not be entitled to acquittal merely for the reason that their conviction is based on the testimony of same set of witnesses whose testimony has not been considered trustworthy sustain the guilt of other accused persons. *Bhola Yadav* v *State of U.P.*, 2001 Cri LJ 377 (All).

87. Confession.—In order to convict an accused on the confessional statement it is the burden of the prosecution to prove firstly that the statement was voluntary and secondly that it was true. AIR 1981 SC 2007 : 1981 Cr LJ 1688 ; 1981 Cr LJ (NOC)

100. Confessional statement cannot be rejected merely because only three hour's time was given. AIR 1985 SC 823 : AIR 1985 SC 48 (in case of extra-judicial confession to a close friend, evidence of friend found reliable and trustworthy; no corroboration necessary).

Section.313 Cr. P.C. is intended to secure the accused an opportunity to explain the evidence against him. It is for the benefit of the accused and not to operate as to his detriment. The purpose for examination of the accused under Sec. 313 Cr. P.C. and to put question to the accused by the Court is to enable the accused to explain the circumstances appearing against him in the evidence. The examination of the accused under Sec. 313 Cr. P.C. and putting question to the accused by the Court at that stage is obligatory after the evidence of the prosecution is closed and the accused is called on for defence. In a case where there is no other evidence available on the record to connect the accused with the crime and to establish the charge against him beyond all reasonable doubts, then it can very well be said that there is nothing in the prosecution evidence which requires to be explained by the accused and therefore, the need for the examination of the accused under Sec. 313 Cr. P.C. does not and cannot arise.

In the present case, except the statements of the appellant made under Sec. 313 Cr. P.C. wherein he admitted his guilt, there is no other evidence at all on the record to establish the charge against the appellant. In such a situation, the trial Court could not have convicted and sentenced the appellant for the offence under Sec. 302 IPC solely on the basis of the statements of the appellant made at the stage of examination under Sec. 313 CrPC. *Dubraj Oraon v. State of Bihar (now Jharkhand)*, 2007 CriLJ 4667 (Jhar).

Conviction on the basis of extra-judicial confession of the accused before an illiterate labourer of a brick kiln, cannot be held proper. *Balbir Singh* v. *State of Punjab*, (1995) 1 Crimes 27 : (1955) 1 CCR 459 : 1995 Cr R 91 (P & H).

There was no eye-witness. The extra-judicial confession made before wife does not inspire confidence. Further the knife alleged to be used in crime was recovered from open place accessible to all and after 4 days of incident. It is not properly sealed. Hence conviction not sustainable. *Raju Singh* alias *Nageshwar* v. *State of Rajasthan*, (1995) 2 RCD 1 (Raj).

Where accused committing murder of his wife by throttling. Extra-judicial confession made prior to lodging of F.I.R.—But same not mentioned in F.I.R. nor in statement of witness recorded under Section 161, Cr. P.C.—Prosecution witness turned hostile. There found no evidence to connect accused with crime. Hence it was the conviction which was not held proper. Therefore accused was acquitted. *Bhanwar Ram* v. *State of Rajasthan*, (1995) 1 RCD 241 (Raj).

Where there is being high degree of probability and there is no conjectures or suspicion in framing link. Extra-judicial confession fully consistent with circumstantial evidence. It is held that guilt of accused appellant fully established and appeal was dismissed. *Gokaraju Venkatanarasa Raju* v. *State of A.P.*, 1994 SCC (Cri) 376 : 1994 JIC (SC) : 1993(5) JT 71 : 1993(3) Scale 495 : 1993(3) Crimes 235.

Where extra-judicial confession made by accused to her mother and respectable persons of the village. Conviction can be based on such extra-judicial confession. Sustenance of conviction proper. *Arjun Singh* v. *State of Rajasthan*, (1995) 2 RCD 552 (Raj).

Where three accused made joint confession before a person with whom they had intimacy. It was not disclosed who out of three accused made the disclosure. Hence no reliance could be placed on such confession. *Niranjan Lal* v. *State of Haryana*, (1994) 2 Recent Cr R 620 (P & H) (DB).

Where there were discrepancies in evidence regarding extra-judicial confession. Accused retracted from confession during examination under Section 313, Cr. P.C. There is no evidence that accused and deceased slept together in the house. The report was lodged next day by accused. The statement made by accused to police is inadmissible in evidence under Section 25 of Evidence Act. Hence conviction not sustainable. *Ravula Sarangam* v. *State of Andhra Pradesh*, (1995) 3 Crimes 767 : (1995) 2 ALT (Cr) 287 (AP).

When no evidence on record to even faintly suggest that concerned him with crime. Medical evidence conflicts the contents of confession and that confession retracted. No material to lend corroboration to the contents of confession. Hence conviction was set aside. *Indrajit Deb* v. *State of Tripura*, (1995) 2 GLR 131 (Gau).

When some witness turned hostile, no independent witness to corroborate extra-judicial confession. No evidence on bringing of petrol—No motive was also not proved—Witness inventing new story in Court.—*Held*, acquittal justified. *State of Rajasthan* v. *Tara Chand*, (1995) 1 RCD (Raj).

Where conviction was on the basis of extra-judicial confession duly supported by other evidence.—*Held*, sustainable. *Tanguru Munda* v. *State of Orissa*, (1995) 1 Crimes 99 (Ori).

It is inadmissible that confession cannot be made before unknown person. *Satbir Singh* v. *State of Haryana*, (1994) 2 Recent Cr R 366 (P & H) (DB) : 1995 Cr. LJ 739 : 1995 (2) Crimes 777.

When motive to take the vengeance was established—Delay in F.I.R. was proved not to be fatal—Injuries inflicted with sharp-edged weapon—Ocular account corroborated from medical evidence and F.I.R.—Extra judicial confession before prosecution-witness was found to be voluntary and reliable. Hence, prosecution case established beyond reasonable doubt. Conviction upheld. Appeal was dismissed. *Piara Singh* v. *State of Punjab*, (1995) 3 CC Cases 42 (P & H).

It is impossible to conceive any situation where a man on bail can be brought in custody till outside Court room with only purpose for getting his confessional statement recorded by Magistrate. This is nothing but forcing a confession if not coercing a man on bail for getting recorded a confession. Such statement loses the basic character of being voluntary one and has thus to be disregarded completely. *Kanti* v. *State of U.P.*, 1994 UP Cr R 374 (All).

The seizure of gun and empty cartridges on the basis of confessional statement of accused-appellant and other circumstances put together leave no doubt whatsoever that it was the appellant and appellant alone who fired the fatal shot at deceased from close quarter. Hence the impugned judgment warrants no interference. *Jiwanlal* v. *State of M.P.*, 1994 Cr LR (MP) 149.

Where conviction based solely on evidence of last seen evidence and extra-judicial confession and there was absence of eye-witness—Conviction held not sustainable. *Balya and Pramod* v. *State of Maharashtra*, (1995) 4 Crimes 427 (Bom).

In murder of step son of accused by beating and knocking against wall. presence of eye-witness being mother of deceased at time of occurrence being natural and her evidence being trustworthy and corroborative and extra-judicial confession of accused also being natural and voluntary, guilt proved beyond reasonable doubt. *Ram Singh* v. *State of Rajasthan*, 1996 Cr. LJ 3783 (Raj).

Conviction cannot be based solely on extra-judicial confession without any independent corroboration. *Jagatram Major* v. *State*, 1997 (1) Crimes 383 (Ori).

88. Extra Judicial Confession.—The accused committed murder of his own brother while he was sleeping in the field. The extra judicial confession was made before witnesses who were residents of same village to which the accused belonged and their evidence showed that accused had made voluntary confession on his own accord without any fear and pressure. The guilt of accused, it was held, stood proved beyond doubt and conviction was proper. *Harkesh* v. *State*, 2003 Cr LJ 4181 (Raj) : 2003(4) WLC 522.

The accused killed his wife as he suspected her character. Other circumstances also pointed towards the guilt of accused. His conviction under Section 302/201 was held proper as extra-judicial confession made by accused was found reliable. *Kamla Muntaratnam* v. *State*, 2003 Cr LJ 4782 (AP) : 2003(3) Crimes 109 : 2003(2) DMC 340 : 2003(2) GCD Guj 1109.

The accused killed the deceased by throttling and then created the scene of suicide by hanging. The motive was to grab the property. The confession by accused was made before the villagers some of whom were eye-witnesses and had stated in their deposition that they had seen accused tightening string on neck of deceased and pressing her chest. The conviction of accused was held proper. *Tulabala Sardesai* v. *State*, 2003 Cr LJ (NOC) 204 (Jhar) : AIR 2003 Jhar HCR 924 : 12003(2) JCR JHA 682.

The accused, a doctor by profession, had killed his wife and submitted fake medical certificate that wife had died of cardiac arrest but doctor issuing the certificate subsequently admitted that certificate was fabricated. The letters of deceased written to her father showed that she was subjected to cruelty by her husband. The Evidence of witness with whom accused made extra judicial confession was reliable. Since dead body was not traced the conviction of accused under Section 302/201 was held proper. In words of Court, "The guilt of the appellant under Section 302/201 is proved to the hilt by clinching circumstantial evidence coupled by his extra judicial confession. *Dharamvir Singh* v. *The State*, 2003 Cr LJ (NOC) 192 (Gau) : 2003 All LJ 1241 : 2003(3) Cri R 123.

89. Private defence.—Where right of private defence is rightly exercised in reacting and causing injuries to deceased—One accused-appellant still chased deceased running away and hit him with an axe till he fell down and thus he exceeded his right of private defence—He is thus convicted under Section 304, Part I and others acquitted. *Sewa Ram* v. *State of U.P.*, 1994 ACC 121 (All).

The injuries sustained by the deceased would clearly show that the place of injury on the deceased was on his head starting from right frontal region and going to right parietal and occipital region on upper part and coming back to left parietal and frontal region being 'U' shaped.

We would assume that a scuffle ensued between the accused on the one hand and the deceased and the prosecution witnesses on the other. It, however, stands admitted that the barrel of the gun was towards the earth. The first shot which was fired, did not have any space to exist as a result whereof it bursted. While the scuffle was going on to snatch the gun, it would be wholly unlikely that the second shot would hit the top of head of the deceased in such a manner. The Autopsy Surgeon, PW-4 in his report showed the place where the deceased suffered the gun-shot injury, in the sketch attached thereto. The place of injury was the top of the head. If the barrel of the gun was facing the ground any accidental fire could have hit the lower part of the body and not the head of the deceased.

We, therefore, could not persuade ourselves to agree with the contention of Mr. Sinha. *State of Punjab vs. Gurlabh Singh*, AIR 2009 SC 2469 : 2009 (8) JT 487 : 2009 (7) Scale 601 : 2009 (8) SCR 853 : 2009 (4) SLT 611.

Right of Private defence—When not available.—Accused entered office room of deceased, threw chilly powder into his eyes, picked up an iron hammer as well as a brick lying there and assaulted deceased in presence of complainant, a worker engaged by deceased. Trial Court finding evidence cogent, credible, recorded conviction of appellant. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

When the factual scenario is examined in the background of the principles set out above, the inevitable conclusion is that the appeal is without merit, deserves dismissal which we direct. *Arun vs. State of Maharashtra*, 2009 CrLJ 2065 : 2009(2) Crimes 6(SC) : 2009(4) SCC 615 : 2009(3) Scale 803 : 2009(4) JT 78 : 2009(3) SLT 220.

Accused need not plead self-defence by examining some witnesses on his behalf or by making any statement. If there are materials, culled out from the cross-examination to indicate that the occurrence had taken place, while exercising the self-defence, then, Court can conclude that it is a case of private defence, in order to decide about the nature of the offence committed by the accused. But, in this case, except the suggestion made to the witnesses, there is no material available on record to indicate that the accused had attacked the deceased, in exercise of his self-defence. *Nagaraj v. State*, 2006 CriLJ 3724 (Madras).

Accused charged with killing deceased by firing gun-shot at him. They did not put forth case of exercise of right of private defence. They merely contended that shot got fired and hit deceased during scuffle when barrel of gun was towards earth. Question of considering their case as if accused had exercised their right of private defence or exceeded same, therefore, could not have been gone into.

The High Court, in our opinion, furthermore committed a serious error in passing the impugned judgment in so far as it failed to take into consideration that the accused never put forth the case of exercise of right of private defence. According to them the deceased was accidentally hit while the scuffle was going on. The question of considering their case as if the accused had exercised their right of private defence or exceeded the same, therefore, in our opinion, could not have been gone into. *State of Punjab vs. Gurlabh Singh*, AIR 2009 SC 2469 : 2009(7) Scale 601 : 2009(8) JT 487 : 2009(8) SCR 853.

Incidents of cruelty, harassment and demand of dowry before death established. Offence under Section 304-B against accused against whom presumption is drawn. Hence it is held, that accused petitioner held guilty under Section 304-B only. *Prakash Chandra* v. *State*, (1994) 1 Crimes 865 : (1994) 1 CC Cases 442 : (1994) 53 DLT 113 (Del) (DB).

When only one gunshot was fired and that too in self defence after receiving a severe blow on head which fractured his skull, it could not be said that he has exceeded his right of self defence. *Kamal Singh* v. *State of M.P.*, 1995 JLJ 195 (MP).

Where serious injuries on person of accused not explained by prosecution and right of private defence available to them. Prosecution-facts undisputed—Sole eye-witness child being present at time of filing F.I.R. but was examined on third day—Such delay not satisfactorily explained by prosecution. Hence appeal allowed and appellants acquitted. *Arjun* v. *State of M.P.*, 1995 Cr LR (MP) 161.

Where allegation of inflicting injury in the right of private defence—Articles recovered not examined by Chemist—Conviction was rightly justified. *Gora Singh* v. *State of Rajasthan*, 1994 Cr LR 140 (Raj).

Where accused causing more damage than necessary in exercise of his right of private defence, causing death. Hence it was held that the accused should be convicted under Section 304, Part I and not under Section 302/149. *Dharam Pat* v. *State of U.P.*, 1995 SCC (Cr) 140 (SC) : AIR 1994 SC 127 : 1994 Supp(3) SCC 668 : 1994 Cr LJ 615.

Where plea of self-defence—Due to altercation between accused-appellant and deceased both raised their rifles—Accused fired three shots at deceased. It was found that there being no occasion for firing three shots for alleged self-defence, appellant was rightly convicted. Hence appeal was dismissed. *Mohd. Yusuf* v. *State of U.P.*, (1994) 1 Crimes 642 (SC) : (1994) 1 CCR 137 : 1994 SCC (Cr) 688 : 1994 JIC 280 : 1994(1) Recent Cr R 464 : 1994 ALJ 386 : 1994 (1) East Cr C 269 : AIR 1994 SC 1542.

Considering that the prosecution witness themselves admit that accused persons received the sharp edged injuries in same incident and that injuries were on heads of the accused persons that no blood was found at the house of complainant the right of private defence is established. Hence appeal allowed. *Ashraf* v. *State of Rajasthan*, 1995 R Cr C 291 : (1995) 1 RCD 175 : 1995 Cr R 470 (Raj).

Right of private defence can be pleaded only as a defence not as an excuse for an offence. *Prakash Singh* v. *State of Rajasthan*, (1994) 1 CCR 7 (Raj).

Such plea raised at appeal stage can be considered even if no such plea was raised in statement under Section 313, Cr. P.C. *Dinkar Vishram* v. *State of Maharashtra*, 1997 (1) Crimes 269 (Bom).

Two simple injuries sustained by accused, being opined by doctor as self suffered, would not give right of private defence when accused trespassed in complainants' house, receded and then brought pistol and shot deceased. *State of Haryana* v. *Mewa*

Singh, 1997 (1) Crimes 142 (SC) : 1997 AIR (SC) 1407 : 1997 (2) JT 226 : 1997(1) Scale 692 : 1997 (1) CCR 181 (SC) : 1997 Cr. LJ 1906 : 1997 (2) Supreme 145.

90. Murder in private defence.—When both parties came armed and indulged in free fight resulting in injuries on both sides then question as to whether any of them exercised their right of private defence is immaterial. *Kewal Singh* v. *State of Punjab*, 2004 Cr LJ 31 (SC) : AIR 2004 (SC) 72 : 2003(4) Crimes 352 (SC) : 2003(7) Supreme 468 : 2003(8) Scale 626.

Right of Private defence against property.—The accused admittedly did not purchase any specific portion of the property. They purchased undivided share. By reason thereof, in law, they did not acquire any right to obtain possession of the lands. Harda Ram and his family being the co-sharers did not give any consent for handing over their possession in their favour. In law, therefore, the accused persons being purchasers of an undivided share merely acquired a right to sue for partition.

It has been amply proved that the scuffle lasted for only two minutes to two and half minutes. PW8- Rajbir was not armed with any weapon, so was not Harda Ram (the deceased). It was Lal Singh alone who had in his hand a small twig (Kamari). According to him, the same is used to drive camels. Kamari was said to be used by Lal Singh in his sole defence as a result whereof Sheo Ram and Raja Ram were injured. We have noticed hereinbefore that the injuries on the persons of the said two accused were simple in nature. It is true that the fact that two of the accused person had suffered injuries had not been disclosed in the FIR or in their Statement before the Investigating Officer, but the same, in our opinion, was not necessary inasmuch as they got themselves medically examined by Dr. Goel almost at the same time when the other prosecution witnesses got themselves examined. By that time they had already been arrested. It was the police authorities who had submitted an application along with the injuries chart. They Had been brought by Constable Satbir Singh. Thus, the fact that two of them had suffered injuries in the same incident was known to the Investigating Officer.

The FIR might have been recorded at a later stage. But the information about the occurrence must have been given by P.W.8 to the officer in-charge of Ateli Police Station prior thereto. Even a copy of the FIR was received by the Magistrate concerned at about 10.30 p.m. on the same day. Furthermore, the Investigating Officers were not cross examined on that point. In any event, it is wholly unlikely that the FIR was anti-timed and anti-dated. Even assuming that the same was anti-timed or anti-dated, the fact that an incident had occurred was not disputed. At least two of the accused persons accepted their presence. The defence story is that two accused persons had sustained injuries at the hands of the prosecution witness Lal Singh. (P.W. 12).

We have noticed hereinbefore that the appellants cannot be said to have been in 'settled possession' of the land in question. Furthermore, they came wholly armed, whereas except Lal Singh was having a small twig (Kamari), deceased party were not armed with any weapon. It was not a dangerous weapon. No grievous injuries could have been caused by use thereof and in fact no grievous injuries have been suffered by the accused Sheo Ram and Raja Ram.

Appellants herein did not raise any plea of self defence. According to them, they were not present at the spot at all. Learned Senior Counsel would contend that Accused

No.1 and Accused No.6 raised the plea of self defence. The learned trial Judge although accepted the said plea but the same was accepted not with particular reference to the said accused. All the accused persons did not raise the defence of exercise of right to private defence. In regard to claim of right of self defence, the matter may have to be considered from somewhat a different angle. Accused Nos. 6, 7 and 8 were attributed with assault of Lal Singh and two ladies, namely, Mamli and Dhankauri.

We have been taken through the depositions of P.W. 8 and P.W. 12. P.W. 12's presence stands admitted. P.W. 8's presence has been doubted by the learned Sessions Judge only on the ground that he got his father admitted at 2.30 p.m. The presence of P.W.8-Rajbir, in our opinion, could not have been doubted on such slender evidence. He was driving the tractor. Accused persons came prepared to assault the deceased. By the time the first informant could come and intervene, the entire incident must have occurred as it is stated that the same took place only for two to two and half minutes. No suggestion had been given to any of the prosecution witnesses by the defence that no tractor was found at the place or it was the deceased who himself was driving the tractor. P.W. 8 in his evidence categorically stated that he left the tractor. P.W.8 in his evidence categorically stated that he left the tractor at that place. Furthermore, his evidence, taking a holistic view of the matter, in our opinion, appears to be trustworthy. He vividly described the entire incident. He was cross examined on all material points. He had also explained as to why he did not suffer any injury categorically stating and that too in cross-examination that by the time he reached all the accused had started running with their weapons towards their respective houses. *Ram Pat vs. State of Haryana*, AIR 2009 SC 2847 : 2009 (7) SCC 614 : 2009(8) Scale 145 : 2009(7) JT 579.

Accused need not plead self-defence by examining some witnesses on his behalf or by making any statement. If there are materials, culled out from the cross-examination to indicate that the occurrence had taken place, while exercising the self-defence, then, Court can conclude that it is a case of private defence, in order to decide about the nature of the offence committed by the accused. But, in this case, except the suggestion made to the witnesses, there is no material available on record to indicate that the accused had attacked the deceased, in exercise of his self-defence. *Nagaraj v. State*, 2006 CriLJ 3724 (Mad).

91. Presumption.—The presumption of guilt arising out of accused's recent possession of stolen property which had been removed from the person of the deceased at or about the time of his murder, is one of the presumptions of fact which are inferences which the Court naturally and logically draws from given facts without the help of legal direction, and therefore fall more properly within the province of logic and do not constitute a branch of jurisprudence; such presumptions are always permissive in the sense that the Court has the discretion to draw or not to draw them. Whether the Court is to draw or not to draw depends upon the circumstances of each case. AIR 1937 Rang 439.

When there is no evidence to connect appellant for injury found on person of his deceased wife and also no evidence that he was in house on fateful night, no presumption can be drawn that appellant must be in house at time of occurrence and thus conviction under Section 302 not sustainable. *Mehmood* v. *State of Rajasthan*, 1997 (1) Crimes 413 (Raj).

92. Mode of leading evidence.—In a capital case, it is important that the more important of the witnesses should be examined in such a way as would enable the Court to properly appreciate their evidence. The evidence should be led in sufficient detail and with due regard to the sequence of events, the facts which the witness saw or the facts which they did and also the reasons which actuated them to do the acts being narrated in an intelligent fashion. It is only by this means that a clear and consistent account of the whole thing may be presented before that judge and jury. 62 Cal 572 : 36 Cr LJ 808 : 155 Ind Cas 687 : 39 CWN 368 : 1935 Cr C 241 : AIR 1935 Cal 1841 (SB). Principle of *falsus in uno falsus in omnibus* does not apply in India. Prosecution witnesses omitting to explain injuries on the accused, but that does not entitle the acquittal on that ground alone. 1962 Raj LW 434 : ILR (1962)12 Raj 481.

93. Murder extenuating circumstances.—The mere suspicion of a wife's conduct is not an extenuation of a deliberate wife-murder. Men cannot butcher their wives and escape hanging on the plea that they suspected them of misconduct. 30 LW 229 : 1929 MWN 269 : 116 Ind Cas 142 : 30 Cr LJ 630 : AIR 1929 Mad 495. The murderer is 19 or 20 years of age and murder prompted by veneration for founder of religion is not extenuating circumstances, AIR 1930 Lah 157. The accused was brought to bay during his escape is not an extenuating circumstance. 139 Ind Cas 213 : 33 Cr LJ 722 : 1932 Cr C 857 : AIR 1932 Cal 818 (FB); *see* AIR 1932 Lah 500 : 33 PLR 580 : 33 Cr LJ 497.

Where the case is based on circumstantial evidence. The deceased was last seen in the company of accused. The motive to commit murder was established by three independent witnesses. Shirt of accused was seized from laundry having blood-stains. All the circumstances are clear and establish that accused in perpetrator of crime. Hence conviction and sentence is confirmed. *Satbir Singh* v. *State of Punjab*, (1994) 1 Mah LR 348 (SC).

Where accused is the husband. Body was found hanging in the room conviction was justified—Accused is held guilty. *Ram Prasad* v. *State of U.P.*, 1994 JIC 374 : 1994 UPCR R 24 (All).

Where chain of circumstances not establish so as to lead to the only conclusion of the guilt of the accused—Dead-body was recovered at the appellant's instance. Appellant held guilty of offence under Section 201, I.P.C. but his conviction under Sections 302 and 376 set aside. *Laldeep Bhagat* v. *State of Bihar*, (1995) 2 Crimes 484 (Pat) (DB).

94. Motive, adequacy of.—If the Court is satisfied as to the fact of murder the adequacy or inadequacy of the motive is not of importance. 1929 MWN 592. In a charge of murder it is wholly immaterial that the motive is inadequate. 100 Ind Cas 226 : 28 Cr LJ 258 ; 35 Cr LJ 1283 : AIR 1934 Lah 368 : 1934 Cr C 617. The accused, a student aged 17, was alleged to have distributed certain sweets containing arsenic among his fellow students. All who has received it ate it then and there except one person who took it home and gave it to his young niece and father. All the persons showed sign of arsenic poisoning and all them recovered except the niece who died. It appeared that the accused himself had eaten a portion of the sweets and there was no motive for the crime. There was no evidence that the accused prepared the sweets. *Held*, that the case was doubtful and that the accused could not be convicted of murder. 30 PLR 424 : 10 Lah LJ 555 : 115 Ind Cas 469 : 30 Cr LJ 478 ; *see* also AIR 1948 Lah 58 : 49 Cr LJ 26 ;

48 Cr LJ 786. Where in a murder case, there is direct evidence of reliable character, no question of motive can arise. 1952 Cr LJ 949 : AIR 1952 J & K 22 ; *see* ILR 1953 Hyd 32 : 1953 Cr LJ 935 : AIR 1935 Hyd 181. Only those motives could be brought to light which appear in the conscious portion of the individual's psychic apparatus. 1962 (2) Cr LJ 672. Absence of motive can not be sufficient to quash the conviction when there is direct testimony of the witnesses who had seen the accused committing the crime. AIR 1956 Madh Bha 169 : 1956 Cr LJ 1408 ; AIR 1957 AP 758 : 1957 Mad LJ (Cr) 421 : 1957 Cr LJ 1091 ; ILR 1962 Cut 806 ; AIR 1955 Nag 93 : ILR 1955 Nag 23 : 1955 Cr LJ 728 ; AIR I960 Mad 370 : 1960 Cr LJ 1102 ; 1961 Ker LT 201. Motive is nothing more than a link in a chain of circumstances establishing the guilt of a person. AIR 1954 J & K 42 : 1954 Cr LJ 1124. In 1960 Ker LT (SC) 1 : 1960 Ker LJ 563 the Supreme Court held that letters written by the accused to his wife in gross languages expressing his sentiments about love, marriage and sex would be sufficient to hold that to such a person the obstacle of a wife in the successful prosecution of an amour would be a motive sufficient for almost any purpose, 1960 Ker LJ 563 : 1960 Ker LT (SC) 1. Absence of motive cannot be used as a mitigating circumstance in connection with the measure of sentence to be imposed. 1963 (2) Cr LJ 481 : AIR 1963 All 501. Mere absence of motive is not enough to hold that murder charge is not established if the case is otherwise made out. AIR 1963 Cut 511. This fact that there was a large number of cases, both civil and criminal between the accused who were aboriginal khonds and the deceased coupled with the fact that ultimately the deceased succeeded in depriving the accused of his land would be sufficient to incur bitter enmity of the khonds and would be a strong motive even for a non aboriginal khond to assault the adversary. (1963) 5 Ori JD 145 : 1964 (1) Cr LJ 464. Motive may not be very material in cases where there is enough direct evidence, but in cases where there is not even an iota of legal evidence or a single telling circumstance, motive has a vital role to play. 1963 Ker LJ 292 : 1963 Ker LJ 366 : 1964 (1) Cr LJ 493. Defence that there was no intention does not take the offence out of murder, 66 Punj LR 1230 : 1965 (2) Cr LJ 127 : AIR 1965 Punj 291.

Conviction and sentence confirmed on the basis of chain of circumstances. *Baban Ramchandra Pawar* v. *State of Maharashtra.* (1995) 1 B Cr C 4 (Bom).

P.W. 7 was merely of 13 years of age and there is no reason to believe that she was of easy virtue and was not well versed with illicit affairs being of tender age. Merely carrying P.W. 7 on motor cycle by appellant 'K cannot lead to illicit relations and this cannot be taken as motive to commit alleged crime. *Kanna* v. *State of Rajasthan*, 1995 Cr LR (Raj) 253.

In criminal cases, the onus of proving everything essential to the establishment of the charge against the accused lies upon prosecution that onus never changes. This follows from the cardinal principle that the accused is presumed to be innocent until his guilt is established by the prosecution. Section 105, of the Indian Evidence Act is an important qualification of this general rule and is an application of the rule in Section 103. It relieves the prosecution of the necessity of proving the absence of facts which might bring the cases within a general or special exception, or exemption or proviso under the Penal Code or other Criminal Law. Under Section 105, of the Indian Evidence Act, when an accused person wishes to rely on any exception in the penal law, it is incumbent on him to prove the existence of circumstances which would show that any of the special or general exceptions would take his case out of criminal liability.

The Section involves both (i) a presumption and (ii) a rule as to the burden of proof following it. The Court shall presume the non-existence of circumstances bringing the case within an exception and the accused person, who relies on its existence has the burden of proof cast upon him. The section has clarified the position by placing all exceptions (special or general) on the same footing, in the sense of the same required to be proved by the accused. But this does not mean that he must plead it specially or specifically or lead evidence. If it is apparent from the evidence on record, whether produced by the prosecution or the defence, that the general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception. Where the evidence adduced fails to satisfy the Court of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted, if upon a consideration of the evidence on both sides, the Court is left in a state of reasonable doubt as to whether the accused is or not entitled to the benefit of the exception pleaded. *Kaliyaperumal* v. *State*, (1995) 1 CCR 129 at p. 134 : (1995) 1 Crimes 873 : (1995) 2 CCR 499 (Mad) (DB).

Where there was no evidence on record to prove appellant's presence in the house at the time of occurrence and direct evidence to connect the appellant with crime. Prosecution may be taken to have failed to establish offence against appellant, and sentence was liable to be set aside. *Gauri Shankar* v. *State of Rajasthan*, 1995 Cr LR (Raj) 297 : (1995) 3 CCR 346 : (1995) 4 Crimes 96 (Raj) (DB).

Where the version of the P.W. 1 and 2 that appellant administered poisonous liquor to deceased was not credible. No motive was proved. The prosecution failed to prove this case beyond reasonable doubt. Hence entitled to benefit of doubt. Conviction set aside. *Sher Singh* v. *State*, 1995 JCC 259 (Del).

Where proof of motive not obligatory to establish guilt when evidence of eye-witnesses, medical evidence and recoveries from accused are sufficient to establish guilt of accused beyond reasonable doubt. Order of acquittal set aside. *State of Karnataka* v. *Surendra* alias *Sony* alias *Anantha Padmanabha Bhat*, (1953) 3 Kar LJ 622 (Karn) (DB).

Where indifferent young eye-witness who happened to be the son of the deceased—Medical evidence not corroborating prosecution story. There was given no explanation for non-examination of other independent witnesses. First informant subsequently improving his version. Conviction in these circumstances was held not sustainable. *Bachitar Singh* v. *State of Punjab*, (1995) 1 Crimes 767 (P & H).

Where accused last seen with deceased and no motive was established. Enmity was also not proved-conviction was not justified. Hence conviction was set aside. *Deep Chand* v. *State of U.P.*, 1994 All Cr C 466 (All) (DB).

The discrepancy in F.I.R. and inquest report cannot be considered in isolation and is not conclusive fact that F.I.R. is ante time more so, when no questions were put to witness and his explanation not obtained. The firing was individual act of concerned two accused and common object of unlawful assembly to kill deceased was missing. Thus other accused would not be vicariously responsible for murder in facts and circumstances of case. *Ali Ahmad* v. *State of U.P.*, 1995 All LJ 1076 (All).

Where onus of offering an explanation for incriminating facts lies upon the accused. In instant case, the appellant has not offered any explanation consistent with innocence regarding the incriminating facts proved against him and that b circumstantial fact against him. Appeal dismissed. *Ashok Kumar* v. *State*, (239 : (1995) 1 CC Cases 398 : (1995) 1 Crimes 347 : 1995 JCC 226 (Del).

95. Illicit Relations.—The husband and in laws were alleged to have killed the deceased as husband was having illicit relations with his Bhabhi (sister-in-law). The neck cut body was found in field and evidence on records pointed towards the guilt of accused. The conviction of accused was held justified. *Bishundeo Poddar* v. *State*, 2003 Cr LJ 1558 (Pat) : 2003(2) DMC 64 : 2003(3) BLJ 771 : 2002(3) East Cri C 176.

When there was no direct evidence only had circumstantial evidence—Interested witnesses inimical to the appellants—Claim that illicit relation between the appellant provided the motive for offence not believed. There was found no circumstance to connect the appellants with offence. Hence it was held that giving benefit of doubt sentence and conviction against appellants set aside. *Harish Chander* alias *Billa* v. *State*, (1995) 3 Crimes 189 : 1995 Cr LJ 3030 : (1995) 2 CC Cases 503 (Del).

Accused husband alleged to have killed his wife with aid of firearm and homicidal death by gunshot injuries was proved. The motive was to get rid of deceased as he had illicit relationship with another woman and wanted to marry her. Testimony of police officials was found trustworthy and reliable. Chain of circumstantial evidence pointed towards the guilt of accused and his conviction was held proper. *Ummed Singh* v. *State*, 2003 Cr LJ 3632 (Raj) : 2003(3) Raj Cri C 1297 : 2003(3) Raj LR 162 : 2003(4) Raj LW 2290 : 2003(3) WLC 465.

There was illicit relationship between the deceased and wife of the accused. Resulting into a murderous quarrel between the deceased and the accused. Accused's plea of sudden Provocation. It cannot be allowed. Relationship was the motive for the killing and not the provocation. *Chinnan* alias *Chinnaswami* v. *State*, (1995) 2 LW (Cr) 589 (Mad).

P.W. 7 was merely of 13 years of age and there is no reason to believe that she was of easy virtue and was not well versed with illicit affairs being of tender age. Merely carrying P.W. 7 on motor cycle by appellant '*K* cannot lead to illicit relations and this cannot be taken as motive to commit alleged crime. *Kanna* v. *State of Rajasthan*, 1995 Cr LR (Raj) 253.

In an Allahabad case the evidence of relation witnesses *i.e.* brother, sister-in-law and mother of deceased was contradictory and full of falsehood and embellishment and no independent witness was produced. The medical report also did not support prosecution story that deceased was assaulted by bricks. It was held that the defence version that informant brother had killed deceased on account of suspicion of illicit intimacy of deceased with his wife appeared to be probable and conviction was not justified. *Jai Narain* v. *State*, 2003 Cr LJ 168 (All) : 2002 All LJ 2415 : 2002(3) All Cri R 2264 : 2003(1) All LJ 73.

96. Joint offence.—Where two assailants, bearing dangerous instruments, assaulted the deceased, and the blows were aimed at the head, with the result that two fatal injuries were caused, and those injuries were such as could not be caused with one and the same instrument. *Held*, that each of the two assailants was responsible for one of the fatal injuries and, therefore, both were guilty under Section 302. 118 Ind Cas 50 : 30 Cr LJ 870 : AIR 1929 Nag 125 ; *see* also 1 LBR 233 ; AIR 1932 : Mad 748 : 64

MLJ 153 : 33 Cr LJ 814. 33 Cr LJ 537 ; AIR 1932 Cal 815 (FB) : 33 Cr LJ 663 ; AIR 1933 All 535. Where there are two accused charged with murder, and where there is no evidence to show as to which accused killed the deceased, what the Court has to consider is whether the evidence justifies the conclusion that the appellants acted in concert in committing the murder. If it does, both are guilty of murder. 1937 MWN 1233 ; *see* also AIR 1936 Rang 131 : 1936 Cr C 219 : 162 Ind Cas 6 : 37 Cr LJ 531 ; AIR 1938 Rang 331 ; AIR 1935 Lah 337 : 36 Cr LJ 1001 : 156 Ind Cas 786 ; AIR 1935 Oudh 52 ; AIR 1935 Oudh 110. In cases of several accused conviction may be of different offences. AIR 1942 Mad 446 : 43 Cr LJ 813 ; AIR 1941 Oudh 517 : 42 Cr LJ 758 ; AIR 1941 Rang 301 : 43 Cr LJ 123; AIR 1942 Lah 59 : 43 Cr LJ 423 ; AIR 1942 Lah 59 : 43 Cr LJ 428.

Where an accused did not actually inflict any injury upon the deceased but accompanied the co-accused on his murderous errand and was his confederate throughout, being himself armed like his co-accused with a weapon to meet all eventualities. *Held*, that the accused was as much responsible for the murder as his co-accused who had actually struck the fatal blow. 116 Ind Cas 613 : 30 Cr LJ 637 : AIR 1929 Lah 791. There is no practice to the effect that when a large number of persons participated in a murder only those persons should be selected for death sentence who are shown to have taken an actual part in causing the death. *Prima facie* all the persons convicted should be sentenced to the extreme penalty unless special circumstances are shown in favour of the alternative punishment of transportation for life. 8 Pat 181 : 117 Ind Cas 176 : 30 Cr LJ 737 : AIR 1929 Pat 161 ; AIR 1933 Lah 661 ; AIR 1931 Lah 536. Where two persons are acting in concert in the sense that their attack on the deceased (with a heavy stick by the one, and with a heavy stone by the other) was a single indivisible thing, both of them are liable for the resultant murder, under the provisions of Section 37, Penal Code, 15 Bom LR 303 : 19 Ind Cas 331 : 14 Cr LJ 235. In the absence of proof that all the prisoners had a common intention to inflict injury likely to cause death, only person who had struck the fatal blow could be convicted of murder and that the other accused would be guilty of grievous hurt only. 19 M 483 : 1 Weir 298 ; *see* also 1 Weir 296 ; 10 PR 1868 Cr ; 3 Ind Cas 622 : 8 PWR 1909 Cr : 10 Cr LJ 231; AWN 1892, 233 ; AIR 1933 Lah 977 : AIR 1933 Lah 930 ; AIR 1933 Oudh 53 : 9 OWN 977.

Where a blow is struck by one prisoner in the presence of, and by the order of the other, both are principals in the transaction ; and where the two persons join in beating a man, and he dies, it is not necessary to ascertain exactly what the effect of the blow was. 23 WR C 11. In case of joint commission of murder, none can be convicted in the absence of finding of common intention. AIR 1930 Sind 99.

Injuries are sustained by blunt weapons—Acquittal of five accused on same evidence. P.W. 9 and P.W. 10. Their presence is natural on the scene. Eye-witnesses evidence being corroborated by medical evidence. Accused attributed with specific injury. Hence it is held accused-s participation proved beyond doubt. *Dayaram* v. *State of M.P.*, 1995 C LR (MP) 272.

Where there was murders of two teenaged children. One of the co- accused was proved guilty. Hence it was held that only the accused can be held guilty against whom the offence was established. *Nathu* v. *State of Rajasthan*, 1995 Cr LR (Raj) 77 : 1996 Cr. LJ 919.

97. Sections 302, 34, 149 and 147.—It is the true that in ascertaining whether a group of persons had common intention to murder, the evidence adduced by the defence that they had common intention to murder is relevant. But in most cases, the discussion of the evidence in compartment—One relating to the offence and the other to the right of private defence may not be possible for almost the evidence relating to one part will have impact on the other part, and the Court in considering whether the accused are liable constructively for murder will have to consider also the evidence of the defence that their common intention was not to commit murder but only to protect their right and to cause hurt if necessary. 1964 SCD 792 : 1965 (1) Cr LJ 742 : AIR 1965 SC 257 ; 1965 (1) Cr LJ 1602 : AIR 1965 Cal 89. As a mere proposition of law, it would be difficult to accept the argument that the sentence of death can be legitimately imposed only where an accused person is found to have committed the murder itself. Whether or not sentences of death should be imposed on the person who are found to be guilty not because they themselves committed the murder, but they were members of an unlawful assembly and the offence was committed by one or more of the members of such an assembly in pursuance of the common object of that assembly is a matter which has to be decided on the facts and circumstances of the case. 1964 SCD 980 : 1965 (1) Cr LJ 226 : AIR 1956 SC 302.

Sufficient material for Conviction. On our independent examination of the judgment given by the trial Court and confirmed by the High Court, we find that both the Courts have properly and rightly re-assessed and reappraised the entire evidence on record and we find no infirmity or perversity in the findings recorded by the Courts below warranting interference. The High Court has not found any reliable and clinching evidence led by the prosecution to prove the guilt of the acquitted-accused. Therefore, the contention that the appellant shall be held entitled to benefit of doubt in the same manner as other acquitted-accused have been given, cannot be accepted. The occurrence, as spoken by the eyewitnesses, is fully established and the appellant alongwith Ram Saran and Harbir will be constructively liable under Sec. 302 read with Sec. 34 IPC for the commission of the crime as fatal injuries were inflicted by them with knives which they were carrying in their hands at the time of commission of offence. The fatal injuries were caused with dangerous weapons on vital parts of the body of deceased which resultantly caused his death. *Satvir vs. State of Uttar Pradesh*, AIR 2009 SC 1741 : 2009 CrLJ 1586 : 2009 (4) SCC 289 : 2009 (1) JT 539 : 2009 (1) SCR 431 : 2009 (1) Scale 683 : 2009 (1) Supreme 364.

Where there is only a charge under Section 302, read with Section 149, of the Indian Penal Code, in the absence of a charge under Section 302, read with Section 34, of the Penal Code, still some of the accused can be convicted under Section 302, read with Section 34, of the Penal Code. AIR 1978 SC 1392 ; AIR 1973 SC 2221 (distinguishing) AIR 1976 SC 1084 : 1976 Cr LJ 835 ; 1981 Cr LJ 1710. In AIR 1979 SC 1019 it was held that the High Court was not quite right in refusing to convict the accused under Section 302, simply on the ground of the absence of a charge under Section 302, the charge being under Section 302, read with Section 149 ; *see* however AIR 1954 SC 670.

When Courts below giving a concurrent finding on the basis of careful appreciation of evidence of eye-witnesses that the accused were armed with lethal weapons. No material omission, discrepancy, variation when compared to the contents of F.I.R. Each one of the accused member of the unlawful assembly—Medical evidence also corroborated the same and common object of unlawful assembly shared. *Held*, liable under Sections 329/149. *Shamsul Kanwar* v. *State of U.P.*, (1995) 2 Crimes 487 (SC) : 1995 SCC (Cr) 753 : (1995) 3 CCR 54(SC).

For fastening of liability with the aid of Section 149. I.P.C. commission of overt act not necessary. *Kaki Ramesh* v. *State of Andhra Pradesh*, (1994) 2 Crimes 268 (S.C.); (1994) 4 SCC 397.

Large number of persons of both parties are involved still no satisfactory explanation was given by prosecution regarding death of one accused and injury of another. True picture of genesis of occurrence was not given. It was wrong on part of trial Court to hold that accused and party alone was aggressor. It was held that Section 149 was not applicable and acquittal was upheld. *State of U.P.* v. *Ram Charan*, 1994 SCC (Cri) 1143.

Circumstantial evidence was found establishing commission of murder of victim by her father-in-law and brother-in-law. The third accused was found helping them in removal of dead body to screen offenders and therefore conviction of first two accused under Sections 302/201/34 was held proper and third accused was convicted under Section 201/34, IPC. *Ashok Kumar* v. *Bal Krishan Das* with *Mahesh Narain* v. *State of U.P.*, 1997 Cri LJ 73 (SC).

Conviction of only three persons out of 13 under Sections 148, 302/149. IPC was held not permissible. Since they had common intention they could be convicted under Section 302/34 I.P.C. *Jivan Lal* v. *State of M.P.*, 1997 (1) Crimes 1 (SC) : 1996 (9) Scale 262 : 1996 (8) Supreme 791 : 1997 (1) CCr 125 (SC).

Accused were armed with knives; they entered the house of the complainant dead at night; may be to take revenge of quarrel which had taken place at day time or because they are rich and head strong person; on a refusal to submit and satisfy their sexual lust accused including the appellant despite resistance by the girl lifted her, brought her in Osara. At that stage when deceased was crying and resisting, her father PW 4 her mother PW 5 got up and started raising shouts. Tahir, one of the accused gave knife blow to the deceased and two others gave knife blows to PW 4 and PW 5. From these facts, only reasonable inference which could be drawn is that common intention of the accused was to ravish the young girl of poor Harijan and in case of resistance to commit murder by inflicting knife blows. Their adventure in criminality cannot be watered down or nullified by contending that injuries caused by them have not resulted in death of PW 4 and PW 5. In this view of the matter, the High Court materially erred in altering the sentence of the accused from the offence punishable under Section 302/34 IPC to Section 324, IPC by observing that assault by knife to PW 4 and PW 5 were individuals act of and the act of Tahir in inflicting the knife injury on the chest of the deceased appears to be his individual act and, therefore, appellant Jhinkoo cannot be convicted for the offence punishable under Section 302 read with 34, IPC. Hence, the impugned order passed by the High Court cannot be sustained. *State of UP v. Jhinkoo Nai* 2001 Cri LJ 3965(SC) : AIR 2001 (SC) 2815 : 2001(6) JT 290 : 2001(5) Scale 19 : 2001(6) Supreme 25.

98. Sections 302 and 304.—Where the accused is suddenly given by another shoe beating on the face in a public place and he in return takes out a knife and stabs the other who dies, the accused cannot be said to be guilty of an offence under Section 302. ILR 1950 All 960. Where a person is found to have stuffed a handkerchief in the mouth of a woman to silence her and the woman is found to have died of suffocation prior to the commission of the sexual intercourse it cannot be said that the natural consequence of the stuffing the handker chief is definitely death. The accused cannot be saddled with the intention or knowledge necessary to constitute an offence under Section 302, Penal Code. He is to be convicted under Section 304. I.P. Code. 1952 Cr LJ 261 : A1R 1952 MB 251.

Where in a trial for offences under Section 302, read with Section 149, the accused are charged with having caused the death of a person by attacking him with sticks and other weapon, the medical officer deposited that only two out of 43 injuries had caused death and prosecution fails to elicit whether the said two injuries were sufficient to cause death, offence under Section 304, is proved and no one under Section 300. ILR 1962 Andh Pra 313 : AIR 1961 AP 79 : 1960 MLJ (Cr). *Held*, on facts of the case that as the intention to cause death was not established, the fight being sudden and unpremeditated, there could be no conviction under Section 304, Part I Penal Code 1960 MPLJ (Notes) 34. Where the evidence showed that the accused was drunk at the time of offence, which was committed at night, and that the arrow discharged by accused struck the deceased on his ribs causing rupture of the spleen resulting in his death, the offence of the accused fell under Section 304 Part I and not Section 302, (in the absence of evidence regarding the accused having selected the place of injury). AIR 1956 Madh B 271 : 1956 Cr LJ 1410 : Madh Bha 1956 Cr 136 ; *see* also AIR 1955 MB. 26 : 1955 Cr LJ 284 (absence of intention) ; 1953 Cr LJ 1878 : ILR 1953 Patiala l51 : AIR 1954 Pepsu 10 (where it was held on circumstances that the accused had no intention to kill or cause fatal injury but had the knowledge that the blows are likely to cause death and hence offence under Section 304, Part II) ; 1961 MLJ (Cr) 70 : 49 Mys LJ 665 : AIR 1960 Mys 228 : 1960 MLJ (Cr) 375 : 1960 Cr LJ 1222 (transaction one and continues) ; ILR (1958) 2 All 98 (inference from throwing of acid on the deceased) ; 1960 Ker LJ 609 (death caused by bodily injury) where it was held that even if there was no intention, the act would still amount to murder.

Presumption of intention of causing death or an injury sufficient in the ordinary course of nature to cause death made in AIR 1954 Pepsu 51 : ILR 1953 Patiala 123 : 1954 Cr LJ 362; ILR 1962 Andh Pra 313 : 1963 (2) Cr LJ 70.

It is not laying down that in no case of single blow or injury, the accused cannot be convicted under Section 302 IPC. In cases of single injury, the facts and circumstances of each case has to be taken into consideration before arriving at the conclusion whether the accused should be appropriately convicted under Section 302 IPC or under Section 304 Part II IPC.—*Gurmukh Singh vs. State of Haryana*, 2010 (1) CrLJ 450 (SC).

Accused-appellants caused injuries with *Kasi* and *Gandasa* and there made injuries sufficient to cause death. Incident on sudden quarrel and there were eye-witness too. Hence it was held that conviction altered to one under Section 304, Part I. *Gurnam Singh* v. *State of Punjab*, (1995) 4 Crimes 260 (SC).

Where the deceased was stabbed when he intervened during the fight between accused and his brother, the offence falls under Section 304, Part 1 I.P.C. *Malla Govindarajula* alias *Govu* v. *Stale of A.P.* (1995) 3 Crimes 801 (AP).

When knife injury inflicted on the abdomen—Death in the hospital next day, Offence fell under Section 403, Part II. *Augustine* alias *Babu* v. *State of Kerala*, (1995) 2 ALT (Cr) 50 (SC).

Where an accused confesses and also explains the circumstances which mitigated the gravity of his action, the trial Court should not ignore that part and if such mitigating circumstances are proved it should take that aspect into consideration in convicting the accused. *Probin Bora* v. *State of Assam*, (1994) 2 GRL 334.

Only one knife blow not on vital part but resulting in puncturing artery which caused death—Matter covered under Section 304, Part II. *Bhagwan Das* v. *State*, 1995 JCC 301 (Del).

Wife assaulted with stick by the appellant—Incident taking place at about 10 a.m. Deceased dying in the evening—Three internal injuries resulting in fracture of 5th, 6th and 7th ribs of the left side in the mid-line—No inference that appellant had a definite plan to finish the life of his wife—Injuries inflicted without any intention or motive but a definite knowledge that injuries were likely to cause death in the ordinary course conviction converted from 302 to 304, Part II. *Ramprasad Ramchandra_Shelekar*. v. *Stale of 'Maharashtra*, (1995) 2 Crimes 426 (Bom).

When injuries were not on vital parts, there was no intention to kill and hence conviction under Section 304, Part I proper. *Ram Chandra* v. *State of Rajasthan*, (1995) 2 RCD 307 (Raj).

Injuries not on vital parts show that there was no intention to kill and hence the case was not covered under Section 203, I.P.C. but accused could be held guilty under Section 304, I, I.P.C. *Ram Chandra* v. *State of Rajasthan*, (1995) 2 RCD 307 (Raj).

The accused was irritated as wife refused to cohabit with her husband. Under fits of grave and sudden provocation he killed her. Offence under Section 304, Part I is committed. *Pappu Singh* v. *State of Rajasthan*, 1995 Cr LJ 718 (Raj).

On the basis of the medical opinion of the doctor, that there was only one injury and the appellant, in fact, inflicted only one blow on the head. Further, he did not take any under advantage of the situation since the ingredients of Section 300. Exception 4 were attracted the Court set aside the order of conviction under Section 302, IPC, and found it to be a case punishable under Sec. 304, Part I. *Debu* v. *State*, 1996 Cr LJ 1903 (On).

In sudden quarrel with no previous enmity solitary stone blow is covered under Section 304, Part II, IPC. *Shrirang Shankar Lokhande* v. *State of Maharashtra*, 1997 (1) Crimes 479 (Bom).

From blow with pair of scissors on vital part of body of deceased it can be inferred that accused had knowledge that it would cause death though he may not have intended to commit murder and therefore conviction under Section 304, Part II, IPC was proper. *Mavila Thamban Nambiar* v. *State of Kerala*, 1997 (1) Crimes 72 (SC) : 1997 AIR (SC) 687 : 1997 (1) JT 367 : 1997 (1) Scale 145 : 1997 (1) Supreme 452 : 1997 (1) CCr 156 (SC).

The occurrence took place at the spur of moment and it was not preplanned. Two accused gave one single blow each and the third stood holding *lathi*. The *lathi* blow inflicted by one of the accused on the head of the deceased proved fatal. Conviction of accused who caused death of deceased by lathi blow under Section 302 was altered to one under Section 304, Part II. The second accused who gave blow on waist of deceased was convicted under Section 323 and 447 IPC. *Bhanwara Ram v. State of Rajasthan*, 2001 Cri LJ 3230 (Raj).

99. Sections 302 and 303.—Conviction of accused under Section 303 by High Court—Section 303 having been struck down by the Supreme Court, conviction was alleged to Section 302. The High Court opined that extreme penalty of death was not called for and sentence reduced to life imprisonment. The Supreme Court set aside the death and impose the life sentence, AIR 1985 SC 1120. Constitutionally Section 303 can be challenged on the ground that it contravenes Articles 14 and 21 of the Constitution. 1982 Cr LJ 763 ; 1982 Cr LJ 969 but *see* contra AIR 1983 SC 473.

100. Murder and unlawful assembly.—*Held* on facts that all the accused persons could be held as members of unlawful assembly where common object was at least to cause hurt in as much the deceased person not having injuries in such number or in such circumstances as would indicate anything like given determination on the part of the assailants to endanger their lives. *Held*, in the circumstances that the accused were guilty of the offence under Section 325, read with Section 149, 1963 Jab LJ 932 : 1964 (2) Cr LJ 185 : AIR 1964 Mad Pra 182 ; but *see* 1964 (1) Cr LJ 114 : AIR 1964 Madh Pra 30 ; 1964 (1) Cr LJ 198.

Common Intention or Unlawful Assembly accused persons having formed an unlawful assembly and in pursuance of common object thereof, committed murder of deceased and injured his brother too. Out of seven accused persons five were acquitted. However, the fact remains that these two appellants were found to have inflicted the injuries with sharp edged weapon, as well as, Lathi. They have also been individually charged with the offence under Section 302, IPC. In that view, they were bound to be convicted for the offence under Section 302 read with Section 34, IPC. They came together on the spot, they also gave abuses to the deceased and thereafter, acted along with each other. Therefore, we have no hesitation in upholding the conviction, but not with the aid of Section 149, IPC, but with the aid of Section 34. Unfortunately, the High Court has not discussed this aspect of the case. *Murli and Anr. vs. State of Rajasthan*. 2010 (2) CrLJ 2228 (SC).

The High Court has noted that from the side of the complainant which includes deceased also, five persons have received in total as many as 15 injuries. The main injury on the head of the deceased has been attributed to A1. Similarly, Gulam Rasul, Jan Mohammad son of Sultan and another Jan Mohammad, have also received wounds on the head. Injury on the head of Gulam Rasul was an incised wound caused by a Farsa. Jan Mohammad son of Sultan had received an incised wound on the head. The other Jan Mohammed had received lacerated wound on the head. The other injuries on the persons of all the other injured persons are in the shape of bruises or lacerated injuries most of which have been caused by lathies.

The prosecution evidence clearly shows that the common object of the unlawful assembly was to commit the murder of Habib and it was not just an assembly at a particular point of time where the accused persons had assembled with Frasa and lathis in order to cause injury on the complainant including Habib-deceased who had gone for filing nomination papers for the Panchayat election.

The High Court found that the purpose of the unlawful assembly was to stop Habib, his brother Gulam Rasul and their supporter from either contesting the election or supporting the persons who filed the nomination. They were all present near the gate of the school where the nomination papers were to be filed. Both the trial Court and High Court have on analyses of the evidence come to hold that all the accused persons had formed an unlawful assembly armed with weapons which were likely to cause death and, therefore, conviction under Sec. 148 IPC and application of Sec. 149, IPC does not suffer from any infirmity. In the background facts, it is clear that the conviction as done is appropriate. *Siri Kishan vs. State of Haryana*, 2009 (12) SCC 757 : 2009 (8) JT 305 : 2009 (6) SCR 1184 : 2009 (6) Scale 438.

Sine qua non for—Scope.—Omission on the part of a prosecution witness to name and identify an accused in the dock cannot be held to be wholly insignificant so as to record a judgment of conviction. Presence of an accused while the offence was committed is a *sine qua non* to find him guilty of being member of unlawful assembly. If his present is doubted question of finding him guilty does not arise.

In a case of this nature, the rule of prudence should be applied. Something more than their being cited as an accused in a witness box would be necessary. The Court must have before it some materials to form an opinion that they had shared a common object. *Akbar Sheikh vs. State of West Bengal*, 2009 (7) SCC 415 : 2009 (6) Scale 745 : 2009 (6) JT 315 : 2009 (7) SCR 518 : 2009 (4) SLT 328.

Sec. 149, IPC consists of two parts. The first part of the Sec. means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Sec. 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object.

The distinction between the two parts of Sec. 149 cannot be ignored or obliterated. In every case, it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first part, but offences committed in prosecution of the common object would be generally, if not always, be within the second part, namely, offences which the parties knew to be likely committed in the prosecution of the common object.

Sec. 149, IPC has clear application to the facts of the cases. Therefore, the trial Court and the High Court were justified in convicting the appellant. The appeals are dismissed. *Raj Nath vs. State of U.P.*, AIR 2009 SC 1422 : 2009 (4) SCC 334 : 2009 (1) JT 373 . 2009 (1) Scale 619 : 2009 (1) Supreme 370 : 2009 (1) SCR 336 : 2009 (1) JCC 801.

In the instant case village political rivalry led to double murder. The accused were put to notice under charge No. 1 that they were members of an unlawful assembly armed with deadly weapons and in prosecution of common object of such assembly, namely, in murdering deceased 1 and 2, they committed offence of rioting, punishable under Sec. 148 IPC. A-1 to A-5 and A-6 to A-9 were noticed of the particulars under charge No. 4 that during the course of same transaction as mentioned in charge No. 1, they committed murder by intentional causing death of D-1 and thereby committed an offence punishable under Sec. 302 IPC. A-3, A-6, to A-8, A-10 to A-13 were put to notice under charge No. 5 that during the course of the same transaction as mentioned in charge No. 1 they committed murder by intentional causing death of D-2 and thereby committed an offence punishable under Sec. 302. Reading of charge No. 4 and charge No. 5 leaves no manner of doubt, since the transaction mentioned in charge No. 1 has been made integral part thereof, that all the necessary ingredients of Sec. 149 IPC are implicit therein except mentioning of Sec. 149 IPC specifically. The particulars stated in charge Nos. 4 and 5 are reasonably sufficient to give the appellants adequate notice of Sec. 149 IPC although not specifically mentioned. Thus, non-mentioning of Sec. 149 in charge No. 4 and charge No. 5 would not be a fundamental defect of an incurable illegality that may warrant setting aside the conviction and sentence of the accused. Non-framing of a charge under Sec. 149 IPC, on the face of the charges framed against the appellants would not vitiate their conviction; more so when the accused have failed to show any prejudice in this regard. The present case is a case where there is mere omission to mention Sec. 149 in charge Nos. 4 and 5 which at the highest may be considered as an irregularity and since the appellants have failed to show any prejudice, their conviction and sentence is not at all affected. Tenor of cross-examination of injured witnesses by the defence also rules out any prejudice to them. The offence, in the established facts and circumstances of the case, under Sec. 302 read with Sec. 149 IPC is implicit, the omission to mention Sec. 149 IPC specifically in the charge Nos. 4 and 5 cannot affect their conviction. In no way their conviction is rendered bad as the appellants has assembled together armed with axes and sickle and were parties to the assault on deceased and others. In a situation such as this it was not obligatory upon the prosecution to prove which specific overt act was done by which of the accused. *Anna Reddy Sambasiva Reddy and Ors. v. State of A. P.*. AIR 2009 SC 2661 : 2009 (6) SCR 755 (SC) : 2009 (12) SCC 546 : 2009 (3) Crimes 17 (SC) : 2009 (5) JT 617 (SC) : 2009 (6) Scale 223 (SC) : 2009 (4) Supreme 506 (SC).

101. Sections 302 and 34.—To constitute common intention, the acts of the accused should be done in pursuance of a pre-arranged plan or, a pre-arranged concert, which may even develop on the spot during the course of the commission of the offence. 1964 (1) Cr LJ 121 ; *see* also 1964 (1) Cr LJ 426 : AIR 1964 Pat 158. The accused were charged in respect of offences under Sections 148 and 302 read with Section 149 but they were convicted under Section 302, read with Section 34, against them. It was held that there was no question of prejudice. AIR 1974 SC 1256 ; AIR 1973 SC 2221 ; AIR 1980 SC 879 ; AIR 1974 SC 541 ; AIR 1974 SC 778 ; 1977 Cr LJ 252 (conjoint complicity is the inevitable inference when a group animated by that intent accomplish their purpose cumulatively) ; AIR 1985 SC 891 (Commutation of death sentence not possible because of the tender age of the accused, but FIR does not establish presence of the accused and description of the accused by the prosecution witness does not tally with that the accused, acquittal of the accused on the ground of possibility of the accused not being a participant held valid).

The evidence clearly shows that accused No. 1 gave the stick blow on the head of and she fell down and succumbed on the spot. The evidence clearly shows that accused No. 1 was intending to commit murder of *V* and hence gave the said blow. Therefore, accused No. 1 can be convicted under Section 302, of I.P.C. simpliciter. The evidence of P.W. 3 shows that after commission of murder, accused No. 2 came forward to help him in order to dispose of the said dead body of *V*. He helped him to put the same in a gunny bag and put it in the basket. Both accused Nos. 1 and 2 in furtherance of their common intention tried to cause the dead-body of *V* to disappear by concealing it in the ditch so as to save the accused No. 1 from legal punishment. Hence, both of them are liable for committing the offence punishable under Section 201, read with Section 34, of I.P.C. and the Judge has correctly recorded the conviction in this respect. *Gonpat Waman Shelar* v. *State of Maharashtra*, (1995) 1 Mah LR 688 at p. 695 (Bom).

Accused persons carrying various weapons like Axe, handle of Axe and handle hoe came to house of deceased in morning. Accused armed with axe dealt Axe blow on head of deceased, resulting he fell down after sustaining bleeding injuries. Witnesses- family members, when came to intervene were given blows on their heads by accused carrying handles of Axe and hoe. Some other accused kicked, fisted and prevented witnesses from intervening in quarrel. Accused convicted under Secs. 34, 143, 144, 148, 323, 302 and 149. *Jagan Shravan Patil vs. State of Maharashtra*, 2009(11) SCC 517 : 2009 (3) Scale 615 : 2009(3) JT 284 : 2009(2) Supreme 352.

Medical report indicated that deceased was unconscious when she was immersed into water. There was conscious effort on the part of defence to make out a case of suicide. This was found totally inconsistent with sequence of events resulting in death of deceased. Hence conviction upheld. *Radheysham Ramkishan Chandak* v. *State of Maharashtra*, (1995) 1 Mah LJ 741.

Where no dependable evidence to lead to inference that *M* committed crime in furtherance of common intention. No meeting of minds. No preconcert. Similar intention different from common intention. No case of sharing the intention. Case against the appellants armed with lathis not proved beyond reasonable doubt. Hence it is held that conviction and sentence unsustainable in law. *Ram Lal* v. *State of Madhya Pradesh*, (1995) 3 Crimes 618 : 1995 Cr LR 341 (MP).

Where for fastening constructive liability under Section 34, I.P.C. simultaneous consensus of minds should be there to bring about a particular result. In instant case accused used only stick against deceased on his face. This could not be said to have common intention to kill with co-accused who employed deadly weapon on vital parts. Hence conviction was altered from Section 302, I.P.C. to that of under Section 325, I.P.C. *Sayad* v. *State of Maharashtra*, (1994) 2 Bom CR 334.

Where motive not established—Co-accused acquitted—Conviction is not justified. *Shyam* v. *State of U.P.*, 1994 JIC 252 (All).

Where the presence of three eye-witnesses P.W. 1, P.W. 2 and P.W. 3, at the time and place of occurrence is extremely doubtful and in any case their evidence is not intrinsically reliable to warrant a conclusion regarding participation of 3 accused appellants in commission of murder. Hence appeal is allowed and conviction and sentence is set aside. *Bhagirath* v. *State of U.P*, (1994) 31 ACC 685.

Where dead-body found in a room—Strangulation cau circumstantial evidence—No corroboration by other evider justified. Hence, conviction set aside. *Kishan Singh and others* 1994 Cr LR (Raj) 101.

Where fatal *Bhala* injury ensued by the main accused—Co-accused minor stick injuries. Hence ought not to be prosecuted under Sections 302. Section 34. Therefore common intention cannot be deduced. *Gopal Singh* v. *St Bihar*, 1995 SCC (Ori) 146 (SC).

Where daughter is eye-witness. Other witnesses turned hostile. Common intention developed at spot.—Accused who played no role was acquitted and other were convicted. *Gurdeo Singh* v. *State of Rajasthan*, 1995 Cr LR (Raj) 115.

Where accused was aged 74 years and 18 years and there no overt act of any kind attributed to them—No evidence of common intention. Hence under the circumstances mere presence insufficient to warrant conviction under Sections 302/34, I.P.C. *Arjun Ram* v. *State of Rajasthan*, (1995) 3 Crimqs 130 : 1995 Cr LR 348 : (1995) 2 RCD 507.

Where petitioner alongwith 14 others forming unlawful assembly committed five murders. He was undergoing life imprisonment since four years back. Application for first furlough. It was held *prima facie* evident what sort of dangerous person the petitioner is—Petition is liable to be dismissed. *Maganbhai Prasanbhai* v. *State*, (1994) 3 Crimes 530 (Guj).

102. Sections 302 and 325.—Where the victim of an assault by several persons dies of injuries which were caused by the violence not of one single person but of several persons be labouring the victim, it is safer to convict the accused of the grievous hurt under Section 325, 4 DLT (AM) 17 : 50 Cr LJ 1003 : AIR 1949 Ajmer 49 ; 4 DLR (A & M) 47 : AIR 1949 Ajmer 29 : 50 Cr LJ 583 ; 3 DLR (A & M) 35 ; 48 Cr LJ 367 : 229 IC 293 ; 46 Cr LJ 728 : AIR 1944 Mad 223 : 45 Cr LJ 729 ; ILR 1945 Mad 73 ; AIR 1942 Cal 426 : 43 Cr LJ 455 ; AIR 1942 Mad 100 : 43 Cr LJ 320 ; AIR 1939 Rang 263 : 40 Cr LJ 871 ; AIR 1939 Oudh 254 : 40 Cr LJ 754 : AIR 1939 Mad 269 : 40 Cr LJ 308.

103. Several accused.—Where murder has been committed by several accused by one instrument but there is no evidence who committed the murder, all the accused can be convicted if it is found that there was common intention to commit murder under Section 34, I.P.C. AIR 1941 Bom 139 : ILR 1941 Bom 315 : 42 Cr LJ 697 : 195 IC 208 ; *see* also AIR 1941 Pat 550 : 42 Cr LJ 603 ; AIR 1941 Lah 117 : 42 Cr LJ 475 ; AIR 1940 Lah 485 : 42 Cr LJ 82 ; AIR 1940 Lah 53 : 41 Cr LJ 348 ; AIR 1939 Rang 361 : 41 Cr LJ 44 : AIR 1939 Lah 245 : ILR 1939 Lah 77 : 40 Cr LJ 712. As regards desirability of passing death sentence to all the accused, *vide* AIR 1938 Cal 295 : 39 Cr LJ 479 : but *see* AIR 1935 Lah 337 : 36 Cr LJ 1001 ; 36 Cr LJ 958 : AIR 1935 Pesh 75. High Court can reappreciate evidence on record so far as it affects case for and against convicted accused for determining whether they had the common intention with them who was assaulted ILR 1964 Guj 414.

Where three accused were acquitted on the same evidence. Whether this may be a ground of acquittal. It was held in negation. Hence merely on this ground it cannot be held to disbelieve that prosecution case. *Suraj Pal* v. *State* of *U.P.*, (1994) 1 Crimes 502 (SC) : 1994 SCC (Cr) 701 : 1994 (1) PLJR 104 : 1994 ALJ 467 : AIR 1994 SC 748 : 1994 Cr LJ 928.

Where P.W. 7 was not an eye-witness—Other eye-witness turned hostile. P.W. 6 wa child witness and not mentioned in FIR. Hence it was not safe to convict the thre accused appellants. *Battilal, Ramjilal and Ramkishore* v. *State of Rajasthan*, (1994) WLC (Raj) 190 : 1994 Cr LR (Raj) 41.

Non-naming of one or few of accused persons in FIR or in dying declaration, whe not fatal. Prosecution case that the accused persons committed criminal trespass int the school and tried to give lesion in the classes and some outsider accused person being armed with iron rod, spear etc. started assaulting the clerk of the school.

Eighteen persons faced trial out of which were acquitted by the trial Court and th High Court. Names of some of the appellants were not mentioned in the FIR or th dying declarations.

The law is fairly well settled that FIR is not supposed to be an encyclopaedia of th entire events and cannot contain the minutes details of the events. When essentiall material facts are disclosed in the FIR that is sufficient. FIR is not substantive evidenc and cannot be used for contradicting testimony of the eye witnesses except that may b used for the purpose of contradicting maker of the report. Though the importance o naming the accused persons in the FIR cannot be ignored, but names of the accuse persons have to be named at the earliest possible opportunity. The question is whethe a person was impleaded by way of afterthought or not must be judged having regard t the entire factual scenario in each case. Therefore, non naming of one or few of th accused persons in the FIR is no reason to dis-believe the testimony of crucia witnesses. The evidence of witness is clear and cogent. *Kirender Sarkar vs. State o Assam*, AIR 2009 SC 2513 : 2009 CrLJ 3727 : 2009 (12) SCC 342 : 2009 (6) JT 114 2009 (6) SCR 1133 : 2009 (6) Scale 589.

104. Abettor.—Person instigating others to beat deceased and in whose presenc injuries are inflicted by such others causing death is guilty under Section 302, 1933 C C 1387 : AIR 1933 Lah 928 : *see* also AIR 1933 Lah 660 : 1933 Cr C 882 : AIR 193 Rang 236 : 11 Rang 354 : 1933 Cr C 907, 1941 MWN 872 ; AIR 1939 Oudh 33.

Where there being altercations between main accused and deceased. Main accuse took gun from appellant and loaded it with cartridges. And appellant instigated mai accused to shoot by saying, "*Maro Sale Ko*". Hence it is *held*, that appellant's convictio for abetment upheld and appeal dismissed. *Manbir Singh* v. *State of U.P.*, 1994 SC (Cri) 1150.

105. Murder or culpable homicide.—In a case, the accused attacked deceased o neck with sharp-cutting weapon. The cut wound extensively damaged blood vessels i neck. The cause of death as explained by the doctor was primarily due to injury cause by the respondent. Bleeding and the consequential heart failure were the effects of suc injury. Held, Section 300 does not contemplate a situation of miraculous survival on th contrary it contemplates an ordinary situation and that is why legislature has advisedl used the words "bodily injury as the offender knows to be likely to cause death". In th instant case, the opinion of doctor that if proper medical care were to be provided, th injured could have survived was a hypothetical answer and was not somethin applicable to the facts of the case. Accused was liable to fall under Section 302 and no under Section 304 II of IPC. *State of Rajasthan* v. *Dhool Singh*, AIR 2004 SC 1264 : 200 Cr LJ 931 : 2004(1) Crimes 165 (SC) : 2003(8) Supreme 850 : 2003(10) JT 179.

From the evidence on record, Court finds that there had been an altercation between the deceased and the appellant, before the shots were fired. The fact is testified by witness who stated that the two quarrelled with each other, because of the land dispute, before the shots were fired. The first shot was fired by the appellant in the air, which suggests that he did not have any intention to kill the deceased, who was his real brother, but wanted only to browbeat and scare him and assert his dominance over him, may be on account of the fact that the deceased was younger to him. It was only the second shot, which caused the death. This shot was also not aimed at any vital part of the body. It was aimed just below the right shoulder. The shot, as per the opinion of Doctor Sharma, was fired from a distance of only 6-7 feet. Appellant was a Home Guard volunteer and, therefore, he was supposed to have been trained at handling the firearms, before he was so appointed. His firing a shot from a distance of only 6-7 feet, aiming the upper chest, just below the right shoulder, suggests that he did not intend to cause the death, though he can be presumed to have had the intention to cause an injury, which could have caused death. Therefore, we hold the appellant guilty not of the offence of murder, under Section 302 of the Indian Penal Code, but of offence of culpable homicide not amounting to murder, punishable under Section 304 (first part) of the Indian Penal Code. *Jodh Raj. vs. State of H.P.*, 2010 (2) CrLJ 2488 (HP).

It is for the prosecution to prove their case of murder and if upon a review of all available evidence a doubt arises as to whether the accused committed murder of whether he committed culpable homicide ; by reason of exceeding the right of private self-defence, he is entitled to be found guilty of the lesser offence only. 171 Ind Cas 586 : 38 Cr LJ 1095 : AIR 1937 Rang 343.

Held, on facts that the accused died homicidal violence. There is no evidence to establish that the appellant could have any *bona fide* claim of right to the land which the deceased was ploughing and consequently in entering that field which at the moment was in possession of the deceased. 1963 MPLJ (Notes) 83. The crucial test for deciding whether a right of private defence of property is available or not, is whether the harm to the property committed by the offender is immediate or not. 29 Cut LT 245.

Where the Court concluded that in all probability (i) there was free fight, (ii) deceased received fatal injuries, (iii) no previous enmity and (iv) offence was committed without prior medition offence committed is culpable homicide not amounting to murder. *Abdul Hamid* alias *Phoulad* v. *State of M.P.*, 1995 Cr LR 212 (MP).

In an incident on account of some minor quarrels, stone used for commission of the crime not a deadly weapon. Cause of death was due to cerebral haemorrhages with blunt trauma over skull offence of murder not made out. It would be an offence of culpable homicide not amounting to murder punishable under Section 304, Part I of the Code. *Baby Mathew D'Souza* v. *State*, (1994) 2 Crimes 608 (Bom).

Injuries where on non-vital part of the body and there was no direct evidence but only circumstantial evidence. Offence of culpable homicide not amounting to murder made out. *Maliya* v. *State of Rajasthan*, 1994 SCC (Cri) 1413.

Where accused, in grave and sudden provocation occasioned by obscene and objectionable behaviour of deceased with his real sister shot dead decease it was held that the accused was liable to be convicted for offence of culpable homicide not amounting to murder. *Pushpendra Singh* v. *State of UP*, 2005 Cr LJ 2022 (All) : 2005 All LJ 1149 : 2005(51) All Cri C 858 : 2005(2) All Cri R 1871.

Where evidence of witness that accused in the course of altercation and quarrel all of a sudden assaulted deceased wife by wooden matte meant for washing clothes, was corroborated by injuries found on dead body of deceased, conviction of accused under Section 302 IPC was altered to one under Section 304-II of IPC. *Sunil Kr. Jachak* v. *State of MP*, 2004 Cr LJ 209 (Chhattisgarh) : 2004(2) MPHT 47.

Since incident occurred all of a sudden during free fights between parties without any intention to cause death of any one hence conviction under Section 302, IPC altered to one under Section 304-II, IPC. *Rang Lal* v. *State of Rajasthan*, 2004 Cr LJ 316 (Raj) : 2004(1) Raj Cri C 125 : 2004(1) WLC 68.

Where ocular evidence as to incident corroborated by post-mortem report proved fact that accused committed offence of culpable homicide therefore accused liable to be convicted under Section 304-II, IPC and not under Section 302, IPC. *Magan Singh* v. *State of Uttaranachal*, 2005 (2) Crimes 516 (Uttar) : 2005(52) All Cri C 396 : 2005(2) All Cri R 1463 : 2005(4) Cur Cri R 143 : 2005(2) UC 913.

Where accused gave fatal blow on deceased without intention and premeditation at a spur of moment though it was likely to cause death, accused was held liable to be convicted under Section 304-II/34, IPC. *Nageshwar Singh* v. *State of Bihar*, 2005 (3) East Cr C 146 (Pat).

Where eye-witnesses giving sufficiently detailed version of the murderous assault by the accused—Their testimony corroborating each other's. Hence prosecution has proved beyond reasonable doubt that the accused was the person responsible for the homicidal death of the deceased. *Bhaga Ram* v. State *of Rajasthan*, 1995 Cr LR (Raj) 375 : (1995) 2 RCD 31 (Raj) (DB).

No intention to cause death or cause particular injury which ultimately proved fatal accused to be imputed with knowledge that the injury caused by him was likely to cause death. Accused was found guilty of offence under Section 304, Part II. *Jaikishan* v. *State of Rajasthan*, (1995) 3 Crimes 480 (Raj).

Where accused inflicted multiple injuries with hard and blunt weapon "*dengaras*" and injuries were likely to cause death in ordinary course of nature though no injury on vital part of body, it was case of murder and not culpable homicide. *Ananda Gavaji Valvi* v. *State of Maharashtra*, 1993 Cri LJ 2826 (Bom).

Death of the deceased caused due to fatal injuries inflicted by appellant with M.O.I. weapon—Evidence of prosecution-witnesses corroborate each other in all material particulars No reason to disbelieve them. Case of culpable homicide amounting to murder established as punishable under Section 302. *Kaduvakuzhiyul Sudhakaran* v. *State*, (1995) 1 CCR 210 : 1995 Cr LJ 721 (Ker) (DB).

Accused inflicted injury on deceased's head with blade portion of axe resulting into death and intention was proved. Accused committed culpable homicide amounting to murder under Section 302. His conviction under Section 302, *held* proper. *Shlodas Antaram Meshram* v. *State of Maharashtra*, (1995) 2 B Cr C 127 : (1995) 2 Mah LJ 36 (Bom).

106. Homicide or suicide.—There are certain methods by which homicidal and suicidal throat wounds are ordinarily distinguished. If more than one severe wound is present, the case is usually one of murder, a suicide may make more than one wound but only one of them will be severe. Again self-inflicted wound are usually less severe and deep, and inference can sometimes be drawn from the position in which the body is found. An intending suicide seldom cuts his throat while lying in bed ; he usually does so in the erect to sitting position, and on the supervention of unconsciousness he collapses to the floor and probably turns over his face. A body stretched out in bed with a wound on the throat suggests murder during sleep, one on its back on the floor makes it possible to infer homicide in which more than one person has a hand ; a body face downwards is almost certainty of a suicide. 18 Pat LT 683 : AIR 1932 Pat 652.

107. Determination as to murder or suicide.—In a case there was dying declaration of deceased who was in a fit state of mind at the relevant, but while the prosecution dropped material witness, the defence brought out a new case of suicide in cross-examination of prosecution witnesses, when the prosecution did not declare hostile. It was held that two views were possible and, therefore, the conviction of the accused for murder was liable to be set aside giving benefit of doubt. *Minaben Meerabhai* v. *State*, 2004 Cr LJ (NOC) 1 (Guj) : 2002 Cri LR (SC Mah Guj) Guj 292 : 2003(2) DMC 10 : 2002(3) GCD GUJ 2080 : 2002(2) GUJ LR 1662.

In the instant case, the version of homicide set up by the prosecution as well as the version of suicide set up by the accused appeared to be highly improbable and did not impose confidence in the mind of the Court to believe other version. It was held that when to incredible version confronted the Court, the Court had to give benefit of doubt to the accused and it was not safe to sustain the conviction and the accused would be entitled to benefit of doubt. *State of Maharashtra* v. *Sanjay D. Rajhans*, 2005 Cr LJ 120 : AIR 2005 SC 97 : 2005 SCC (Cri) 231 : 2005(4) Crimes 338 (SC) : 2004(8) Supreme 138.

In a case where accused are charged of the offence under Sec. 498-A and Sec. 302 there should be no difficulty for the Court to convict the accused under Sec. 306 if the basic ingredients of the offence under Sec. 306 of IPC are established by the prosecution even without framing a charge under that section. What is material and relevant, is that the prosecution should establish that the accused had enough notice of the allegations which could form the basis for conviction under Sec. 306 of IPC. In a bride burning case there could be or could not be any eye-witness and if there is no direct evidence the Courts have to base the order of conviction either under Sec. 302 or under Sec. 306 of IPC on the basis of circumstantial evidence. Motive for committing murder and basic ingredients of the offence under Sec. 306 of IPC in such cases could be one and the same. In both the cases the accused would make every effort to disprove the case of the prosecution under Sec. 498-A, namely, that neither any demand of dowry was made nor any gifts or presents or money was received by the accused at a subsequent stage or that he subjected the deceased to cruelty for the same or for any other reason. In other words, the accused would try to disprove the motive if a charge is under Sec. 302 and/or to establish that the ingredients of the offence under Sec. 306 do not exist. The motive for conviction either under Sec. 302 or the basic ingredients to establish charge under Sec. 306 of the IPC in a case of bride burning would be common and, therefore, the conviction under Sec. 306 of IPC can safely be recorded and same would not result in failure of justice in any manner even if the charge under Sec. 306 was not framed and the accused was tried only under Sec. 302 r/w Sec. 498-A of IPC. There is absolutely no reason and ground as to why the trial Court cannot frame alternative charge under Sec. 306 of IPC in a case of bride burning particularly where the accused are charged under Sec. 498-A also. As a matter of fact, if the facts and circumstances demand, the trial Court should frame alternative charge under Sec. 306 also so as to keep the accused on guard and make him aware that there could be a conviction under Sec. 306 even if a charge under Sec. 302 of IPC is not established. *Kisan and Ors. v. State of Maharashtra*, 2007 CriLJ 130 (Bom).

108. Procedure.—Cognizable–Warrant–Not–Bailable Not compoun-dable—Triable by Court of Session.

High Court can not alter finding of acquittal to conviction under Section 302. AIR 1962 Punj 348 : ILR (1962) 1 Punj 836 : 1962 (2) Cr LJ 210 : Cr LJ 62 All Cr R 214. Conviction under Sections 302, 307 and 149 can be converted into one under Sections 302, 307 and 34. AIR 1961 SC 177 : 1962 All Cr R 23 : 1963 Mad LJ (Cr) 175 : 1961 Cr LJ 853.

Where the Session Judge cannot take cognizance and cannot be assigned with the case without commitment so any order passed by him with regard to remand be it with reasons or not must be held to be without injurisdiction and hence illegal. *Rashid* v. *State of U.P.*, 1995 (32) ACC 103 : 1995 (32) ACC 69 (Alld).

109. Right of private person to insist upon enquiry.—It cannot be said that in the case of an offence under Section 302, I.P. Code, any private person has got any inherent right to insist upon an enquiry. AIR 1948 Mad 230 : 49 Cr LJ 459.

110. Charge.—I (name and office of Magistrate, etc.) hereby charge you (name of the accused) as follows :

That on or about the............day of............. at............. you committed murder by intentionally (or knowledgly) causing the death of (*name of the deceased*), and thereby committed an offence punishable under Section 302, of the Indian Penal Code, and within the cognizance of Court of Session (or High Court).

And I hereby direct that you be tried by the said Court of the above charge.

Where on the evidence led before the Court or not, even though no separate substantive charge has been framed against that accused under Section 302, I.P.C. heldyes. *Virender Kumar* alias *Bittoo* v. *State*, (1995) 2 Crimes 466 (Del) (DB).

Where a charge under Section 302, I.P.C. had been framed and where prosecution failed to prove the same and where screening of offence has been made out and accused person has got knowledge about it and purposely misled the Police and pushed conviction under Section 201, I.P.C. conviction can be made even without framing a charge. *Anisetti Swaprasadarao* v. *State of Andhra Pradesh*, (1994) 2 ALT 13 (NRC) (AP).

Discrepancy as regard the time of the death taking place between prosecution version and the charges framed by the Court—Time very significant factor. Hence no conviction on basis of such charge, case remitted back. *Sukhdev* v. *State of M.P*, (1995) 2 Crimes 336 (MP).

Section 221, Cr. P.C. makes it clear that only when it is doubtful which of several offences the facts can be proved will constitute alternative charges can be framed. This provision will apply only in cases where there is no doubt about facts which can be proved but a doubt arises as to which of several offences had been committed on proved facts in which case any of murder charge can be framed and tried or alternative charge can be framed. *Mishrilal* v. *State of M.P.*, (1995) 3 CCR 178 (MP).

When accused was charged for offence under Section 302 read with Section 149, accused persons were found guilty. But where no prejudice were caused to accused person for not framing an independent charge under Section 302, it was held that trial is not vitiated. *Swamygowda* v. *State of Karnataka*, 1997 Cri LJ 423 (Kant).

111. Bail.—AIR 1940 Oudh 8 : 40 Cr LJ 841. In AIR 1962 SC 253 the Supreme Court observed that if the offence is of a kind in which bail should not be granted considering the seriousness, the Court should refuse bail even though it has very wide powers under Section 298 of the Code of Criminal Procedure. *See* also AIR 1968 Guj 77.

Where second bail appellant was filed and there was inordinate delay in decision of appeal. It was held, that the appellant was entitled for bail. *Ghanshyam* v. *State of U.P.*, 1994 ACC 310 : 1994 JIC 294 : 1994 (23) ALR 561 : 1994 U.P. Cr R 226 (All).

Where accused merely catching hold of the deceased while the main culprit was giving knife blows. But accused not named in F.I.R. There was no identification evidence. Hence accused, held, entitled for bail. *Dinesh* v. *State*, 1995 JCC 549 (Del).

Accused has absconded after judgment such person makes a mockery of court and loses his right to remain on bail. *Premendra Singh* v. *State of U.P.*, 1994 ACC 214 (All).

Where once chargesheet filed within prescribed time, bail not to be granted under Section 167, Cr.P.C. *Biju. Varghese* v. *State of Maharashtra*, 1994 (1) Crimes 698 (Bom).

Where application rejected on ground of "adverse police opinion"—Petitioner having law abiding clean conduct both inside and outside jail. Mere relying on phrase "adverse police opinion" without anything in support of same cannot be made ground for rejecting parole leave application. Parole to be granted. *Vallabh Ramji* v. *State of Gujarat*, (1994) 1 Crimes 198 (Guj) : 1994 Cr LR (Guj) 72.

112. Dying declaration.—Where burn injuries were to the extent of 70%. There was doubtful dying declaration and material witness also became hostile. Tutoring possible. Dying declaration was in question answer format. There was no other evidence to connect the accused with offence. *Held*, conviction set aside. Acquittal of accused is proper. *Kalloo* v. *State of M.P.*, 1995 Cr LR (MP) 276.

Discrepancies in dying declaration—Apparent discrepancies.—In the first dying declaration recorded by a Nayab Tehsildar, it has been clearly stated that she tried to set herself ablaze by pouring kerosene on herself, but in the subsequent declaration, recorded by the another Nayab Tehsildar, a contrary statement was made. It appears that one dying declaration earlier was made before the Doctor. The trial Court referred to the evidence of Dr. Chaturvedi who stated that the deceased was admitted on bed No. 8, but the father of the deceased stated that her daughter was admitted on some other bed number.

The trial Court and the High Court came to abrupt conclusions on the purported possibility that the relatives of the accused may have compelled the deceased to give a false dying declaration. No material was brought on record to justify such a conclusion. The evidence of the Nayab Tehsildar who recorded Exh. D4 was examined as PW. 8. His statement was clear to the effect that nobody else was present when he was recording the statement. That being so, in view of the apparent discrepancies in the two dying declarations it would be unsafe to convict the appellant. *Heeralal vs. State of Madhya Pradesh*, 2009 CrLJ 2787 : 2009 (12) SCC 671 : 2009 (4) JT 115 : 2009 (3) Scale 715 : 2009 (4) SCR 283.

Dying declaration recorded by Magistrate—Reliability.—Deceased did not state in his dying declaration before the Judicial Magistrate that accused Nos. 1 to 4 were his assailants in the occurrence. Ex. P-12 is the dying declaration of deceased recorded by. Judicial Magistrate Kalavathi (PW-11). According to dying declaration of deceased from the hospital at 10.00 p.m. on 26.08.1989 she went and saw deceased in the Trauma Ward and she put some questions to him and was satisfied that the injured was in a fit condition and she recorded Ex. P-12 statement given by deceased in the presence of PW-12 and she obtained the left hand thumb impression of him in it. PW-12 has also given a certificate in Exh. P-12 that the patient was fully conscious and was able to speak throughout the recording of the statement. From the above, it is clear that the Judicial Magistrate after observing formalities had recorded the dying declaration of deceased in the presence of duty doctor. In that Exh. P-12 dying declaration. Deceased had stated as follows :

> "Today night four persons chased and stabbed me near the fly-over. *Their names* are *not known*. One month before, they exhibited posters that we would all be killed. *It is not known who are they.*"

Deceased in the above statement has stated that four persons attacked him and he did not know their names. According to the prosecution case, deceased knew all the accused very well since he had an encounter with all of them a few days before the occurrence as is evident from the testimony of PW-10. In such circumstance, if really accused Nos. 1 to 4 had attacked deceased, definitely he would have told the names or identification of the assailants. The prosecution relied on Exh. P-21 statement given by deceased to PW-22 Head Constable in the Coimbatore Medical College Hospital as his dying declaration. According to PW-22 Head Constable, he received intimation about the admission of deceased in Government Hospital at 8.15 p.m. and he went to Trauma Ward in the Hospital and enquiry deceased at 9.30 p.m. and recorded Exh. P-21 statement given by him and Dr. Jayaprakash (PW-25) had given a certificate in it. PW-25 was not the doctor on duty in Trauma Ward at the time of recording Ex. P-21 statement and he himself in the cross examination has stated that usually the doctor incharge of the ward alone would certify in the dying declaration. Exh. P-21 statement of deceased runs to two full pages and the names of the accused and the overt acts on their part were mentioned in detail and the signature of deceased is also found in it. Exh. P-21 was recorded at 9.30 p.m. by the Head Constable and Exh. P-12 was recorded at 10.15 p.m. by the Judicial Magistrate. There is vast difference in both the statements with regard to the contents and it is pertinent to note that Exh. P-22 first information report based on Exh. P-21 complaint was received in the Court at 6.40 a.m. on 27.08.1989 and Exh. P-21 statement as such had reached the Court only on 28.08.1989. The actual complaint was not sent along with the first information report and it leads to a serious suspicion as noted by the High Court. In the circumstances, the dying declaration recorded by Judicial Magistrate (PW-11) deserves acceptance and in it deceased did not implicate accused Nos. 1 to 4 as his assailants.

The High Court highlighted the above said aspects to direct acquittal. We find that the analysis made by the High Court to direct acquittal cannot be faulted. The appeal is without merit and dismissed accordingly. *State of Tamil Nadu vs. Subair*, AIR 2009 SC 1189 : 2009 CrLJ 1777 : 2008 (16) Scale 284 : 2009 (1) JT 27 : 2008 (17) SCR 1046.

Death of wife alleged to have been burnt by accused husband. Listed eye-witness were not examined—Prosecution case based solely on dying declaration recorded by Executive Magistrate—Dying declaration not recorded by Judicial Magistrate though available in same station—Procedure of Rule 31 not followed—No proof that deceased was in fit condition to make statement—At the time of recording brother and mother of deceased were present—Statement of mother not reliable. Conviction cannot be based on such dying declaration. *Cingiah* v. *State of Andhra Pradesh*, (1994) 1 ALT (Cri) 626 : 1994 Cr LJ 1242 (AP) (DB).

Where Murder at Railway Station and doctor recording the dying declaration—Delayed recording of the eye-witness's statements—Delay was sufficiently explained. Hence accused ought not to be acquitted. *Vinay Kumar* v. *State of M.P.*, (1994) 1 CCR 3 (SC) : 1994 Cr LJ 942 : (1994) 1 ALT (Cr) 719 : AIR 1994 SC 830 : 1994 Supp (1) SCC 359 : 1993 (4) Scale 567 : 1993 (3) Crimes 1055 : 1994 SCC (Cr) 719.

Dying declaration was recorded by Magistrate but he did not puting specific question whether victim was conscious and mentally fit. However doctor certified mental condition of victim. Doctor was not examined by prosecution—Serious injuries were inflicted on the victim still sufficient evidence to show that Magistrate was satisfied with mental condition of victim while recording dying declaration. Hence it was held that dying declaration was validly recorded and conviction upheld. *M. Bhadraiah* v. *State of A.P.*, (1994) 1 APLJ 6 (SN) : (1994) 1 ALT (Cr) 1.

Conviction based on two dying declarations—The versions recorded in two statements given by deceased at variance. Absence of any other independent evidence—Not be safe to base the conviction of appellants on the basis of such dying declaration. *Sakharam Chimaji Sarane* v. *State of Maharashtra*, (1994) 2 Crimes 527 (Bom).

Where prosecution evidence found reliable. Hence conviction based on dying declaration needs no interference. *Parmanand* v. *State of Rajasthan*, 1995 CrLR 414 (Raj).

In a case the deceased wife made the statement that the accused had poured kerosene and set her on fire. Since none of his relations were present there, the statement was found reliable and trustworthy and conviction was held proper. *Kanak Singh Rai Singh Rav* v. *State of Gujarat*, 2003 Cr LJ 855 (SC) : AIR 2003 (SC) 691 : 2003(1) SCC 78 : 2003(1) Crimes 168 (SC) : 2002(8) Supreme 419.

In a case the dying declaration was found to be beyond the scope of reliability as deceased had made simply oral statement before her father and others. The conviction based on such statement was set aside. *Teklal Mahto* v. *State*, 2004 Cr LJ 84 (Jhar) : AIR 2003 Jhar HCR 1351 : 2003(3) East Cri C 143.

Where the dying declaration showed that it were accused who had inflicted injuries on accused which resulted in his death. It was held that the conviction was proper. *Ram Muni Yadav* v. *State*, 2003 Cr LJ 4131 (All) : 2003(2) A Cri R 1577 (All).

In a Supreme Court case, the evidence of Magistrate was unequivocal that the deceased was conscious and was able to answer the questions. The certificate of the doctor who was with him was also obtained on the dying declaration. If some person other than the accused attacked and burnt him there was no reason why the deceased would have thought of implicating the accused while leaving out the real culprits. *Sree*

Vijaya Kumar v. *State of Inspector of Police, Kanya Kumari*, 2005 Cr LJ 3085 : 2005 SCC (Cri) 1896 : 2005 (10) SCC 737 : 2005(3) Crimes 55 (SC) : 2005(4) Supreme 662 : 2005(5) JT 481.

In a case there was serious inconsistency between the contents of the dying declaration and ocular evidence as well as documentary medical evidence. It was held as the circumstances raised serious doubts as to the implicit credibility of the dying declaration and, therefore, the dying declaration could not be believed. *Shekh Mehboob* v. *State of Maharashtra*, 2005 Cr LJ 2136 : AIR 2005 SC 1805 : (2005) 10 SCC 387 : 2005(1) Crimes 386 (SC) : 2005(2) Supreme 458.

Ample evidence on record that deceased was in sense and speaking and disclosed the incident—The dying declaration was true and reliable—The axe was recovered from *kotha* of the accused at his instance and is in exclusive possession and found '*A*' blood group—Conviction upheld. *Prakash Ram* v. *State of Rajasthan*, (1995) 2 RCD 397 (Raj).

Where deceased suffered extensive damage to his liver which may cause instantaneous death—Dying declaration was rightly discarded. *State of M.P.* v. *Sunder Singh*, 1994 Cr LR (MP).

Deceased murdered by pouring kerosene and putting fire—Oral dying declaration followed by dying declaration recorded by S.H.O.—Dying declaration and *Parcha Bayan* bearing the signature of the deceased. Dying declaration admissible in evidence. *Parmanand* v. *State of Rajasthan*, 1995 Cr LR (Raj) 414.

Death was caused by burning dying declaration that a day prior to incident appellant attempted to rape her—On failure to commit rape he set her on fire—No witness deposed about attempted rape—Conduct of deceased that after being set on fire in courtyard she would rush inside room did not inspiring confidence and unnatural—Dying declaration recorded by A.S.I, not endorsed by doctor who was present there. All create suspicion—No further evidence to establish prosecution case. Hence conviction of appellant was held not sustainable. *Jagga Singh* v. *State of Punjab*, (1994) 3 Crimes 567 (SC) : 1995 AIR (SC) 135 : 1994 Supp (3) SCC 463 : 1994 (6) JT 99 : 1994 (4) Scale 188 : 1994 (2) UJ 620 : 1994 (4) CCR 729 (2) : 1994 SCC (Cr) 1798.

The oral dying declaration alleged to have been made by deceased to several witnesses was discarded as unreliable. There was no other evidence available to link the appellant with offence. The possibility of committing suicide could not be ruled out. Hence order of conviction was held liable to set aside. *Sanjeev* v. *State of Maharashtra*, (1994) 2 Crimes 48 : 1994 B Cr C 247 (Bom).

Where it is not a rule of law that dying declaration cannot be acted upon without corroboration. If the court is satisfied that it was in time and voluntary it can base conviction on it without corroboration. *Vithal Sadashiv Gaikwad* v. *State of Maharashtra*, (1994) 1 Bom CR 702 : 1994 Cr LJ 2035 (Bom).

Two dying declarations were recorded by Magistrate and Doctor—Dying declaration corroborated by recovery of blood-stained knife with *B* group of blood and watch at the instance of accused—Versions in both the dying declaration same. Conviction upheld. *Mustaq Ali* v. *State of Rajasthan*, (1995) 2 RCD 411 (Raj).

Where dying declaration—Not corroborated, can be basis for conviction sustained. *(Smt.) Chandrabai Balu Kapase* v. *State of Maharashtra*, (1995) 1 Bom CR 503 : (1995) 1 Mah LR 792 : (1995) 2 B Cr C 156 (Bom).

Where record of case history of patient can be treated as dying declaration. *(Smt.) Chandrabai Balu Kapase* v. *State of Maharashtra*, (1995) 1 Bom CR 503 (Bom) : (1995) 1 Mah LR 792 : (1995) 2 B Cr C 156 (Bom).

Where dying declaration was unreliable. There was no evidence of source from which poison was procured. The prosecution case was unacceptable. Hence conviction and sentence is set aside. Accused acquitted. *(Smt.) Kampuri* v. *State of Rajasthan*, (1994) 2 WLC (Raj) 570.

Where prosecution case corroborated by medical report and dying declaration. Conviction order was justified and conviction was upheld. *Sumer Chand* v. *State of U.P.*, 1994 JIC 931 (All).

Death of deceased husband alleged to have been caused by wife accused by burning. Both deceased and accused married 10 years prior. Their only son died few weeks before. Extensive burn injuries and no-eye-witness—Deceased being under influence of liquor at the time of incidence—Oral dying declaration corroborated by statements of two witnesses—Medical evidence showing deceased not in fit condition to make oral dying declaration—No motive established—Circumstantial evidence not connecting accused with crime. It was *held*, that conviction was not sustainable. *Darshana Devi* v. *State of Punjab*, (1995) 4 Crimes 225 : (1995) 3 CC Cases 122 (SC) : 1995 Supp(4) SCC 126 : 1995(7) JT 269 : 1995(5) Scale 695 : 1996 SCC (Cr) 38.

Where the dying declaration recorded by Magistrate not even remotedly implicated the accused in the incident and the evidence of eye-witness had not disclosed specific ill treatment or torturing given by accused to deceased on account of non-fulfilment of demand of dowry, the accused was acquitted. *State* v. *(Smt.) Satya-bhama Pandurang*, 2003 Cr LJ 1996 (Bom).

Evidence on record showed ill-treating and beating his wife by accused from preceeding two years. Evidence also showed that the relations between accused and his wife was not cordial. Testimony of child of deceased and two brothers of deceased was reliable. Three dying declarations were wholly trustworthy. The doctor clearly recorded in the Accident Register and also stated that the patient was conscious. The conviction of accused was held proper. *State of Karnataka* v. *Shariff*, 2003 Cr LJ 1254 (SC) : AIR 2003 (SC) 1074 : 2003(2) Supreme 16 : 2003(2) Crimes 144 (SC) : 2003(2) SCC 473.

The accused was convicted on the basis of dying declaration as no eye-witness to incident was available. Doctor had certified that the victim was in a position to speak and sensing and seeing his condition the dying declaration was recorded which was signed by brother of deceased in the presence of nurse and ward boy whose presence in hospital was natural. The conviction was held proper. *Abdul Kasem* v. *State*, 2003 Cr LJ 3667 (Gau).

In a Madras case there were five dying declaration made before separate persons including the Magistrate. According to all the dying declarations, the accused had fumed Kerosene oil and set the deceased on fire. The doctor opined that she was conscious through out. It was held that the conviction of the accused was proper. *Jairaj* v. *State*, 2003 Cr LJ 1479 (Mad) : 2002(2) Mad LW (cri) 943.

Where the deceased was in fit mental condition when dying declaration on which she had impleated the accused, conviction was held proper. *Simabhai Ramji Bhai*

Chauhan v. *State*, 2003 Cr LJ 4728 (Guj) : 2003(3) Crimes 109 : 2003(2) DMC 340 : 2003(2) GCD Guj 1109.

Where eye-witness has turned hostile and does not support the prosecution case. The other eye-witnesses who is said to have taken the deceased to the hospital turned hostile by stating that the injured was not talking and that he did not enquire his name and thus he also has not supported the prosecution case and though the police witness has claimed to have recorded dying declaration of the deceased in hospital, the doctor has stated in evidence that the deceased was not in a condition to give statement and there is no explanation as to why the statement of the deceased had not been recorded in presence of the doctor and as to why no certificate was obtained from the doctor as to the fitness of the deceased to give statement and even the witness who brought the deceased to the hospital has not supported the dying declaration by stating that no dying declaration was recorded in his presence, it has been held that since the whole prosecution is based on the dying declaration which is not trustworthy, the conviction of the accused cannot be sustained because the prosecution has utterly failed to establish that the deceased had given dying declaration. *Thanu* v. *State*, (2004) 1 Crimes 71 (Chh).

The accused mother-in-law was alleged to have thrown a lighted kerosene lamp against her deceased daughter-in-law due to which she received burn injuries. Dying declaration was recorded by magistrate on same day but certificate about fitness of deceased was obtained Post factum. It was held that it cannot be said that there was medical opinion about fit mental condition when declaration was made. The conviction of accused solely made on the basis of such dying declaration was not proper. *Sarojini Amma* v. *State*, 2003 Cr LJ 3323 (Ker) : 2003(4) All cri LR 312 : 2003(2) Ker LJ 792.

Case was based on two dying declarations—The quarrel about of dowry mentioned in dying declaration. No burn injuries on scalp. The statement of deceased was not in question and answer form. The fact of beating was contradicting in two dying declarations. Hence conviction could not be based on them. *Abdul Rehman* v. *State of Rajasthan*, 1995 Cr LR 663 (Raj).

Dying declaration recorded by head constable it was not established whether deceased was capable of making declaration, since he received 24 grievous injuries—The conviction was not justified. *Bashir Shah* v. *State of Rajasthan*, (1994) 2 Crimes 850 (Raj) : 1994 Cr LJ 2526.

The evidence of eye-witnesses was corroborated from medical evidence—The finger prints of accused were found on the glasses and blood-stained clothes and knife recovered at the instance of accused. Dying declaration made before P.W. 6—Case proved beyond reasonable doubt. Conviction upheld. *Jakir Hussin* v. *State of Rajasthan*, (1995) 2 RCD 403 (Raj).

The dying declaration recorded by the Executive Magistrate not in question-answer form and not accompanied by the doctor's certificate of fitness was held reliable. *Kamal Kumar* v. *State*, (1995) 1 Crimes 735 : 1995 JCC 280 : 1995 Cr LJ 2240 : (1995) 59 DLT 65 : (1995) 3 CCR 498 (Del) (D.B.).

When dying declaration is not necessarily be made before the Magistrate. *Charipalli Shankararao* v. *Public Prosecutor, High Court A. P. Hyderabad*, (1995) 1 Crimes 393 (SC) : 1995 JIC 684 : 1995 (32) ACC 430 : 1995 Cr R 253 (SC).

Where the witness stayed for the whole night at accused place and did not report after the accused confessed the guilt. This makes the story of extra-judicial confession doubtful. *Nathu Ram* v. *State of Rajasthan*, 1995 Cr LR 680 (Raj).

Where there were minor contradiction in F.I.R. and dying declaration. But even if there was some difference in time of exact firing by informant, it cannot be said that there exist any contradictions in these two pieces of evidence. *Bhondu* v. *State of U.P.*, 1995 (32) ACC 172 (All).

Where death of wife was caused by burning. The accused was husband though he married 15 years ago—His relations with wife remained strained. Conviction awarded on the basis of dying declaration recorded by Judicial Magistrate. Doctor's testimony that victim was in fit state to make dying declaration. Dying declaration though not in question-answer form and not corroborated still held wholly reliable and conviction justified. *Subhash* v. *State of Haryana*, (1994) 3 Crimes 66 (P & H) (DB).

Where there was delay in lodging F.I.R., there was no previous enmity and neither notice nor intention was proved dying declaration of the offence *held*, not reliable. *Liddu* v. *State of Haryana*, (1994) 1 CC Cases 599 : (1994) 1 CC Cases 364 : (1994) 1 Recent Cr R (P & H).

Where there is no infirmity in recording dying declaration. It was absolutely free and voluntary statement when the patient was capable of giving out the same. *Sumer Chand* v. *State of U.P*, 1995 (32) ACC 84 (All).

The accused closed the door of room, set ablaze his wife and then ran away from the place. From the conduct of the accused adverse inference could be drawn specially when deceased in her dying declaration had named the accused for committing this inhuman act. The order of conviction was confirmed. *Sri Kumar* v. *State*, 2003 Cr LJ.

Dying declaration was recorded by police officer but there was no evidence to the effect that condition of victim was so precarious that the magistrate could not be summoned whereas victim remained alive for three days after burning incidence. The prosecution witnesses had admitted in their cross-examination that the victim was not in a position to speak as at the time she was taken to the hospital she was unconscious. It was held that under the said circumstances alleged dying declaration could not be the sole basis for the conviction. *Dinesh Gopal Bhure* v. *State*, 2003 Cr LJ 3083 (Bom) : 2003(4) Crimes 502 : 2003 All MR (cri) 637.

The accused was lying dead on culvert of village on morning whereas he was given a threat on eve of this incident. Dying declaration made not his niece was found unreliable and delay in filing the FIR was to convincingly explained. It was held that the possibility could not, therefore, be ruled out that accused was roped in falsely on account of mere suspicion. The conviction of accused was set aside. *Chandra Mohan Singh* v. *State of Uttaranchal*, 2003 Cr LJ 3988 (Uttaranchal) : 2003(12) All Ind Cas 190 : 2003(47) All Cri C 740.

Where the wife was burnt by pouring Kerosene on the person of deceased and her dying declaration was recorded and was well within the prescribed norms, the conviction based on such declaration was held proper. *Puran Babu Chavan* v. *State*. 2003 Cr LJ 4684 (Bom) : 2003 All MR (CRI) 649.

In a Supreme Court case, the witness merely stated that he knew deceased and used to talk to him and further that at 1.30 pm on 3.9.2004, the deceased contacted him over phone and told him that his petition presented to HR & CE Department was numbered if any danger came to him, the accused alone will be responsible for the same. It was held that since the telephonic conversation which the deceased had with the witness, did not relate to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, the same did not come within the purview of Section 32(1) of the Evidence Act. *Jayendra Saraswathi Swamigal* v. *State of T.N.*, 2005 Cr LJ 883 : AIR 2005 SC 716 : 2005 SCC (Cri) 481 : 2005(1) Crimes 113 (SC) : 2005(1) Supreme 82 : 2005(2) SCC 13.

Accused was alleged to have caused the death of deceased wife by inflicting knife blow on stomach of deceased. The dying declaration as recorded by executive magistrate was not certified by doctor that the patient was in a conscious condition. As such it was found not reliable but blow given on vital part of body with a deadly weapon showed that accused intended to cause the death. As such he was held guilty under Section 304 instead of under Section 302. *Rajendra Singh Bahadursingh Zala* v. *State*, 2003 Cr LJ 3222 (Guj) : 2003(4) Crimes 398.

Where the prosecution case is supported by dying declaration recorded by police, surrounding circumstance and other evidence on record medical evidence also. The defence evidence was contradictory and not satisfactory. Hence conviction justified. *Fulo Devi* v. *State of Bihar*, (1995) 2 East Cr C 531 (Pat).

Where the dying declaration was recorded in the form of nods and gestures by Magistrate after deceased was declared conscious and fit by doctor-full reliance could have been placed on the statement of deceased as recorded by P.W. 11 to find the accused guilty under Section 302, I.P.C. Hence conviction confirmed. *Meesala Ram Krishan* v. *State of Andhra* Pradesh, (1994) 2 Crimes 114 (SC) : (1994) 54 DLT 336 : (1994) 4 SCC 182 : (1994) 2 East Cr C 251.

Injury caused by the knife and the accused seen running after the injury caused—Corroboration by dying declaration—Knife used was recovered—Conviction was held justified. *Baluakas Pradip Moreshwar* v. *State of Maharashtra*, (1994) 1 Crimes 534 (Bom).

No independent witness available despite occurrence in market- place at 4.30 in the evening-Witnesses including the doctor recording the dying declaration were inimical towards accused—Discrepancies in oral evidence and dying declaration—Trial Court rightly discarded both the dying declaration and the oral evidence. *State* v. *Pulandar*, (1995) 2 Crimes 346 (MP).

The dying declaration was recorded in language not different from one spoken by deceased and inspiring confidence as being true version of statement given by deceased. The statement of child witness P.W. 6 was rightly believed by trial judge as free from an exaggeration. Hence conviction and sentence confirmed. *Hans Raj* v. *State of Rajasthan*, (1995) 1 WLC (Raj) 307.

The dying declaration does not make liable the accused *'P* for causing fracture on frontal bone. Author of particular injury not proved. Hence conviction under Section 302, I.P.C. is not sustainable and altered to Section 325/149, I.P.C. *Pooran Son of Bansi* v. *State of Rajasthan*, (1995) 2 RCD 317 (Raj).

Where the dying declaration was not recorded by any Magistrate or Doctor, the Judge rightly discarded such dying declaration for valid reasons. *Rama* v. *State of U.P.*, 1995 (32) ACC 113 (All).

Witnesses stated that when deceased obstructed the removing of the articles the appellant poured kerosene on her and lit fire. Their evidence is truthful and there is no reason to disbelieve it. Hence the High Court was justified in accepting dying declaration and oral evidence as truthful and reliable. Hence there is no ground to interfere. *Charipalli Shankarao* v. *Public Prosecutor, High Court of A.P., Hyderabad*, (1995) 1 Andh LT (Cr) 421 (SC) : (1995) 1 Crimes 393 : 1995 JIC 684 : 1995 (32) ACC 430 : 1995 Cr R 253 (SC) : 1995 AIR (SC) 777 : 1995 Supp (4) SCC 24 : 1995 (10 JT 364 : 1995 (1) Scale 192 : 1995 (1) CCR 66 (SC) : 1995 (1) UJ 354 : 1996 SCC (Cr) 21.

The victim blamed mother-in-law for pouring kerosene oil and lighting the fire. This was recorded in case history. This uncorroborated dying declaration can form basis for conviction. *Smt. Chandrabal Balu Kapase* v. *State of Maharashtra*, (1995) 1 Bom CR 503 (Bom).

Where there was acceptance of dying declaration. Guidelines for causing death of wife and child by pouring kerosene oil and setting fire. For the act husband made accused in dying declaration before Magistrate and statement to police. Guidelines satisfied by facts and inference drawn by lower Courts. *Uttam Bhagwant Sangle* v. *State of Maharashtra*, (1995) 1 Bom CR 631 : (1995) 1 B Cr C 99 (Bom).

Where conviction based on dying declaration justified. Therefore conviction was justified. *Shyam Kumar Singh* v. *State of U.P.*, 1994 JIC 128 (All) (DB).

Where the cause of death was shock and syncope due to severe peritonitis and anemia as per doctor. Dying'declaration in form of F.I. R. was proved by witnesses. Conviction is liable to be converted under Section 304, Part II, I.P.C. Jail term also reduced to period already undergone. *Prem Singh* v. *State of M.P.*, (1994) 2 Crimes 494 (MP).

Injuries on accused not explained—Accused might have exercised right of private defence though such plea not raised. There being doubt that High Court can give its benefit to accused. Since there being great diversion in versions in F.I.R., dying declaration and other witnesses—These versions not supported by medical evidence. Acquittal by High Court requires no interference. *Chakhan Lal* v. *Prem Chand*, 1994 SCC (Cri) 1142.

Where accused given knife blows on deceased persons' different parts of body eye-witnesses found reliable and trustworthy—Ocular evidence supported by medical evidence—Oral dying declaration implicating accused—At instance of accused knife recovered—Accused person's clothes found soaked with deceased person's blood—Conviction and sentence of accused upheld as he is alone responsible of committing murder conviction is maintained. *Unus Khan Sardar Khan Pathan* v. *State of Maharashtra*, (1995) 2 Mah LR 18 (Bom).

Where doctor not produced to prove if death was caused due to burn injuries. No witness of incident or any neighbour examined—Dying declaration was also implicating appellant. Dying declaration not inspiring nor true or voluntary. Except it there was no other evidence. Hence there found no evidence to connect appellant with crime. Appeal was allowed and conviction was set aside. *Bhoor ji* v. *State*, (1995) 1 RCD 154 (Raj).

The object of punishment has been succinctly stated in Halsbury's Laws of England (4th Edition; Vol. II; Para 482) thus :—

> "The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided".

In *Dinesh vs. State of Rajasthan*, 2006 AIR SCW 1123 = 2006 (3) SCC 771, it is held:

> "An undeserved indulgence or liberal attitude in not awarding adequate sentence in such cases would amount to allowing or even to encouraging 'potential criminals'. The society can no longer endure under such serious threats. Courts must hear the loud cry for justice by society in cases of heinous crime of rape and impose adequate sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court".

In this case, the learned Additional Sessions Judge forgot the necessity of awarding due sentence. He had shown undue leniency in awarding a sentence lesser than the minimum sentence, that too, after finding that the appellant deserved no leniency and liable to be punished deterrently. He had assigned no reason to award a lesser sentence. The sentence awarded for offence under Section 302, IPC is illegal. But in view of our finding in appeal that the conviction under Section 302 is to be altered to one Section 304 Part II and we having been found that a sentence of rigorous imprisonment for ten years with fine would meet the ends of justice, no separate order is warranted in this Revision Case. Accordingly, the Revision Case is disposed of. We hope that the learned Additional Sessions Judge would take lessons. *Mohanan vs. State of Kerala*, 2010 (3) Cri LJ 2920 (Ker).

When it was recorded before doctor and Magistrate in fit state of mind with unimpeachable evidence it can not be said it was influenced just because a distant relation accompanied deceased to hospital. *Navakoti* Veera *Raghavulu* v. *State of A.P.*, 1997 (1) Crimes 86 (SC).

When oral dying declaration is not convincing, it can not be relied upon without corroboration. *Ram Pyari* v. *State*, 1997 (1) Crimes 46 (All).

When no oral dying declaration was mentioned in statement recorded under Section 161, Cr PC but introduced for first in evidence after six years of incident, it can not be accepted and relied upon. *R. Ramesh* v. *State of A.P.*, 1997 (1) Crimes 174 (AP).

Dying declaration need not be corroborated for basing conviction on it. *State of M.P.* v. *Balkishan*, 1997 (1) Crimes 29 (MP).

113. Capital Punishment-Rarest of Rare cases.—The Court has to *see* whether there is something uncommon about the crime which renders the sentence of imprisonment of life inadequate and calls for greater punishment, *i.e.*, death sentence. *Chandran* v. *State of Kerala*, (1994) 2 KLJ 215 (Ker).

In a latest case reported in *Ramjirat* v. *State of Bihar*, 1999 (8) SCC 389; 2000 Cri LJ 19, their Lordships of the Supreme Court have given the guidelines under which the death sentence has to be ordered. Their Lordships held that in order to award death sentence the court should ask itself and answer the following questions. (1) Was there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence (2) Where the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender. *Refering Officer* v. *Tingili Ashappa* 2000 Cri LJ 2569 (AP) : 2000 (1) An LT Cr. 489 (AP).

In *Dhananjoy Chatterjee* alias *Dhana* v. *State of West Bengal*, (1994) 2 S.C.C 220 while confirming the sentence of death the Court opined:

> "In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime, the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befiling the crime so that the courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

The accused in furtherance of their diabolic motive conspired to teach a lesson to the complainant by killing such of those members of the family who were vulnerable and helpless. This was clear from the timing of the attach which was when other able members of the family were away from the house and only the aged and the weak remained alone in the house. Also the fact that they solicited the help of four of their friends (other accused) showed that the intention was to kill as many members of the complainant family as possible, irrespective of the fact whether the victims where the cause of their vengeance or not. The ghastly manner of attack on the deceased, showed that the act in question was premeditated , senseless dastardly and beyond all human reasoning inasmuch as 53 wounds were inflicted on the 5 deceased persons each one suffering at least 10 wounds on an average. The attacks were aimed at such parts of the body in succession where even a single stab would have, in the ordinary course, sufficed to cause death. The denuding of the lower part of the body off showed an element of perversity which could be attributed to the mind of frustrated men who totally lacked human sensitivity. A holistic examination of the material on record showed that the barbaric offence in question could only be termed as a rarest of the rare case. *State of U.P.* v. *Dharmendra Singh*, 2000 Cri LJ 5 (SC) : 1999 AIR (SC) 3789 : 1999 (8) SCC 325 : 1999 (7) JT 207 : 1999 (6) Scale 113 : 1999 (8) Supreme 183 : 1999 (8) SLT 3 : 2000 (1) SCJ 55 : 1999 (9) SRJ 486 : 1999 (4) CCR 25 (SC) : 1999 (2) JCC (SC) 567 : 1999 SCC (Cr) 1425 : 1999 (4) Recent CR 250.

It is possible in a given set of facts that the court might think even in a case where death sentence can be awarded, the same need not be awarded because of the peculiar facts of that case like the possibility of one or more of the accused being responsible for offence less culpable than the other accused, in such circumstances, in the absence of their being no material available, to bifurcate the case of each accused person the court might think it prudent not to award the extreme penalty of death. But then such a decision would rest on the availability of evidence in a particular case. A straight jacket formula for awarding death sentence can be evolved which is applicable to all cases. The facts of each case will have their own implication on the question of awarding sentence. *State of U. P.* v. *Dharmendra Singh*, 2000 Cri LJ (SC) : 1999 AIR (SC) 3789 : 1999 (8) SCC 325 : 1999 (7) JT 207 : 1999 (6) Scale 113 : 1999 (8) Supreme 183 : 1999 (8) SLT 3 : 2000 (1) SCJ 55 : 1999 (9) SRJ 486 : 1999 (4) CCR 25 (SC) : 1999 (2) JCC (SC) 567 : 1999 SCC (Cr) 1425 : 1999 (4) Recent CR 250.

In *Ronny* alias *Ronald James Alwairs* v. *State of Maharashtra*, 1998 Cri LJ 1638 : AIR 1998 SC 1251 : 1998(3) SCC 625 : 1998(2) JT 375 : 1998(2) Scale 261 : 1998(3) Supreme 378 the Supreme Court on facts found extenuating factors to curb the sentence which is clear from the following extract from the judgement.

"From the facts and circumstances, it is not possible to predict as to who among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and *vice versa*. Where in a case like this it is not possible to say as to whose case falls within the rarest of the rare cases, it would serve the ends of justice if the capital punishment is commuted into life imprisonment.

In *Ronny's* case the Apex Court while discussing the role of the Court in imposing the extreme penalty in para 40 of the said case, has observed thus: "The obligation of the Court in making the choice of death sentence for the person who found guilty of murder is onerous indeed. But by sentencing a person to death, the Court is giving effect to the command of law which is in public interest whereas in committing the murder or being privy to commit murder, even if it be a vengeance for another murder, the convict is violating the law which is against public interest."

In *Dharmender Singh's case (Supra)* it was contended that after the High Court refused to confirm the death sentence, the accused entertained a just expectation of survival which was a mitigating factor. The Court repelled the contention and held that "We do not find legal basis for this argument. In a judicial system like ours where there is hierarchy of Courts possibility of reversal of judgements is inevitable, therefore, expectations of an accused cannot be a mitigating factor to interfere in an appeal for enhancement of sentence if the same is otherwise called for in law.

Where the accused was labouring under impression that his three daughters were not from him caused death of his wife and children under extreme mental or emotional disturbance, the case cannot be classified in the category of "rarest of rare". *State of Maharashtra v. Raju Dadaba Dorge*, 2001 Cri LJ 3638 (Bom) : 2001 (1) CCR 115 (126) : 2001 (5) Bom CR 98 : 2001 (1) B Cri C 93 (Bom) (DB).

Where both accused-appellant and deceased last seen together. Same group of blood found on stone as weapon of offence, clothes of deceased and clothes of appellant. Hence conviction is justified. However as act of appellant killing deceased with already stone being not so cruel, unusual or diabolic, death sentence altered to life imprisonment. *Ashok Kumar* v. *State (Delhi Administration)*, (1995) 4 Crimes 50 : 1995 SCC (Cr) 1085 (SC) : 1996 Cr. LJ 421 : 1996 AIR (SC) 265 : 1995 Supp (3) SCC 626 : 1995 (6) JT 660 : 1995 (5) Scale 443 : 1995 (4) CCR 52 (SC).

Where accused killed his children in prime of their youth and wrapped their bodies in plastic mattress and covered with earth in locked room and accused also admitted guilt, death penalty was held justified. *Janki Dass* v. *State*, 1995 Cr LJ 2175 (Del).

Where alleged murder interrogated after lapse of three years—Contradictions regarding age of deceased *as per* post-mortem report—Reasons for award of death-sentence devoid of merit and judicial approach. Hence execution of death sentence suspended and bail granted. *(Smt.) Usha* v. *State of U.P.* 1994 ACC 101 : 1994 UP Cr R 249.

Taking all facts and circumstances into consideration the extreme penalty of sentence of death should be substituted by sentence of life imprisonment which shall meet the ends of justice. *Janki Dass* v. *State (Delhi Administration)*, (1995) 2 CCR 35 (SC) : 1995 Cr LJ 1464 (SC) : 1995 AIR (SC) 1002 : 1992 Supp (3) SCC 143 : 1994 (5) JT 604 : 1994 (3) Scale 905 : 1994 (2) UJ 535 : 1994 (3) Crimes 375 : 1994 SCC (Cr) 1673 : 1995 (1) CCR 51 (SC).

It is true that the act of the appellant is barbaric and gruesome. Three helpless persons are done to death while asleep in a room which they thought to be safe after bolting the door from inside. The door is locked from outside to ensure that no one escapes. However, Court also finds that the appellant is not a professional or a hardcore killer. The prosecution has not been able to bring on record the exact manner in which the incident has occurred, the genesis or the sequence of the events, but evidence establish only the circumstances which leave no scope for any other hypothesis than the guilt of the appellant. But how the act was committed is not established. In this set of circumstances, it would be stretching a bit too far to put this case in the category of rarest of rare cases. Court has no material to come to the conclusion that the appellant would be a risk and menace for the society in future and his elimination is the only remedy for the safety of society. Further the appellant has a disabled wife and eight children to look after. We are, therefore, of the view that the punishment of death is a bit too harsh.

Foregoing discussion would result into partly allowing the appeal preferred by the convict appellant by altering the sentence from death penalty to imprisonment for life while confirming his conviction for the offence of murder. He shall suffer imprisonment for life, that is, till he breathes his last breath. *State of Gujarat vs. Fatehsinh Ramlal Chauhan*, 2010 (2) CrLJ 2473 (Guj).

The incident occured at the spur of moment. He was engrossed in conversation with his wife and mother-in-law to pursuade them that his wife should accompany him to his house that very day. The accused's request was turned down and in the heat of passion and out of frustration picked of sharp edged weapon lying nearby killed has wife and mother-in-law by repeated blows. It was held not to be the rarest of rare cases. *Mani Ram v. State of Uttranchal*, 2001 Cr. LJ 3403 (Uttaranchal) : 2001 (3) Crimes 1 (6) : 2001 (43) ACC : 137 (Utt) (DB).

The evidence of witnesses with regard to allegation that the accused offence intoxicate sweets to inmates of house of deceased with a view to execute plan of murder without any hindrance was not trust worthy considering the mitigating circumstances, it was found that the accused was a young man of about 30 years and these was all probability of the accused being reformed and rehabilated. It was held that the case did not fall within the category of "rarest of rare cases". *State of Orissa* v. *Kiran Kumar Bedi*, 2006 Cut LJ 1381 (Orissa).

When murders of four close relatives including wife and infant child committed by accused under influence of extreme mental and emotional disturbances out of sheer frustration and without pre-planning, it is not rarest of rare cases. *Vinod Malhotra* v. *State of Rajasthan*, 1997 (1) Crimes 82 (Raj).

In a case the accused killed deceased and his son by setting house on fire. The deceased apprehending the assault concealed himself in the room in which her son was also sleeping to kill the father. In such a situation the court held that it was not a rarest of rare cases warranting extreme penalty of death. *State of M.P. v. Puthu*, 2001 Cri LJ 3217 (M.P.).

After keeping in mind the relevant considerations for awarding the extreme penalty of death and also on considering the fact that in the instant case, the sole eye-witness did not tell, according to P.W. 1, the names of four of the appellants. Although the murders had been committed in a premeditated and calculated manner with extreme cruelty and brutality, for which normally sentence of death will be wholly justified. In the special facts of the case, it will not be proper to award extreme sentence of death on the appellants. *Raja Ram Yadav* v. *State of Bihar*, 1996 Cr. LJ 2307 (SC).

Accused was found guilty of burning his own brother and sister by pouring kerosene oil upon their persons. There was no premeditation. In reply to show cause notice for enhancement of sentence he stated that he was suffering from accused mental conflict for a long time. Case did not fall category of rarest of rare cases. *Dina Bawari v. State of Assam* 2002 Cri LJ NOC 9 (Gau) : 2001(4) Cur Cri R 355 : 2001(3) Gau LR 101.

Evidence, is wholly reliable being clear cogent and convincing F.I.R. lodged within an hour of the incident. Evidence coupled with corroborative evidence. Conclusively proved that accused caused the death of the deceased. Medical report supporting the evidence of the witnesses. Evidence relating to motive need not be considered—No interference with the order of conviction but not a case fit for capital punishment. Hence appeal dismissed. *Malkiat Singh* v. *State of Punjab*, (1995) 3 Crimes 530 (P & H).

Where accused, committing robbery and triple murder. His guilt is established by all circumstances. Hence death sentence confirmed. Conviction sustained. *Amrutlal Someshwar Joshi* v. *State of Maharashtra*, (1995) 2 B Cr C 71 : (1995) 2 Bom CR 312 (Bom).

When accused aged 19 years stabbed three women resulting in their deaths and witnesses stated that accused was under some psychic disorder and had no previous enmity with deceased women, it is not case of rarest of rare cases and thus death sentence committed to one of life imprisonment. *Joseph* v. *State of Kerala*, 1996 Cri LJ 4094 (Ker).

Where accused, young persons of about 30 and 25 years of age respectively were found killing one helpless lady and her two children in most and manner for committing robbery of ornaments and cash which were kept in the house; accused being relative of victim; enjoyed her confidence and taking undue advantage of situation committed gruesome murder along with his associate and therefore it was considered a rarest of rare case. *S.K. Nair* v. *State of Punjab*, 1997 Cri LJ 772 (SC) : : AIR 1997 SC 1537 : 1997 (1) SCC 141 : 1996 (10) JT 338 : 1996 (13) Scale 237 : 1996 (8) Supreme 182 : 1996 (4) Crimes 186 (SC) : 1996 (8) AD (SC) 77.

Where accused killing his children and burying their dead bodies in his own house. Conviction was for murder and sentence to death. Accused being mentally disordered. Death sentence altered to life-imprisonment. *Janki* Das v. *State (Delhi Administration)*, (1995) 2 CCR 35 : 1995 Cr LJ 1464 (SC) : (1995) 2 CCR 35 (SC) : 1995 Cr LJ 1464 (SC) : 1995 AIR (SC) 1002 : 1992 Supp (3) SCC 143 : 1994 (5) JT 604 : 1994 (3) Scale 905 : 1994 (2) UJ 535 : 1994 (3) Crimes 375 : 1994 SCC (Cr) 1673 : 1995 (1) CCR 51 (SC).

Second petition against conviction and sentence with a view to prolong the matter is not maintainable. *Sukumar Barman* v. *State of West Bengal*, 1994 SCC (Cri) 36.

Where death sentence was to be awarded in rarest of the rare cases. *Malkiat Singh* v. *State of Punjab*, 1995 SCC (Cr) 982 (SC).

Where there were 10 murders in broad daylight. Assault was made by accused party led by A-11 on unarmed and innocent persons. In peculiar facts and circumstances of case and when the occurrence took place almost 10 years ago. High Court should not have enhanced the sentence of A-11 from life imprisonment to death. *Jashubha Bharatsinh Gohil* v. *State of Gujarat*, (1994) 2 Crimes 92 (SC) : (1994) 4 SCC 353 : 1994 (3) JT 250 : 1994 (2) Scale 534 : 1994 (3) CCR 710 (SC) : 1994 SCC (Cr) 1193.

Cold blooded and brutal murder of girl of 7 years after raping her in forest and there was no eye witness but only had circumstantial evidence only. Death was due to asphyxia by throttling her. Medical evidence showing forcible sexual assault just before death. Accused absconded and apprehanced after 14 months and one underwear of accused stained with blood found near dead-body in forest. Clothes of deceased completely found smeared with blood. There were serious bleeding injury in her private part. Circumstances established guilt of accused. Conviction of accused confirmed with sentence of death as offence fell in category of forest rape cases. *Laxman Naik* v. *State of Orissa*. 1994 (1) Crimes 806 (SC) : AIR 1995 SC 1387 : 1995 Cr. LJ 2692 : 1994 (3) SCC 381 : 1994 (2) JT 39 : 1994 (1) UJ 645 : 1994 (1)Scale 692 : 1994 SCC (Cr) 656 : 1994 (2) CCR 299 (SC) : 1994 JCC 376.

Where two boys hit by *lathi* with great pressure. Hence boys dying on the spot. This is not rarest of rare case. Capital punishment is set aside. Life imprisonment is awarded to accused person. *State of M.P.* v. *Shriram*, 1995 Cr LR (MP) 25.

No doubt the murder was committed in a most cruel manner but this alone is not the aggravating circumstance to award extreme penalty considering other aspects of the case, the motive, the number of accused who shared the common object of unlawful assembly, the role played by each of the accused and respective age of the accused, the case is rarest of rare and therefore death penalty was altered to one of life imprisonment. *Amar Pal v. State of U.P.* 2002 Cri LJ 290 (All.)

Where it was alleged that accused killed his real brother's two minor sons and aunt while they were asleep they were attempting to murder brother's wife and daughter but there was absence of provocation. Because this murder was committed in cool and calculated manner, therefore, it was held that present case is one of rarest of rare case and hence, death sentence was justified. *Surja* v. *State of Rajasthan*, 1997 Cri LJ 51 (SC) : AIR 1997 SC 18 : 1996 (6) SCC 271 : 1996 (8) JT 461 : 1996 (7) Scale 192 : 1996 (7) Supreme 248 : 1996 (3) SCJ 275 : 1996 (4) Crimes 45 : 1996 SCC (Cr) 1314 : 1996 (7) AD (SC) 97.

Section 302, makes it clear that along with the sentence of death or imprisonment for life, the Court is legally bound to impose a fine as well. It is the settled law that the quantum of fine should be commensurate with the capacity of the accused to pay the same. So, Court agreed that no excessive fine should be imposed under Section 302 IPC while sentencing a particular accused for life imprisonment or imposing a death penalty. However, some fine has to be imposed which is mandatory to be imposed in view of the clear wording of Section 302. So, imposition of Rs. 500/- as fine in the present case is in order as the amount is not excessive. *Hari Kishore* v. *State*, 1996 Cr LJ 2540 (Del).

A 16 year old girl, was preparing for her 10th class examination at her house and suddenly both the accused took advantage of her being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangulated her by using her undergarment and thereafter took her to the septic tank along with the cycle and caused injuries with a sharp edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. The Court held that it was a rarest of rare cases and awarded the capital punishment. *Molai* v. *State of MP* 2000 Cri LJ 392 (SC) : AIR 2000 SC 177 : 1999 (9) SCC 581 : 1999 (8) JT 361 : 1999 (6) Scale 606 : 1999 (8) Supreme 664 : 1999 (9) SLT 56 : 1999 (3) SCJ 686 : 1999 (10) SRJ 399 (2) : 1999 (4) CCR 225 (SC) : 1999 (4) Recent CR 844 : 2000 (1) JCC (SC) 30 : 2000 SCC (Cr) 438.

In absence of pre-plan to commit murder, death sentence reduced to one of life imprisonment with fine. *State* v. *Banwarilal*, 1996 Cr LJ 1078 (Raj).

Where the evidence disclosed that the act of deceased in tying his buffalo on the disputed land infuriated the accused and the incident accused all of a sudden. The case cannot be regarded as a rarest of rare case where the penalty of death would be justified. *Rajendra Rai* v. *State of Bihar* 1999 Cri LJ 1448 (SC) : AIR 1999 SC 996 : 1999 (2) SCC 423 : 1999 (1) JT 334 : 1999 (1) Scale 314 : 1999 (1) Supreme 362 ; 1999 (1) Crimes 57 (SC) : 1999 (1) CCR 65 (SC) : 1999 SCC (Cr) 239.

Murder of lady who was alone in the house with number of wounds inflicted on her, person being a ghastly murderer was held a rarest of rare cases calling for death sentence. However, the confession of the accused person under Section 164, Cr PC and Section 313, Cr PC which remained till the last stage of the trial was taken as a mitigating circumstances in favour of the accused and the sentence of imprisonment was awarded. *State of Mizoram* v. *Sri Lalrinawma* 2000 Cri LJ 2358 (Gau) : 2000 (2) Crimes 344 : 2000 (2) Gau LR 406 : 2000 (1) Gau LT 616 (Gau.) (DB).

When accused is not found to have made or likely to have made any pecuniary gain by committing alleged offence of burning by fire imposition of sentence of fine of Rs. 10,000/- besides sentence of death, was held not proper. *Chandrawati* v. *State*, 1996 Cr LJ 975 (Del).

When accused lost control over himself due to anger and committed murder in land dispute. It is not rarest of rare cases for award of death sentence. *S.G. Gowdegowda* v. *State*, 1996 Cr LJ 852 (Kant).

When accused mother-in-law subjected deceased to harassment and cruelty for demand of dowry and then setting her on fire. It is not rarest of rare case for death penalty. *Chandrawati* v. *State*, 1996 Cr LJ 975 (Del).

In gruesome murder of five persons when it is shown that accused was not a person of dangerous character and there was no premeditation, it does not fall under rarest of rare cases. *Rataniya Bhima Bhil* v. *State of Gujarat*, 1997 Cri LJ 891 (Guj).

In *Om Prakash* v. *State of Haryana*, 1999 Cri LJ 2044 (SC) : AIR 1999 SC 1332 : 1999 (3) SCC 19 : 1999 (1) JT 599 : 1999 (1) Scale 570 : 1999 (2) Supreme 227 : 1999 SCC (Cr) 334 : 1999 (2) KLT 21 (SN), the question was whether the case of the accused could be one of the 'rarest of the rare' case. The Apex Court after considering the background of the matter observed as under:—

> "Considering the aforesaid background of the matter, the question would be whether the case of the appellant could be one of the 'rarest of the rare' cases so that death sentence is required to be imposed. In our view, even though this is a gruesome act on the part of the appellant, yet it is a result of human mind going astray because of constant harassment of the family member of the appellant as narrated above. It could be termed as a case of retribution or act for taking revenge. No doubt, it would not be a justifiable act at all, but the accused was feeling morally justifiable on his part. Hence, it would be difficult to term it as the 'rarest of the rare' cases. Further, this is not a crime committed be- cause of lust for wealth or women, that is to say, murders are neither for money such as extortion, dacoity or robbery; nor even for lust and rape; it is not an act of anti-social element, kidnapping and trafficking in minor girls or of an anti social element dealing in dangerous drugs which affects the entire moral fibre of the society and kills number of persons nor is it crime committed for power or political ambitions or part of organised criminal activities. It is a crime committed by the accused who had a cause to feel aggrieved for injustice meted out to his family members at the hands of the family of the other party who according to him were strong enough physically as well as economically and having influence with the authority which was required to protect him and his family. The bitterness increased to a boiling point and because of the agony suffered by him and his family members at the hands of the other party and for not getting protection from the police officers concerned or total inaction despite repeated written prayers goaded or compelled the accused to take law in his own hand which culminated in gruesome murders; may be that his mind got derailed of the truck and went astray or beyond control because of extreme mental disturbances for the constant harassment and disputes. Further considering the facts and circumstances, it cannot be said that he would be a menace to the society; there is no reason to believe that he cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. He was working in B.S.F. as a disciplined member of the Armed Forces aged about 23 at the relevant time, having no criminal antecedent. In the result, we are of the view that this case cannot be treated as one of the rarest of rare cases where lesser sentence of imprisonment of life would not at all be adequate."

As to what circumstances bring a particular case in the category of rarest of rare case will vary from case to case depending upon the nature of crime; weapons used, the manner in which it is purported and the reasons, cause of motive for which it was committed. In the absence of nature and cause for murder of his own wife infore and children and what prompted the accused to kill his own wife after 11 years of marriage and children aged 7 years and 2½ years, being not established by the prosecution, it cannot be said that this is one of the rarest of rare case where death sentence alone could be awarded. *Brij Bhushan Sharma* v. *State of U.P.*, 2001 Cri LJ 1384 (All).

In a Punjab and Haryana case, the accused was found guilty of committing attempt to commit rape and maternal sister and also murder of his maternal grand mother. It was found that the mother had inflicted number of injuries with sharp-edged weapon on the vital parts of body of both victims. The murders had been committed without any provocation and in a cold-blooded manner. Accused in his defence, took false plea of *alibi* and of unsound mind. It was held that the case fell within the category of "rarest of rare cases" and death sentence was warranted. *State of Punjab* v. *Kulwinder Singh*, 2005 Cr LJ 3937 (P&H) : 2005(4) Rec Cri R 1 : 2005(3) Chand LR (Civ & Cri) 451.

The instant case was preplanned and broad-day light brutal murder of a public leader. Charges against accused were established beyond reasonable doubt. Motive to kill was available on record and there was no reason for false implication. It was held that death sentence was warranted. *Narmadeshwar Prasad Singh* v. *State of Jharkhand*, 2005 Cr LJ 3295 (Jhar) : AIR 2005 Jhar HCR 1426 : 2005(2) BLJR 1463 : 2005(3) East Cri C 367 : 2005 SJLJR 251.

The accused taking advantage of the helplessness of the informant attempted to commit rape on her. With such an intention he entered her house late in the night and caught hold of her in an attempt to make her sleep with him. One cannot underestimate the depravity of a person who makes such attempt taking advantage of the helplessness of a married lady. Not only this, he entered the house to satisfy his lust armed with pistol. The only inference that can be drawn is that he was prepared to go to any extent in achieving his vile objective. Thereafter when the child woke up and out of fear clung to his mother he wanted the child to be separated from his mother. This again demonstrates the complete lack of emotion and sensitivity so far as the accused is concerned. The child was a helpless spectator who could neither defend himself nor his mother. He could offer no resistance. His mother was in no better position. Then, to shoot the child who was clinging to his mother out of fear is another gruesome act executed with extreme cruelty particularly having regard to the fact that a son aged about ten years clinging to his mother was being shot at in her presence. Neither the deceased nor his mother had offered any provocation to the accused. Killing an innocent child in the presence of his helpless and defenceless mother is itself an act of extreme cruelty. The question yet arises as to whether this is one of the rarest of rare cases in which a death sentence can be upheld. This case comes dangerously close to the category of cases which can be said to be the rarest of rare cases. However having regard to the fact that the conviction of the accused is based upon the sole tesacmony of the informant not a matter of law but by way of abundant caution, the sentence of death may not be justified on the facts of the case and life imprisonment will meet the ends of justic. *State of Bihar* v. *Triloki Singh*, 1998 Cri LJ 2447 (Pat).

In a Bombay case, several persons assaulted complainant and deceased who subsequently died but trial judge acquitted them as in his view it was a case of personal rivalry and prosecution had failed to prove the guilt of the accused. On appeal the *alibi* pleaded by one of the accused was accepted and he was acquitted but all others were convicted under Section 302/34 as in the opinion of Court it could not be said that entire evidence was discrepant and of no value and was liable to be discarded. *State* v. *Lalu Laxman Pabale*, 2003 Cr LJ 1174 (Bom) : 2002 All MR (cri) 2204.

In a Supreme Court case, one of the accused set up the plea of *alibi* relying upon the records relating to his attendance in his battalion at Meerut cantonment. The evidence showed that he was living out of cantonment in a village which was just 35 km away from his work place and it was quite possible for him to go to the village and report back next morning at parade at 6 a.m. The plea of *alibi* was therefore not accepted and his conviction for murder was upheld. *Jasbir* v. *State of Haryana*, 2003 Cr LJ 826 (SC) : AIR 2003 (SC) 554 : 2002(10) SCC 324 : 2003(1) Supreme 311 : 2003(1) Crimes 389 (SC).

The deceased died of asphyxia during the commission of rape on her by accused but it could not be said that it was a murder of brutal. Grotesque, diabolical revolting or dastardly nature and consequently it does not call for the extreme penalty of death. *State* v. *Suresh*, 1998 Cri LJ 2491(All).

In a case of murder and rape the accused aged less than 22 years on the relevant day was sentenced of death. The apex Court modified the sentence to an imprisonment for life and observed : "However, the learned counsel for the appellant submitted that in any set of circumstances, this is not the rarest of the rare case where accused is to be sentenced to death. He submitted that age of the accused on the relevant day was less than 22 years. It is his submission that even though the act is heinous, considering the fact that no injuries were found on the dedeased, it is probable that death might have occurred because of gagging her mouth and nosetrix by the accused at the time of incident so that she may not raise hue and cry. The death, according to him, was accidental and unintentional one. In the present case, there is nothing on record to indicate that the appellant was having any criminal record nor it can be said that he will be a grave danger to the society at large. It is true that his act is heinous and requires to be condemned but at the same time it cannot be said that it is rarest of the rare case where accused requires to be eliminated from the society. Hence there is no justifiable reason to impose the death sentence."

In *State of Maharashtra v. Bharat Fakira Dhiwar* 2002 Cri LJ 215(SC) : AIR 2002 (SC) 16 : 2001(7) Scale 285 : 2001(5) Supreme 67 : 2001(3) Crimes 234 (SC) the accused was convicted and sentenced to death by trial Court but he was acquitted by High Court. In appeal, Supreme Court while convicting accused did not impose extreme penalty of death in spite of the fact that the case is perilously near the region of rarest of the rare cases, as the accused was once acquitted by the High Court. Death sentence altered to sentence of life imprisonment.

The victim was not taken by surprise and the accused had not pounced upon her and had rendered her helpless. She had completely removed her Salwar. Her Kurta was rolled up to the neck. The circumstances indicated that probably she was not unwilling initially to allow the accused to have some liberty with her. The accused not being able to resist his urge for sex went ahead. In spite of her willingness for a sexual intercourse, offered some resistance and started raising shouts at that stage. The accused to prevent her from raising shouts tied the salwar around her neck which resulted in strangulation and her death. This was held to be not a case fit for death sentence. This is not a case of extreme penalty of death. *Kumudi Lal* v. *State of U.P.*, 1999 Cri LJ 2523 (SC) : AIR 1999 SC 1699 : 1999 (4) SCC 108 : 1999 (3) JT 121 : 1999 (2) Scale 622 : 1999 (4) Supreme 121 : 1999 (3) Crimes (SC) : 1999 (2) CCR 81 (SC) : 1999 SCC (Cr) 491 : 1999 (2) Recent CR 485.

The age of the accused being of 22 years cannot, in the factual matrix of the matter under consideration, be said to be a mitigating factor. Accused is of 22 years of age while the victim was aged 30 years and at the time of the unfortunate death, she was under pergnancy between 22 to 30 weeks, the other victim was an innocent girl a child of 8 years the murder was cold blooded while two victims were in helpless and hapless situation. No amount of preversity would prompt a person to break open the door by removing the bricks from the wall and commit such gruesome murders on failure to satisfy the lust—the human lust ought to know its limits. Imagination shall have to run wild to consider existence of any mitigating factors in the matter of sentence, having due regard to even the subsequent conduct of the accused in the matter of disposal of the bodies as noticed above.

Can there be any mitigating circumstances on account of such ghastly act the answer cannot but be in the negative. The mother of the accused was bolted inside the room and she watches as a bewildered spectator from the creeks of the window and it is the mother who had given evidence about the bad characteristics and the reputation of the accused in the locality; the sister-in-law has been murdered along with an innocent child. The savage nature of the crime has shocked judicial conscience. The murder was cold blooded and brutal without any provocation. It certainly makes it a rarest of the rare cases in which there are no extenuating or mitigating circumstances. *Jai Kumar* v. *State of M.P.*, 1999 Cri LJ 2569 (SC).

In *Satish Kumar Kantilal Dave* v. *State of Gujarat* 1999 Cri LJ 2628 (Guj) the accused was a poor man and a driver in Ahmedabad Municipal Transport Bus Services. He had committed double murder for his love for Geeta the daughter of the deceased person. He was not a lethal economic offender nor he was hardened criminal. It was not on record that he relished the killing to the extent that he was beyond rehabilitation. That was, therefore, not the rarest of the rare case as contemplated and as such the accused did not deserve capital punishment. In *Panchi* V. *State of U.P.* (1998) 7 SCC 171 : 1998 Cri LJ 4044 the Honourable Apex Court has observed as under (at page 4047-4048/of Cri LJ).

In a murder case, the accused hacked on the head of his deceased class-mate and caused her death. he accused committed offence after previous planning and with extreme brutality. No material was placed before the Court to prove probability that the accused would commit criminal act as would constitute continuing threat to society and the accused could not be reformed and rehabilated. The Court held that the mitigating circumstances outweigh aggravating circumstances and converted the death sentence to life imprisonment. *Yelchuri Manohar* v. *State of AP*, 2005 Cr LJ 4593 (AP) : 2005(2) ALD (CRL) 758 : 2005 (3) Andh LT (Cri) AP 386.

The accused, who was a drunkard, had regular quarrels with his father. The accused intentionally, recklessly and knowingfully, the consequences of his action assaulted his father. The post-mortem report showed the injuries caused by the accused to the deceased. This proved his guilty mind and the guilt, conviction and sentence of life imprisonment was sustained. *Channappa Advyappa Ambi* v. *State of Maharashtra*, 2005 Cr LJ 89 (Bom) : 2004 All MR (Cri) 3284 (Bom).

We have extracted the above reasons of the two Courts only to point out that it is the savagery or brutal manner in which the killers-perpetrated the acts on the victims including one little child which had persuaded the two Courts to choose death sentence for the four persons. No doubt brutality looms large in the murder in this case particulary of the old and also the underaged child. It may be that the manner in which the killings were perpetrated may not by itself show any lighter side but that is not very peculiar or very special in those killings. Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the rarest of rare cases as indicated in *Bachan Singh* case supra. In a way every murder is brutal, and the difference between one from the other may be on account of mitigating or aggravating features surrounding the murder."

Accused being relative of victim lady and her two children enjoyed her confidence and taking undue advantage committed gruesome murder of lady and children and committed robbery of ornaments and cash kept in their house. This is rarest of rare case and death sentence awarded. *State of M.P.* v. *Mukund*, 1997 Cri LJ 534 (MP).

In *Mohd Chaman* v. *State (N.C.T. of Delhi)* 2001 Cri LJ 725(SC) a baby girl aged about one and half years had been a prey to the lust of a thirty years old man and had been killed in a most revolting manner arousing intense and extreme indignation to community on the question of sentence. The apex Court preferred to adopt the safer course and imposed the sentence of life imprisonment on the accused and set aside the sentence of death. The Apex Court observation may be usefuly noted as under:—

> "Coming to the case in hand, the crime committed is undoubtedly serious and heinous and the conduct of the appellant is reprehensible. It reveals a dirty and preverted mind of a human being who has no control over his carnal desires. Then the question is whether the case can be classified as of a rarest of rare category justifying the severest punishment of death. Testing the case on the touchstone of the guidelines laid down in *Bachan Singh, AIR* 1983 SC 898 : 1980 Cri LJ 6361 (Supra). *Machhi Singh* AIR 1983 SC 957; 1983 Cri LJ 1457 : (Supra) and other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, we are not persuaded to accept that the case can be appropriately called one of the rarest of rare cases deserving death penalty. We find it difficult to hold that the appellant is such a dangerous person that to spare his life will endanger the community, we are also not satisfied that the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the offender. It is our considered view that the case is one in which a humanist approach should be taken in the matter of awarding punishment."

In *State of Karnataka* v. *Sheikh Khader*, 2000 Cri LJ 430 (Kant) it was submitted that the accused were young persons and they had old parents and that they had already undergone two years' in custody and leniency in punishment was requested, the court held:—

> "We have taken into consideration these factors as also the overall complexion of the case. We need to note that the facts clearly established that this was a premeditated murder and that this was committed with an abnormally high degree of brutality. The case, viewed at from various features, which the Supreme Court has laid down from time to time does come dangerously close to the rarest of the rare cases, but in our considered sentences prescribed under Section 302, IPC.

In *Manohar Lal* v. *State (N.C.T. of Delhi)* 2000 Cri LJ 581 (SC) the accused killed four persons by setting them ablaze in an incident taking place during riots following assassination of Indira Gandhi. Regarding sentence, the apex Court observed: "The normal sentence for murder is life imprisonment and death penalty is now reserved to be given in rarest of the rare cases in which the other sentence is unquestionably fore closed (vide *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 (AIR 1980 SC 898 : 1980 Cri LJ 636). Thus death penalty is now sequestered to the narrowest region. What the appellants have done were no doubt acts of the most gruesome nature. But we bear in mind that they were on a rampage, and they ran berserk unguided by sense or reason and triggered only by a demented psyche. They had no special or personal animosity towards anyone of the deceased individually. The assassination of Prime Minister Indira Gandhi had blind-folded those youths and unfortunately there was no leadership to bridle the mob frenzy unleashed with all cruelty. The Court after making above observations held that sentencing accused to death was not proper.

While awarding death sentence felonious propensity of offender could not be the sole basis but other factors like motive, manner and magnitude of offence are also to be considered. *Krishan* v. *State of Haryana*, 1997 (2) Crimes 59 (SC) ; 1997 AIR SCW 2554.

In *State of Haryana* v. *Nirmal Singh* 1999 Cri LJ 662 (P&H) the observation of Mr. Justice M.L. Singhal may be usefully noted:—

> "Upon taking an overall global view of all the circumstances in the light of this proposition that when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, the option to impose sentence of imprisonment for life cannot be senselessly exercised and after according full weightage to the mitigating circumstances and drawing up a just balance between the aggravating and mitigating circumstances, we feel that death sentence will be the only sentence that will meet the ends of justice. Award of imprisonment for life will be no imprisonment indeed because we know that after earning remissions and paroles, a person hardly spends 10 years both day and night in the four-walls of the jail. Five years or so, they have already remained in jail and they will come out of jail after remaining there for another about 5 years and after coming out of jail, they will feel emboldened that they are still alive, will enjoy with their family and what the society has done to them though they had eliminated the entire line of their co-villager Tale. After getting out of jail, no wonder they eliminate punam, her family and punam's sister Nirmal and her family. Dharmpal and Nirmal do not deserve to remain in human society. They have forfeited their right to remain members of an orderly society because of their having acted brutally, shockingly, desparately, irrationally in eliminating the entire

> family of Tale. If, there had been little human tinge in them, it would have directed them only to eliminate Neelam and Punam. What was the fault of Tale who did not appear at all in the rape case? What was the fault of Krishna? What was the fault of two sons of Tale i.e. Tinu and Parveen who were 10-11 and 12-13 years old. Dharmpal and Nirmal are savage and brutes. They committed murder of Tale and four members of his family in premeditated and calculated manner. It is certainly the rarest of rare cases where death sentence will be the only proper sentence that will commensurate with the gravity of the crime and the circumstances in which the same was committed. If the death penalty imposed upon them by the learned Sessions judge is diluted, that will be going against the just aspriations of the society expected from the administrators of law and justice. Nirmal appellant is equally barbaric, brute denude of human compassion and human heart. He too has forfeited his right to remain a member of an orderly society. Let we live and others live is absolutely alien to them."

In a Gauhati case, two persons were burnt to death by bolting the house from outside. One of the victim managed to come out of the house but the accused persons caught hold of him and threw him back with the burning house. The incident took place in broad day light and was preplanned. There was absolutely no mitigating circumstances in favour of the accused person. The accused were not repentant at all inasmuch as soon after the occurrence, he absconded and he was apprehended long thereafter. Imposition of death penalty was held proper. *State of Assam* v. *Holiram Bardoloi*, 2005 Cr LJ 1020 (Gau) : 2004(2) Gau LT 113 Gau.

114. Punishment in cases where self defence is borne out.—It should always be remembered that in awarding a sentence in a case wherein plea of self-defence is borne out, the approach of the Court should be realistic and not wooden. It should place itself in the predicament of the accused and then decide as to what sentence should be imposed on him. In the instant case, the deceased had tresspassed into the house of the accused-appellant, thereafter assaulted him and it was only then that the appellant inflicted two knife blows on his chest. Considering the high-handed conduct of the deceased, a sentence of five years R.I. coupled with the sentence of fine and that in its default, sentence imposed on the appellant, by the trial Court would meet the ends of justice. *Shivaji Ganu Naik* v. *State of Maharashtra*, 1999 Cri LH 471 (Bom).

Considering their antecedents, the way in which the murder was planned and executed inside the court hall while the court was in session, the various attacks on the face of the deceased which made even his identification impossible and also dragging on the body by all the accused towards the court compound and threw it inside the SLB School compound and there after escaping themselves by scaling over the compound wall would amply prove that it is not usual case of murder but a rarest of rare case. *Sheik Meeran* v. *State of Tamil Nadu*, 1999 Cri LJ 4981 (Mad).

The accused committed murder of the deceased girl not intentionally and with any premeditation. On the other hand the accused found a young girl alone in a lonely place and picked her up for committing rape; while committing rape and in the process by way of gagging, the girl died. The medical evidence also indicated that the death was on account of asphyxia. In the circumstances the court held that it could not be held to be one of the rarest of rare cases justifying the punishment of death. *Akhtar* v. *State of U.P.*, 1999 Cri LJ 5007 (SC) : 1999(6) SCC 60 : 1999(9) JT 348 : 1999 SCC (Cr) 1058.

In *Natarajan* v. *State* 2000 Cri LJ 1045 (Mad) the Madras High Court's observation on the subject may usefully be noted as under:—

> "To true it is, that the assault was on the ladies who were helpless and hopeless. It is also true that the accused had shown cruelty in assaulting the deceased persons with a dangerous weapon like sickle and had inflicted number of injuries on them even when no retaliation was offered by any of these persons. Yet, however, this case could not be placed on the high pedestal of rarest of rare case. We have already given our reasons of extreme poverty on the part of the accused, his utter helplessness in the matter and the bitter insult offered to him by his mother in law which must have affected his mind. It has to be borne in mind that the accused does not have any criminal list. There is no evidence on record to suggest that he was a person of cruel or arrogant nature. The evidence is completely wanting in their behalf. Here is the case of a poor and a meek villager who does not have a criminal history. Picked by the constant poverty and further by the insults offered by his own near and dear ones, the man had acted at the spur of the moment in a biased manner so as to terminate two lives and endangered two others. It can not be said to be a rarest of a rare case. Perhaps, the evidence of the eye witnesses that the accused was uttering that unless Gomathiammal was finished, there would be no peace in the family, suggests the constant dissatisfaction and disturbed atmosphere in his family for a long time. True it is that two persons have lost their lives, but the number of persons losing their lives in the incident has not been the only factor. In the reported decision of *A. Deivendran* v. *State of Tamil Nadu* (1997) 4 Crimes 181: (1988 Cri LJ 814) (SC), where the Supreme Court was dealing with the offence of murder of two old ladies during the robbery bid as also the murder of one more victim, the Supreme Court observed that the number of persons died in the incident is not determinative factor for deciding whether the extreme penalty of death could be awarded or not. In that case relying upon the decisions in *Machhi Singh* v. *State of Punjab* (1983) 3 SCC 470; (1983 Cri LJ 1457); *Suresh* v. *State of UP*, (1981) 2 SCC 569 : (1981 Cri LJ 746); *Raja Ram Yadav* v. *State of Bihar*, (1996) 9 SCC 287 : (1996 Cri LJ 2307) and *Mukund* alias *Kundu Mishra* v. *State of Madhya Pradesh* (1997) 3 Scale 769 (1997 Cri LJ 3182), the Supreme Court refused to award the death sentence. It is liable to be seen that this was a robbery case and the murders were for gain, so also the murders in *Raja Ram Yadav's case (Supra) Mukund* alias *Kundu Mishra's* case (supra) were obviously for gain. Yet considering the peculiar facts, the Supreme Court did not choose to award extreme penalty."

The accused and Sudipa wanted only Sudipa's mother to be removed from this world. At no point of time the accused had planned to kill Sudipa's father and her grand-parents. Sudipa was ill treated by her mother and no other way could be seen for improving Sudipa' future. It was, therefore, out of helplessness and frustration that Sudipa and accused had decided to remover her. There was no other reason. Till Sudipa's mother was made to eat the Kalojam mixed with poison there was not even the remotest desire on the part of the accused to kill Sudipa's father or her grand-parents. The subsequent events happened unexpectedly. The accused killed them out of confusion and fright that he would be named as the murderer of Sudipa's mother. Considering the facts and circumstances of the case, the Supreme Court hold that it was not a fit case in which the death sentence could be regarded as an appropriate punishment. *Randhir Basu* v. *State of West Bengal*, 2000 Cri LJ 1417 (SC) : AIR 2000 SC 902 : 2000 (3) SCC61 : 2000 (1) JT 618 : 2000 (1) Scale 483 : 2000 (2) Supreme 534 : 2000 (2) Crimes 41 (SC) : 2000 (10 CCR 195 (SC) : 2000 SCC (Cr) 587.

In *State of Haryana* v. *Raju*, 2000 Cri LJ 2726 (P&H) a young girl of 11 years was kidnapped and raped and murdered brutally by the accused who was a young man of 20/22 years. He Smashed the child's skull and face with a brick which indicated his insensitive and sick mind. The court observed that "It is true that the extreme penalty has to be awarded in the rarest of rare cases. But, we cannot allow every sick man to evade the rope and make the society suffer. Society needs to be saved from the sick men like Raju. They must be eliminated, that others may live. Helpless children like Rinku need to be given a sense of security and protected from such persons. We find no mitigating circumstances which may warrant anything less than the extreme penalty." In *Suresh* v. *State of Haryana*, 2000 Cri LJ 2792 (All). The accused committed heirous crime in a diaboliced manner. As many as five persons were murdered. Who were the own close relatives of one of them. It was such a ghastly crime that amongst the victims were three innocent children aged between one and nine years. The offence was committed by them with planning. Having regard to the totality of the facts and circumstances of the case and the magnitude of the horendous crime committed by the accused, the extreme penalty of death was called for to be awarded to them for the offence under section 302, IPC.

The accused appellant was a young lady of about 22 years of age at the time of the incident and after a lapse of 19 years he must be about 42 years of age. During this long interval his socio-economic conditions must have gone radical changes. Having regard to all these circumstances as well as to the nature of the injury caused by the appellant, the weapon used by him and the circumstances in which the offence was committed, it is felt that a sentence of 7 years shall meet the ends of justice. *Naseem alias Bhatey* v. *State* 2000 Cri LJ 3043 (All).

The accused killed his wife and children having administered poison to them and thereafter severed their heads from tranks and then fled away. On the question of sentence the court made the following observations. "It is true that the murder is cold blooded one and on pre-planned hypothesis but that alone in my mind does not attract the case of rarest of rare case for imposing capital punishment in such a case. It is true that it is a cold blooded triple murder but the mind of the accused and the subsequent action of the accused totally infers that he was distrubed minded with a fear psychosis which has completely demurred all his fine and pleasing normal instincts and made him a cruel murderer. Considering all this aspect I am of a firm opinion that this case does not come within the purview of rarest of rare case for imposing capital punishment and I do covert the same to rigorous imprisonment for life. *Manik Mukherjee* v. *State of Bihar*, 2000 Cri LJ 3661 (pat).

In *Ram Deo Chauhan* v. *State of Assam* 2000 Cri LJ 3954 (SC) : AIR 2000 (SC) 2679 : 2000(7) SCC 455 : 2000(8) JT 430 : 2000(5) Scale 355 : 2000(5) Supreme 312 the murder was pre-planned cold blooded brutal and quadriple. The murder was committed in the most brutal manner with severe cruelty inflicting number of injuries on each victim including a female baby hardly of 2½ years of age and two helpless women. They were murdered while they were in deep sleep after lunch keeping the doors and windows of the house open without suspecting any foul play from any quarter. Th Supreme Court after referring to various judgements observed as under.—

> "It is true that in a civilised society a tooth for tooth, and nail for nail or deat for death is not the rule but it is equally true that when a man becomes a beas and menace to the society, he can be deprived of his life according to the procedur established by law, as constitution itself has recognised the death sentence as premissible punishment for which sufficient constitutional provisions for a appeal, reprieve and the like have been provided under the law. It is true that lif sentence is the rule and death sentence is an exception. We are satisfied that th present case is an exceptional case which warrants the awarding of maximu penalty under the law to the accused/appellant. The crime committed by th appellant is not only shocking but it has also jeopardised the society. The awardin of lesser sentence only on the ground of the appellant being a youth at the time o occurrence cannot be considered as a mitigating circumstance in view of ou findings that the murders committed by him were most cruel, heinous an dastardly. We have no doubt that the present case is the rarest of the rar requiring the maximum penalty, imposable under law."

In *Verabharathi* v. *State* 2000 Cri LJ 4236 (Mad) the mitigating circumstances wer that the accused had relatively clean past inasmuch as nothing had been said abou the previous nefarious criminal activities. All the three accused were also in their lat 20's or early 30's. Two of the accused persons came from educated backgroun inasmuch as their parents had the teachers. All the there accused had famil depending upon them as also the old parents. It was not clear as to who had actual murdered the girl. It was not found that the accused could not be reformed or that the were a total menace to the society to the extent that their remaining in the societ would itself prejudice the general interest of the society. In view of the above fact death sentence was altered to one of life imprisonment. *Veerabharathi* v. *State* 2000 C LJ 4236 (Med).

On the one hand there were aggravating circumstances with regard to the rape an murder of a minor girl of about 5 years of age, who was totally unprotected as also th brutality and the depravity with regard to the manner in which the crime had bee committed and on the other hand there were mitigating circumstances that the accuse was a boy of 20 years i.e. in the age of adolescence, he was not a hardened crimin with any criminal record in past, his father had already expired, seeming to be ignora of social and moral values, could not be said to be a menace to the society, it appeare to be a case of impulsive bravado of sex and that he wanted to satisfy his sexual urg on the date of the incident and in the process, the murder was also committed. Th accused was convicted solely on the basis of circumstantial evidence with corroboratio of button and saliva on bidi bud etc. coupled with his own say before doctor. Deat sentence was altered to that of life imprisonment. *Trikambhai* v. *State of Gujarat*, 200 Cri LJ 4363 (Guj) : 2000 (3) Guj LR 1925 : 2000 Cr. LR (Guj) 593.

In *State* v. *Mota*, 2000 Cri LJ 4414 (Kant) the two accused armed with dead weapons killed 5 persons in most savage and blood curdling manner. The court whi determining the sentence observed as under:—

> "There is only one small factor which can be pleaded on behalf of the accuse and that was their status and the circumstances under which the incident too

> place. The two accused in this case come from what can be described as virtually the poorest of the poor strata; it is a social tragedy that they have been deprived of any form of education or literacy and starting from this premise one has to try and recreate their mental condition if they felt that the only little possession on this planet namely a small piece of land that made for their virtual sustenance was threatened. The situation in rural India and particularly at this level, makes for a very harsh life style and the prosecutions has suggested, as admitted by the witnesses, that the deceased chotaiah was mixed up in some form of so-called "nata" or witchcraft which was supposed to have been used for purposes of trying to deprive the accused of whatever little land their life solely depended on. The Court has to perhaps visualize that this provided a life and death situation for the accused and there is no doubt that reaction on their unsophisticated minds was a violent one. The learned spp is right when he points out that when accused came down at the dead of night with such deadly weapons machus and when they straightaway went and hacked their victims into pieces that they came there with the mental predisposition of killing those persons, but we cannot lose sight of the circumstances that triggered off this action. The law cannot and will never justify the taking of life but while evaluating the gravity of the offence and prescribing the punishment, the law cannot lose sight of these deep seated aspects. If one were to take this aspect of the matter into consideration, as we have to, then this case would get relegated to the category of those cases in which the Supreme Court has said that even though on a normally evaluation the crime called for a death sentence that it still should not be awarded. This is the solitary ground on which we refrain from enhancing the sentences even though, as indicated in the judgement, the learned spp has otherwise made out an absolutely a fit case for awarding the death sentences.

In a latest case reported in *Ram ji Rat.* v. *State of Bihar*, 1999(8) SCC 389: 2000 Cri LJ 19 : AIR 1999 (SC) 3857 : 1999(8) JT 236 : 1999(6) Scale 565 : 1999(9) Supreme 36, their lordships of the Supreme Court have given the guidelines under which the death sentence has to be ordered. Their Lordships held that in order to award death sentence the court should ask itself and answer the following question. (I) Was there something uncommon about the crice which renders sentence of imprisonment for life inadequate and calls for a death sentence.

Were the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender. *Refering officer.v. Tingili Ashappa* 2000 Cri LJ 2569 (AP).

115. Term "imprisonment".—The term "imprisonment" includes the sentence of imprisonment for life and this word enjoined in Section 31 of Cr PC not defend in Cr PC. *Kamalanatha* v. *State of T.N.*, 2005 (3) East Cr C 78 (SC) : AIR 2005 (SC) 2132 : 2005(5) SCC 194 : 2005(4) JT 170 : 2005(3) Crimes 24 (SC) : 2005(4) Supreme 501.

116. Eye-witness—Testimony of—Merely because deceased and complainants had criminal track record would not be ground to discard evidence of witnesses which was otherwise reliable. The fact that the police had given clean chit to accused would be of no consequence. Conviction was held proper. *Dhanaj Singh* v. *State of Punjab*, AIR 2004 SC 1920 : 2004 Cr LJ 1807.

Eye-witnesses—Minor inconsistencies.—There is a minor discrepancy pointed out as to what eye-witnesses have spoken about the manner of arrival of the motor riders. PW-3 stated that they came when the deceased was crossing the road while PW-4 stated that they were already there. This is too a trivial matter to corrode the credibility of the witnesses who were being examined after a length of time. *Abuthagir vs. State*, AIR 2009 SC 2797 : 2009 CrLJ 3987 : 2009 (7) Scale 585 : 2009 (5) Supreme 138 : 2009 (5) SLT 352 : 2009 (8) SCR 432.

Independent eye-witnesses—Delayed.—It is seen that the PWs. 3 and 4 disclosed that they had witnessed the incident. Before PW-22 their evidence was recorded. The incident took place on 29.08.1997 and the accused persons were arrested after about 8 months. Till the arrest of the accused the statements of PWs. 3 and 4 were not recorded under Sec. 161 of Code. After arrest because their photos were published in the newspapers, that is how PWs. 3 and 4 came to the Police Station on their own accord on two different occasions and gave statements. It has been submitted by learned Counsel for the appellants that PWs. 3 and 4 did not disclose the incident to any one. They have no interest either for prosecuting the accused or making a statement in the defence. They are independent witnesses. In such a case it is absurd to hold that Investigating Officer had erred in recording the statement of PWs. 3 and 4. The investigating agency was making all possible efforts to know the names of the witnesses. This factor cannot be doubted. If really as contended by learned Counsel for the appellants the prosecution wanted to tamper some witnesses they could have immediately done so after the incident.

In the instant case, as PWs. 3 and 4 have no enmity with the accused they are independent and natural witnesses. They are not under the control of the police and do not have in any sense any obligation to the police. Since they have revealed the truth after long time after seeing the photos of the accused persons, that cannot be a factor to discard their evidence. *Abuthagir vs. State*, AIR 2009 SC 2797 : 2009 CrLJ 3987 : 2009 (7) Scale 585 : 2009 (5) Supreme 138 : 2009 (5) SLT 352 : 2009 (8) SCR 432.

Where evidence of eye-witnesses as to incident was cogent, consistent and reliable and remained unshaken in lengthy cross-examination and also corroborated by medical evidence and witnesses, it was held that the conviction of accused was just and proper. *Mohan Manjhi* v. *State of Jharkhand*, 2005 Cr LJ 1545 (Jhar) : AIR 2005 Jhar HCR 308 : 2004(3) JCR JHA 413 : 2004(3) JLJR 437.

Where evidence of eye-witnesses as to incident was cogent, consistent and reliable as their presence on spot of incident was natural and corroborated by post-mortem report that repeated blows of iron-rod given by accused with sufficient force on head of deceased resulting into his death, it was held that convicted warranted no interference. *Babulal* v. *State of MP*, 2005 Cr LJ 2095 (MP).

Where evidence of eye-witnesses as to incident that accused stabbed deceased with knife was cogent and reliable and weapon of offence recovered at instance of accused stained with blood matching with blood group of deceased, conviction warrants no interference. *Bass* v. *State of T.N.*, 2005 (2) Crimes 648 (Mad).

Where evidence of sole eye-witness, wife of deceased that accused attacked deceased with *kripan* on his back side causing his death was corroborated by medical evidence. he conviction warrants no interference. *Sohan Singh* v. *State (NCT of Delhi)*, 2005 (2) mes 540 (Del).

The accused killed 13 persons of his family in moonlite night. The surviving members of the family were eye-witnesses. Their presence in the house was natural. Since the accused were known to eye-witnesses being members of the family, they were identified by them in moonlite night. The accused renamed on the scene of crime for a longtime killing the victims one after the other. There could be no doubt about their identity to the eye-witnesses. In the area where the incident took place there were big farms and residential portion in each farm was located at quite a distance. Therefore, presence of independent witnesses was not probable. Motive for commission of crime also appeared on record. It was held that conviction was justified. *Gurmeet Singh* v. *State of UP*, 2005 Cr LJ 4384 : 2005 (4) Crimes 84 (SC) : 2005(8) JT 628 : 2005(6) Supreme 571 : 2005(7) Scale 610. See also *Narwadeshwar Prasad Singh* v. *State of Jharkhand*, 2005 Cr LJ 3295 (Jhar) : AIR 2005 Jhar HCR 1426 : 2005(2) BLJR 1463 : 2005(3) JCR JHA 284.

The reliable and fully corroborated evidence of independent eye-witnesses was considered and accepted as independent eye-witnesses had no enmity with accused and there was no reason for falsely deposing against her. Motive was not considered relevant in this case as guilt was proved beyond reasonable doubt. The conviction of accused was upheld. *Deoki Devi* v. *State*, 2003 Cr LJ (NOC) 204 (Jhar.) : AIR 2003 Jhar HCR 924 : 2003(2) JCR JHA 682 : 2003(3) JLJR 95.

The accused were alleged to have murdered the deceased near *kahua* tree but body was recovered from the place which was 200 yards away. Evidence of eye-witness, who was also independent witness was reliable as he had consistently deposed during trial as to what had been stated by him in *farde beyan* (FIR). The recovery of two empty cartridges from spot by investigation agency corroborated the fact mentioned in testimony of witness that two shots were fired. The non mentioning of tree in FIR was of no relevance and delay in filing of FIR in the circumstances was inconsequential. The conviction of accused was held proper. *Gaya Yadava* v. *State of Bihar*, 2003 Cr LJ 1564 (SC) : AIR 2003 (SC) 1759 : 2003(2) Crimes 257 : 2003(3) JT 479 : 2003(9) SCC 122 : 2003 SCC (Cri) 1767.

In a Supreme Court case the accused were seen dragging the deceased and when witnesses tried to intervene they fired and killed the deceased. The eye-witnesses immediately after firing ran away and on next day headless body of deceased was recovered from the field of accused. The head was lying near the tube well of accused. The presence of witnesses at place of occurrence was not doubtful and accused could not explain as to how headless body of deceased was lying in his field. Their conviction was restored and acquittal order was set aside. *State of Punjab* v. *Karnail Singh*, 2003 Cr LJ 3892 (SC) : AIR 2003 (SC) 3609 : 2003(11) SCC 271 : 2003(5) Supreme 508 : 2003(3) Crimes 292 (SC).

The accused charged for committing the murder as there was standing dispute between accused party and deceased party. The eye-witness evidence was corroborated by medical evidence and otherwise also it was found truthful. It was held that conviction of accused was well founded and could not be disturbed. *Shyam Sunder* v. *State of Chattisgarh*, 2002 Cr LJ 4315 (SC) : AIR 2002 (SC) 3292 : 2002(8) SCC 39 : 2002(4) Crimes 291 (SC) : 2002(6) Supreme 471.

There was question of evidentiary value of eye-witness account as his name was not mentioned in FIR which was lodged by son of deceased and explanation for this omission given by informant was found plausible. The eye-witness's statement was recorded immediately after the investigation was started. It was held that plea of defence side that immediately after the investigation was started. It was held that plea of defence side that testimony of eye-witness was doubtful. lacked substance. The conviction of accused under Section 302 was confirmed. *Chittar Lal* v. *State of Rajasthan*, 2003 Cr LJ 3548 (SC) : AIR 2003 (SC) 3590 : 2003(3) Crimes 131 : 2003(7) JT 270 : 2003 SCC (Cri) 1377 : 2003(6) SCC 397.

In a Gauhati case, the accused with an intention to kill had assaulted deceased with an axe following an altercation and went away but returned back again and gave two more blows on head with same axe. Medical evidence had given full support and corroboration to the evidence of eye-witnesses. The Court held that accused could be said to have killed deceased with the intention to cause his death and conviction under Section 302 was justified. *Pulu Tanti* v. *State*, 2003 Cr LJ 3505 (Gau.).

In an Allahabad case the accused persons were alleged to have committed the murder of a person by assaulting him with knife. The immediate motive of crime was beating of one of the accused persons by deceased. The testimony of three eye-witnesses was consistent on all material points and found above suspicion reliable. The evidence was also corroborated by the facts stated in the FIR. The conviction of accused persons was held sustainable. *Narendra* v. *State*, 2003 Cr LJ 2068 (All) : 2003 All LJ 773 ; 2003(46) Cri C 211 : 2002(3) All Cri R 2949.

In a case, the deceased was attacked with dangerous weapons and eye-witnesses had seen everything as incident had taken place near their houses where light emitted by tubelight enabled them to identify the culprits. It was held that their evidence was cogent and conviction was proper. *Suresh Sita Ram Surve* v. *State of Mahrashtra*, 2003 Cr LJ 475 (SC) : AIR 2003 (SC) 344 : 2002(10) SCC 28 : 2003(8) Supreme 352 : 2003(1) Crimes 156 (SC).

The accused assaulted and killed the deceased and eye-witnesses account of wife and son of deceased when analysed minutely by High Court was found to be credible and cogent. Medical report and postmortem report showed that there was no discrepancy in medical evidence *vis-à-vis* ocular evidence. The accused here had killed the deceased when he was sleeping outside and reason was some altercation they had over a petty issue on some other day. The plea taken by accused was sudden fight but court said in sudden fight there is no premeditation and fight takes place in heat of passion and there is no time for the passion to cool down. There is mutual provocation and one attacks another. Hence in this case it was held that exception 4 to Section 300 was not applicable and conviction for murder was proper. For application of exception 4 it was pointed out that fight not only be sudden but also it should be shown that offender had not taken undue advantage or acted in cruel or unusual manner. *Dhiraj Bhai Gorakhbhai Nayak* v. *State of Gujarat*, 2003 Cr LJ 3723 (SC) : AIR 2003 (SC) 2855 : 2003(9) SCC 322 : 2003(6) JT 189 : 2003(3) Crimes 219 (SC) : 2003(5) Supreme 223.

The prosecution case was fully established by direct testimony of eye-witnesses which was corroborated by medical evidence. However High Court acquitted the accused on the ground that investigation was tainted and was of no substance. On appeal the Apex Court held that the failure of the Investigating Officer in sending the fire-arms and empties for compassion could not completely throw out the prosecution case when the case was fully established from the testimony of eye-witnesses. whose presence on the spot was not doubted. *Amar Singh* v. *Balwinder Singh*. 2003 CrLJ 1282 (SC) : AIR 2003 SC 1164 : 2003 (2) SCC 518 : 2003 (2) Supreme 155 : 2003 (2) Crimes 186 (SC).

The accused husband alleged to have killed his wife by cutting her throat with sharp razor and testimony of witnesses was corroborated with each other and also with medical evidence. Plea of *alibi* was not tenable and extra judicial confession was found truthful. It was held that conviction of accused for gruesome murder of his wife was proper. *Arun Das* v. *State*, 2003 Cr LJ 1337 (Cal) : 2003 Cal Cri R 231 : 2003(2) Cal HN 180 : 2003(2) Crl LT 226.

Accused assaulted deceased with *lathi* fitted with iron rings. Incident took place at 8 am. Evidence of witnesses residing in nearby locality and present at time of incident found reliable. Statement of injured eye-witness, who travelled with deceased on motorcycle within hours of incident, cannot be discarded on ground of acquaintance or friendship with deceased. Medical evidence that injuries may have been caused by sharp, heavy cutting weapon were found acceptable as nature of weapon not examined during investigation and heavy blow with *lathi* fitted with iron rings would have caused skull to break. There was no evidence as to whether deceased took food or not before leaving house in morning. Thus finding by doctor that stomach of deceased was empty would be of no consequence as to time of incident. There were no incongruities in prosecution evidence. Conviction of accused was held proper. *Ram Kishan* v. *State of UP*, 2004 Cr LJ 4236 (A) : AIR 2004 SC 4678 : 2004 Ali LJ 3773 : 2004(6) Supreme 479 : 2004(3) Crimes 397 : 2004(7) Scale 569 : 2004(3) JCC 1694.

There used to be quarrels between deceased and accused on the point of accused grazing their cattle in the field of deceased. Accused inflicted injuries on deceased and caused death of the deceased. Son of deceased, witnessed incident. Another son and wife of deceased identified accused by voice as they were standing at a distance. Evidence of said witnesses clearly established that accused were responsible for death of deceased. Fact that incident happened far away from house of deceased. However prosecution failed to explain as to how dead body was found near boundary of his property. When the incident had occurred far away from the house of deceased. It was held that, that would not cast doubt on prosecution case. Conviction of accused was proper. *Kishnia* v. *State of Rajasthan*, 2004 Cr LJ 4227 : AIR 2004 SC 4318 : 2004(6) Supreme 474 : 2004(3) Crimes 20 (SC) : 2004(4) Recent Cr 294.

In the instant case there was alteration and quarrel in between accused and deceased. The presence of eye-witness and complainant on the spot of occurrence was proved. The testimony of sole eye-witness was found reliable and trustworthy as the same was corroborated by medical evidence. The deposition proved that the intention of the accused was to cause death of the deceased in as much as the assault was directed at the neck of the deceased. The weapon of offence had been recovered at the instance of the accused from his own house. Held, the testimony of the eye-witness could not be branded as related or interested witness because he was merely a friend of the deceased. There was no enmity between himself and accused persons. His conduct was consistent and natural in accompanying the deceased to his office at Loco Shed on the date of the incident. Conviction of accused for offence of murder could not be interfered with. *Yakub Ismailbhai Patel* v. *State of Gujarat*, AIR 2004 SC 4209 : 2004 Cr LJ 4205 : 2004(7) JT 178 : 2004(7) Scale 374 : 2004(3) JCC 1335 : 2004(4) Recent CR 731.

Where there was direct evidence of eye-witness that accused caused death of deceased by gun-shot injuries, the eye-witness had also sustained injuries and there was no discrepancy in his evidence, the conviction was not interfered with. *Janak Singh* v. *State of UP*, AIR 2004 SC 2495 : 2004 Cr LJ 2533 : 2004(4) Supreme 110 : 2004(3) Crimes 79 (SC) : 2004(2) Recent CR 711.

In the instant case it was alleged that the respondent-accused armed with a dagger, picked-up a fight with injured witness and stabbed him on his thigh and thereafter stabbed his wife on chest resulting into her death. Evidence of the I.O. that he received a telephonic message from doctor in hospital was contrary to the evidence of witnesses that they went to police station and lodged a complaint. There was material contradiction between evidence of witnesses regarding recovery of dagger from place of incident. Conviction was held not proper. *State of HP* v. *Sukhvinder Singh*, AIR 2004 SC 2834 : 2004 Cr LJ 1434 : 2001(1) Supreme 945 : 2004(2) Crimes 22 (SC) : 2004(2) Scale 210 : 2004(1) JCC 398.

The conviction of accused for murder was held proper where the accused could not shake the credibility of eye-witness account and there was no material contradictation in prosecution case. *Sarwan Singh* v. *State of Punjab*, 2003 Cr LJ 21 (SC) : AIR 2002 (SC) 3652 : 2003(1) SCC 240 : 2002(7) Supreme 85 : 2002(4) Crimes 414 (SC).

Where the solitary eye-witness graphically described the assaults on the deceased stating that he gave several blows on the person of deceased while co-accused caught hold of him to facilitate the assailants, conviction of accused under Section 302/34 IPC on the basis of sole testimony of eye-witness was held proper. *Sunil Kumar* v. *State Govt. of NCT, Delhi*, AIR 2004 SC 552 : 2004 Cr LJ 819 : 2003(4) Crimes 383 (SC) : 2003(7) Supreme 519 : 2003(11) SCC 367.

The accused without any provocation had inflicted a single blow on the head of deceased and two three blows on back of injured witness with a wooden bar. Here deceased was father and injured was mother of the accused. The conviction of accused under Section 302/323 was held proper as there was no reason to disbelieve the statement of injured mother eye-witness. The deceased in a Supreme Court case was found murdered in his farm house and blood stains were found on number of places in house. The eye-witnesses evidence that accused were perpetrators of crime was cogent and reliable. The conviction of accused under Section 302 was held proper. *Rajesh* v. *Chandu Lal Gandhi*, 2002 Cr LJ (NOC) 52 (Orissa) : 2001(92) Cut LT 628 : 2001(21) OCR 215 : 2001(2) Orissa LR 215.

When eye-witness does not disclose the incident to persons when he must have met after incident, his such conduct indicates that actually he had not seen the incident. *Ganpat Kondiba Chavan* v. *State of Maharashtra*, 1997 (2) Crimes 38 (Bom).

When evidence of eye-witness has been found cogent, consistent and corroborative with medical evidence, it can be relied upon though eye-witness is mother of deceased and interested. *Jivan Lal* v. *State of M.P.*, 1997 (1) Crimes 1 (SC) : 1996 (9) Scale 262 : 1996 (8) Supreme 791 : 1997 (1) CCR 125 (SC).

Testimony of an eye-witness found reliable can not be ignored on mere ground that name of such eye-witness was not mentioned in FIR. *Sahab Singh* v. *State of Rajasthan*. 1997 (1) Crimes 251 (SC) : AIR 1997 SC 945 : 1997(3) JT 181 : 1997(2) Scale 429 : 1997(2) Supreme 644.

Accused Raj stands on the same footing and in absence of any material on record there is no scope of distinguishing his case from other persons who have been acquitted on the ground that being the son of the main accused Harish who was prime mover of the crime he may have a motive and as such his conviction cannot be sustained. *Charan Singh* v. *State of UP*, (2004) 1 Crimes 423 (426, 427) (SC) : (2004) 4 SCC 205 : 2004 SCC (Cri) 104 : 2004(2) Supreme 421 : 2002(3) Scale 71.

Where testimony of complainant was contradictory with evidence of I.O. and other witnesses and dying declaration was also found not credible, conviction of accused was set aside. *Sheikh Meheboob* v. *State of Maharashtra*, 2005 Cr LJ 2136 (SC) : 2005(10) SCC 387 : 2005(3) JT 137 : 2005(2) Supreme 458 : 2005(1) Crimes 386 (SC) : 2005(1) JC 511.

The evidence of PW2 alone was sufficient to fasten guilt on the accused appellant. But, added to that is the evidence of PW1, the informant, which further strengthens the prosecution version. The First Information Report was lodged with promptitude. Merely because PW2 was examined after some time, the reason thereof had been clearly explained by the investigating officer who stated that after the information was lodged by PW1 at the police station he interrogated him and thereafter left for the place of incident which he reached at 8.45 PM. So far as time of injury on PW2 was concerned, the opinion of PW4 (doctor) was clearly hypothetical. He himself stated that there could be a margin of 2-3 hours. That being so, credible evidence of eye-witnesses did not become tainted. Great emphasis was laid on the approximate time of injury. That is no way affected the credibility of PW2's evidence. Though evidence of PW1 did not specifically indicate the injury on PW2 that was but natural. The High Court was justified in dismissing the appeals filed by the accused appellants before it. *Jai Karan* v. *State of UP*, 2003 (4) Crimes 503 (SC) : AIR 2004 SC 1148 : 2004 Cr LJ 403 : JT (2003) 8 SC 220.

The accused was alleged to have killed the deceased and ocular evidence was in full conformity with material (medical) evidence as occurrence had taken place in broad day light. Absence of motive was irrelevant and immaterial in view of ample ocular evidence. The conviction of accused was held proper. *Ram Babu Jha* v. *State*, 2003 Cr LJ 3167 (All) : 2003(2) Crimes 14 : 2003 All LJ 1578 : 2003(46) All Cri C 892 : 2003(1) All Cri R 714. The accused as per eye-witnesses set the house on fire and when deceased came out of that they assaulted and killed him to take the revenge of killing of their mother by accused. They were found guilty and convicted. *Bhukhlal Tewari* v. *State*, 2003 Cr LJ (NOC) 194 (Jhar).

In a case the accused had caused the death of deceased and evidence of eye-witnesses was consistent, reliable and unshakable as they had seen the accused inflicting axe blow on the neck of the deceased. The age of accused as 16 years was also proved. The conviction of the accused under Section 302 was maintained but sentence of life imprisonment was quashed. *Pran Singh* v. *State*, 2003 Cr LJ 2721 (All) : 2003 All LJ 1380 : 2003(46) All Cri C 531 : 2003(1) All Cri R 488.

In a Supreme Court case, it was held that the highly hypothetical imaginary story advanced by defence to extent that the witness and his family members had killed the deceased could not be accepted being too hollow and that the conclusion arrived at that charges under Section 302/34 stood established. *Krishnan and O. Ayyar Thavar* v. *State of T.N.*, 2003 Cr LJ 3705 (SC) : AIR 2003 (SC) 2978 : 2003(7) SCC 56 : 2003(5) Supreme 173 : 2003(3) Crimes 197 (SC).

In *State of Karnataka* v. *Papanaika*, 2004 Cr LJ 4667 : AIR 2004 SC 4967 : AIR 2004 SCW 5689 : AIR 2004 Kant HCR 3269 : AIR 2004 JHAR HCR 3112, the Apex Court observed and held as under:

> "After close examination of the evidence of eye-witnesses and after taking chaff from the gram, so far as the testimony of eye-witnesses, the wife of the deceased and the nephew of the deceased, can be said to be trustworthy and there can be no reason to disbelieve, these two witnesses leave apart other eye-witnesses. These two witnesses were injured witnesses, as they were examined by the doctors and, therefore, their testimony was wholly reliable so far as accused persons 1 to 6 were concerned and they also have been corroborated by other eye-witnesses and they have been supported by the medical evidence also. Therefore, the testimony of these witnesses fully substantiate the prosecution case. Therefore, the order passed by the High Court acquitting the accused 1 to 6 by taking easy approach would be liable to be set aside. Further mere fact that the houses of the accused persons were damaged and main accused was also injured, would not negate the prosecution case. The injury on the person of main accused cannot improbabilise the whole of the prosecution case......"

Where there is direct testimony of eye-witnesses corroborated by medical evidence fully establishing prosecution version, mere failure or omission of negligence on the part of investigating officer cannot affect credibility of prosecution version. *Ram Bali* v. *State of UP*, AIR 2004 SC 2329 : 2004 Cr LJ 2490 : 2004(2) Crimes 498 : 2004(3) Supreme 547 : 2004 SCC (Cr) 2045.

In the instant case the doctor who conducted post-mortem was not examined. Motive was not established and provocation prompting to commit murder was also absent. It was held that since prosecution failed to explain fatal injuries sustained by accused plea of right of private defence was established and, therefore, conviction was set aside. *Sita Ram Jha* v. *State of Bihar*, 2005 (3) East Cr C 72 (Pat).

Failure of prosecution witnesses of incident to withstand cross-examination and their admission that they did not know names of assailants and anti-timed FIR render conviction unsustainable. *Atul Singh* v. *State of UP*, 2004 Cr LJ 111 (All) : 2003 All LJ 2742 : 2003(47) All Cri C 172.

In a case, the incident occurred in presence of informant, father of deceased. The testimony of informant was corroborated by medical evidence. The testimony of informant was also corroborated by an independent witness. Delay in conducting post-mortem was also explained. Acquittal of accused was held justified. *Jagdish Narain* v. *Krishna*, 2005 Cr LJ 4513 : AIR 2005 SC 4341 : 2005(4) Crimes 109 (SC) : 2005(6) Supreme 629 : 2005(12) JT 327.

Held, during the course of investigation a serious doubt was cast on the fair investigation by the Investigating Officer and the Investigating Officer was subsequently changed but that did not render the testimony of eye-witness unreliable. After going through the testimony of eye-witness, the wife of the deceased, it left no manner of doubt that she was a truthful witness and her testimony fully supported the case of the prosecution. The technical grounds sought to be utilized by the High Court in discarding the testimony of this witness nowhere showk the truthful version given out by eye-witness. Therefore, it could be said that the conviction of accused under Section

302, IPC by the trial Court for causing the death of husband of said eye-witness was correct. *State of Punjab* v. *Hakam Singh*, 2005 Cr LJ 4111 : 2005 SCC (Cri) 1679 : 2005(10) SCC 124.

In a case, the presence of eye-witness at the place of occurrence was sought to be justified on the reasoning that she was waiting for a bus to go to another place where she was being treated. The prosecution produced no evidence to show that she was required to go in connection with her treatment. In fact the witness could not even disclose the name of the doctor who was treating her. The testimony of eye-witness also suffered from improvements. It was held that the eye-witness could not be believed. *State of UP* v. *Shri Krishan*, 2005 Cr LJ 892 : AIR 2005 SC 762 : 2005 SCC (Cri) 1551 : 2005(1) Crimes 200 (SC) : 2005(1) Supreme 263 : 2005(10) SCC 394.

117. Delay in examination of.—Unless the Investigating Officer is not categorically asked about the reason for the delay in examining the witnesses, the defence cannot gain any advantage therefrom. *Ramanand Yadav* v. *Prabhu Nath Jha*, 2004 Cr LJ 828 : AIR 2004 SC 124 : 2003 Crimes 446 (SC) : 2003(8) Supreme 21 : 2003(8) JT 514.

Where no question regarding delay in recording statement by police was put to Investigating Officer specifically, delay in recording statement was held not fatal. *Sunil Kumar* v. *State of Rajasthan*, 2005 Cr LJ 1402 : AIR 2005 SC 1096 : 2005 SCC (Cri) 1230 : 2005 Cr LJ 1402 : 2005(9) SCC 283 : 2005(1) Scale 608.

In the instant case the High Court held that no reliance could be placed on the evidence of eye-witness because he was examined by the police on 27.11.1979 while the occurrence took place on 15.10.1979 and even though he was mentioned as an eye-witness in the FIR. He was projected as an independent witness but it appeared from the evidence of wife of deceased that he happened to be the causing of the deceased. The Supreme Court agreed with the High Court and held that the eye-witness, in the circumstances of the case could not be considered as reliable. *State of UP* v. *Gambhir Singh*, 2005 Cr LJ 2579 : AIR 2005 SC 2439 : (2005) 11 SCC 271 : 2005(2) Crimes 175 (SC) : 2005 SCC (Cr) 1633.

Where the investigating officer was not asked about reason for delay in examining witnesses it was held that the prosecution could not be discarded on such ground. *Ramanand Yadav* v. *Prabhu Nath Jha*, AIR 2004 SC 1053 : 2004 Cr LJ 640 : 2003(8) JT 404 : 2003(7) Supreme 576 : 2003(4) Crimes 399 (SC).

118. Testimony of eye-witness in darkness.—In a murder case of neighbouring at night the parties were close relatives living in neighbouring huts. There were strained showed relations between the parties on account of dispute relating to partition of property. The parties were used to live on the midst of nature and accustomed to live without light. The presence of witness at scene was natural as incident had taken place near to huts of accused and deceased, who were neighbours. The place of incident being away from village which itself was situated in remote area of Taluka, no body could dare to go to police station at dead of night to lodge FIR and this delay was reasonable. The trial Court acquitted the accused on the ground that due to darkness the witnesses could not have really witnessed the occurrence. The High Court did not accept this plea and reversed the acquittal of accused. The Supreme Court held that despite the cogent and convincing evidence on record a finding in favour of the accused was arrived at by learned session judge on an incomplete evaluation of the evidence resulting in total miscarriage of justice. As such High Court was justified in interfering with judgment and conviction of accused was justified. *Shivraj Bapuray Jadhav* v. *State of Karnataka*, 2003 Cr LJ 3542 : 2003 SCC (Cri) 1372 : 2003 (3) Crimes 161 (SC) : AIR 2003 (SC) 3578 : 2003(6) SCC 392 : 2003(5) Supreme 65.

119. Interested witness.—Prosecution alleged that accused persons armed with pistols and lathis came to house of deceased in night and fired shots at him resulting into his death. Testimony of eye-witness wife of deceased was trustworthy and corroborated with evidence of other witnesses. Non-disclosure of her statement to effect that she had gone out of house chasing accused upto one furlong before Investigating Officer was of no consequence. Medical report showed that death took place because of 'injuries' meaning thereby more than one injury fully supported prosecution case. Testimony of witnesses could not be rejected merely because they were related to deceased. *State of UP* v. *Nawab Singh*, AIR 2004 SC 1511 : 2004 Cr LJ 1367 : 2004(1) Supreme 954 : 2004(1) Crimes 440 (SC) : 2004(2) JT 79.

120. Evidence of Solitary Eyewitness.—Positive findings of the Investigating Officer also support the prosecution case. The Investigating Officer found one quarter bottle of Aristocrat liquor lying empty near the Almirah in the room in which the incident is said to have taken place. He seized blood-stained earth from the place of occurrence and a blood-stained dhoti belonging to the appellant. The blood-stained earth, dhoti and dagger seized from the appellant apart from the blood-stained clothes which the deceased persons were wearing, were sent to the Chemical Examiner who reported that the same contained human blood and its group was 'A' which was blood group of the deceased persons. Thus, objective finding of the Investigating Officer and the report of the Chemical Examiner go to show complicity of the appellant with the crime. *Ashok Kumar Pandey v. State of Delhi*, AIR 2002 SC 1468 : 2002(4) SCC 76 : 2002(3) JT 103 : 2002(2) Scale 647 : 2002(2) Supreme 430 : 2002 Cr LJ 1844.

In Babuli v. State of Orissa, AIR 1974 SC 775; (1974 Cri LJ 510), also in catena of judgment the Apex Court has held that when the witnesses are not disclosing the names of accused persons for about 20 hours, their testimony loses importance. Similarly, *in State of Orissa v. Brahmanand Nanda*, AIR 1976 SC 2488; (1976 Cri LJ 1985), the Apex Court has held that when eyewitnesses are not disclosing names of assailant for a day and half their credibility suffers. In the matter at hand even after coming to know of the fact that subsequent to cruel beating seen by these two witnesses Pramila was found missing from her inlaws house for two days, they did not disclose the factum of beating seen by them to the family members of Pramila. All these factors emerging in the prosecution evidence have not been appreciated by the trial court and reliance on these witnesses was placed by it which to our mind is contrary to the established legal principles of appreciation of evidence. *Kevji and others v. State of Rajasthan*, 2002 Cri LJ 725 (Raj) : 2002 (1) Raj (Cri) C 61 : 2002 (1) Raj W 525 (Raj) : 2002(1) WLC 547 (Raj).

The two appellants alongwith two others accused persons were charged for committing the murder and an offence under Section 27 of Arms Act. There was only one eye-witness and High Court confirmed the order of conviction on the ground that evidence of sole eye-witness was sufficient in the normal course to base a conviction. The Supreme Court held that presence of eye-witness at the scene of occurrence was highly doubtful and his testimony could not be relied upon as he being closely related to deceased was an interested witness. The Court set aside the conviction by giving the benefit of doubt to the accused appellants. This benefit was also extended to the accused who had not appealed. *Suresh Choudhary* v. *State of Bihar*, 2003 Cr LJ 1717 (SC) : AIR 2003 (SC) 1981 : 2003(4) SCC 128 : 2003(2) Supreme 523 : 2003(2) Crimes 48 (SC).

The Court refused to place reliance on evidence of sole eye-witness. Where in a land dispute the prosecution had failed to establish complete and conclusive chain of circumstances to bring guilt of accused. *Lallu Manjhi* v. *State of Jharkhand*, 2003 Cr LJ 914 (SC) : AIR 2003(SC) 886 : 2003(2) SCC 501 : 2002(10) JT 377 : 2003(1) Supreme 316 : 2003(1) Crimes 393 (SC).

In a case the sole eye-witness stated that the accused had killed his mother on village path by giving on her neck *dao* blow. The evidence was considered reliable and trustworthy as it was corroborated by evidence of investigating officer. It was held that culpability of the accused had to be judged not by the quantity but by the quality of the evidence tendered by the prosecution and that conviction of accused was proper. *Anil Chandra Deka* v. *State*, 2003 Cr LJ 2458 (Gau).

In a M.P. Case, the conviction based on testimony of sole eye-witness was set aside where the delay in lodging FIR was sufficiently not explained and the conduct of eye-witness to run without stop in order to get the help of relatives of the deceased was quite unnatural. *Nabab Khan* v. *State of MP*, 2003 Cr LJ 94 (MP) : 2003(2) All Ind Cas 501 : 2003(1) MPHT 165 : 2002(2) Cur Cri R 413.

In a Patna case, the evidence of eye-witness to incident was cogent and reliable, as death of deceased by gun shot injury was admitted by defence, establishing motive behind crime, place of incident, time and manner, it was held that conviction of accused warranted no interference. *Medni Singh* v. *State of Bihar*, 2005 (3) East Cr C 164 (Pat).

121. Solitary eye-witness.—The solitary eye-witness in the instant case was a chance-witness whose presence at the spot of incident was highly doubtful. His conduct of not informing anybody about the incident though persons were available on his way back until he went to village square appeared unnatural. In examination-in-chief he stated that he saw only one assault on deceased while in cross-examination, he stated that he saw accused attacking deceased twice and both inquires were caused in his presence. It was held that his evidence was not reliable. *Shankarlal* v. *State of Rajasthan*. AIR 2004 SC 3559 : 2004 Cr LJ 2874 : 2004(4) Supreme 345 : 2004(3) Crimes 132 (SC) : 2004(2) JCL 959.

In a murder case the sole eye-witness claimed that he had seen accused persons from a distance of 10 to 20 steps with their back towards him at night and had identified 10 out of 11 accused. It all appeared to be improbable as he was on inimical terms with accused and his ocular evidence was not supported by any other evidence. It was held that prosecution had failed to establish its case beyond doubt and conviction of accused was liable to be set aside by extending him the benefits of doubt. *Jasim Mian* v. *The State*, 2003 Cr LJ (NOC) 205 (Jhar) : AIR 2003 Jhar HCR 1110 : 2003 (2) JCR Jha 491.

122. End of Socitary Witness.—In the instant case the said witness was chance witness whose presence at spot of incident was highly doubtful. His conduct of not informing anybody about the incident though persons were available on his way back until he went to village square appearing unnatural. In examination-in-chief he stated that he saw only one assault on deceased while in cross-examination, he stated that he saw accused attacking deceased twice and both injuries were caused in his presence. His evidence was not reliable. There was unexplained delay in filing complaint. There was no other material base to convict the accused was held entitled to benefit of doubt. *Shankarlal* v. *State of Rajasthan*, 2004 Cr LJ 2874 : AIR 2004 SC 3559 : 2004(4) Supreme 345 : 2004(3) Crimes 132 (SC) : 204(2) JCC 959.

123. Conviction.—Accused suffered from deformity of fingers in both the hands. However he was fully capable of using his arms like normal person. His right thumb and index finger are sufficiently strong. Held, fact that he was not capable of holding any object with firm grip from either of his hands did not mean that he could not hold a knife at least in his right hand. It was common experience that physically challenged persons since birth as of necessity, impressed their own methods of doing things like a normal person. The ornament snatched from deceased were recovered at the instance of accused. The fact that no explanation was offered by accused as to how he came in possession of gold chain belonging to deceased is strong circumstance to prove his complicity. Other circumstances especially unexplained injuries on hand of accused and blood of same group being found on clothes of deceased as well as an accused gave rise to further presumption that the removal of gold ornaments and fatal attack on deceased had taken place as part of the same transaction. Each circumstance was incriminating in nature and totality of circumstances concdusively prove guilt of accused. Conviction was proper. *Gilbert Pereria* v. *State of Karnataka*, 2004 Cr LJ 4837 : AIR 2004 SC 4454 : 2004(7) JT 121 : 2004(4) Crimes 65 (SC) : 2004(6) Supreme 644 : 2004(7) Scale 99.

Where injury caused by accused by deadly weapon from behind with extreme force was inflicted intentionally which was sufficient in ordinary course of nature to cause death, then the conviction under Section 302, IPC warrants no interference. *Soham Singh* v. *State (NCT of Delhi)*, 2005 (2) Crimes 540 (Del).

The accused conspired to commit murder but certain accused were not named in FIR and this was considered inconsequential. The motive relating to land dispute was proved and guilt of accused was proved beyond any doubt. The conviction of accused under Section 302/120 was held proper. *Nirpal Singh* v. *State*, 2003 Cr LJ 4668 (P&H).

If certain persons are given benefit of doubt and are acquitted, that does not mean that others whose involvement in crime was proved should also be extended benefit of doubt. Their acquittal was set aside and conviction order of Sessions Judge was confirmed. *State of UP* v. *Rashid*, 2003 Cr LJ 2011 (SC) : AIR 2003 (SC) 1243 : 2003(9) SCC 449 : 2003(2) Supreme 743 : 2003(2) Crimes 65 (SC).

Merely because deceased and complainants had criminal track record would not be ground to discard evidence of witnesses which was otherwise reliable. The fact that the police had given clean chit to accused would be of no consequence. Conviction was held proper. *Dhanaj Singh* v. *State of Punjab*, AIR 2004 SC 1920 : 2004 Cr LJ 1807 : AIR 2004 SCW 1609 : AIR 2004 Jhar HCR 148 : 2004(2) Crimes 2 : 2004(3) Scale 93.

In the instant case, the witnesses saw accused at the time and place of inciden after the incident. Pistol was recovered from the accused and the bullet found therei tallied with empty khokha recovered from place of occurrence. The pistol recovered was in working condition and was used for firing. There was convincing evidence of witnesses as to how the incident occurred. It was held that the evidence regarding recovery of empty khokha from place of incident could not be discarded on ground that witness did not see such article lying there on ground after incident. Accused was liable to be convicted. *Hem Raj* v. *Raja Ram*, 2004 Cr LJ 901 : AIR 2004 SC 1489 : 2004(1) Supreme 510 : 2004(1) Crimes 317 (SC) : 2004(4) Scale 637.

In the instant case, the acquitted accused members of unlawful assembly had enmity with deceased. There was no finding that acquitted accused were not members of assembly or they ceased to be so. The fact that no injury could be assigned to the acquitted accused was held to be no ground to acquit them. *Jai Shree Yadav* v. *State of UP*, 2004 Cr LJ 4826 : AIR 2004 SC 4443 : 2004 All LJ 3232 : 2004(3) Crimes 286 (SC) : 2004(6) Supreme 236 : 2004(6) JT 519 : 2004(6) Scale 587.

It was alleged that the accused person armed with deadly weapons assaulted deceased persons. Motive was proved since father of accused was murdered for which deceased were made accused and were granted bail prior to the date of occurrence. Presence of eye-witnesses at place of occurrence and time of occurrence was not doubtful. Held, testimony of eye-witnesses was trustworthy and could not be discarded merely because they were related to deceased persons and inimical to accused. Acquittal of accused persons was proper. *State of UP* v. *Sheo Sanehi*, 2004 Cr LJ 4650 : AIR 2004 SC 4974 : 2004 All LJ 3784 ; 2004(9) JT 196 : 2004(8) Scale 520 : 2004(4) Crimes 163 (SC) : 2004(7) Supreme 275.

The accused armed differently came to the place of occurrence where PW1 was cutting fodder in his *nohara* and started firing indiscriminately in which two persons died on the spot and certain others received gunshot injuries. In Trial Court the accused persons were convicted under Sections 148, 302, 307 and 448 and one accused was also convicted under Section 3/25 of Arms Act but the High Court acquitted them. The Apex Court held that High Court had erred in acquitting the accused as evidence was sufficient to point to the guilt of accused. Hence, acquittal by High Court was set aside and conviction order of Additional Sessions Judge was restored. *State of Rajasthan* v. *Bhawani*, 2003 Cr LJ 3857 (SC) : AIR 2003 (SC) 4230 : 2003(7) SCC 291 : 2003(5) Supreme 287 : 2003(3) Crimes 228 (SC).

In a murder case, the wife had tried to rescue her husband, and had sustained some injury also. Her presence at the spot was found natural and her evidence was corroborated by medical evidence. It was held that conviction of accused was proper. *Brij Rani* v. *State of MP*, 2003 Cr LJ 3756 (SC) : AIR 2003 (SC) 3566 : 2003(3) Crimes 238 (SC) : 2003(5) Supreme 301.

The testimony of eye-witness showed that accused had fired on deceased resulting in injuries on chest and forehead but postmortem report did not show any pellet injury on forehead of deceased. From circumstances it appeared that eye-witness stated the pellet injuries due to presence of blood on forehead of deceased. It was held that testimony of eye-witness was reliable and conviction was proper. *Amba Lal* v. *State*, 2003 Cr LJ 115 (Raj) : 2003(1) WLC 587.

"A crime committed on Indian soil against the popular national leader a former Prime Minister of India, for a political decision taken by him in his capacity as the head of the executive and which met with the approval of the Parliament, by persons running political organisation in a foreign country and their agents in concert with some Indians for the reason that it did not suit their political objectives and of their organisation cannot but be a rarest of rare case. In such a case the part played by A-1 (Nalini) is a candid participation in the crime of conspiracy to assasinate Shri Rajiv Gandhi who was himself a young popular leader so much loved and respected by his fellow citizens and had been the Prime Minister of India. The conspirators including A-1 (Nalini) had nothing personal against him but he was targetted for the political decision taken by him as the Prime Minister of India. She in spite of being an Indian citizen joined the gang of conspirators and engaged herself in pursuit of common intention to commit the crime only because she was infatuated by the love and affection developed for A-3 Muragan and this played her part in execution of conspiracy which resulted in the assasination of Shri Rajiv Gandhi and death of many police officers and innocent citizens including a small girl. In a person like A-1 taking into consideration all the mitigating circumstances, there is no room for any lerienay kindness and beneficience". *State of Tamil Nadu* v. *Nalini* 1999 Cri LJ 3124 (SC) : AIR 1999 (SC) 2640 : 1999(5) SCC 253 : 1999(4) JT 106 : 1999(3) Scale 241 : 1999(5) Supreme 60.

When accused was found coming out of residential portion of house immediately after incident and was found carrying some articles wrapped in white sheet with stains of blood, conviction of accused was held proper. *Manmohan Singh* v. *State of Punjab*, 1997 AIR SCW 1003 : AIR 1997 SC 1773 : 1997 (2) JT 72 : 1997 (1) Scale 538 : 1997 (1) Supreme 671 : 1997 (1) Crimes 114 (SC) : 1997 Cr. LJ 1632.

The accused entered the house of deceased and inflicted serious injuries. The graphic description of incident given by the grand mother of deceased who was sleeping alongwith deceased was found genuine. The conviction was held proper. *Jagbandhu Kishan* v. *State*, 2003 Cr LJ 378 (Orissa).

The prosecution case was based on evidence of direct eye-witnesses who were reliable and trustworthy but due to winter holidays in Court FIR was presented before magistrate after lapse of one complete day which was not considered fatal to prosecution case. The conviction and sentence awarded under Section 302/34 were upheld. *Ram Dev* v. *State*, 2003 Cr LJ 1680 (Raj) : 2003(1) WLC 34.

When chain of incriminating circumstances is not complete, conviction is not sustainable. *Radhey Shyam* v. *State*, 1997 (1) Crimes 69 (Del).

In absence of reliable and independent corroboration of confessional statements of appellants, conviction cannot sustain. *Makhlal Mahto* v. *State of Bihar*, 1997 (1) Crimes 568 (Pat).

When only eye-witness turned hostile and there was inordinate delay in recording statement under Section 161. Cr PC with material contradictions and improvements, conviction was held not sustainable. *Shaikh Shamshad* v. *State of A.P.*, 1997 (1) Crimes 50 (AP).

.In absence of any evidence to connect accused for injury found on deceased wife and that accused was in house on fateful night, no presumption can be drawn that accused must be in house at that time of occurrence and hence conviction not sustainable. *Mehmood* v. *State of Rajasthan*, 1997 (1) Crimes 413 (Raj).

124. Conviction held not sustainable.—In the instant case the accused were well known to eye-witnesses. Deposition of eye-witness was not corroborated by statement in FIR. He and other eye-witness sought to implicate more accused persons for the first time in course of their deposition. The credibility of the witnesses was doubtful. The person who could really unfold prosecution case and who ought to have been main target, if motive alleged was true was not examined as witness. FIR was lodged after much deliberation and the explanation for delay in lodging FIR was not found acceptable. It was held that acquittal could not be interfered. *State of Punjab* v. *Ajaib Singh*, AIR 2004 SC 2466 : 2004 Cr LJ 2547 : 2004(3) Supreme 494 : 2004(2) Crimes 459 (SC) : 2004(2) JCC 842.

There was fight due to misunderstanding in which death of 12 persons was caused. The ocular evidence and medical evidence were discrepant. The acquittal of accused was held proper. *State of Punjab* v. *Harbans Singh*, 2003 Cr LJ 2335 (SC) : AIR 2005 (SC) 2268 : 2003(11) SCC 2003 : 2003(3) Supreme 492 : 2003(2) Crimes 479.

There was different versions of witnesses as to scene of offence and investigation had examined the child eye-witness 4-5 days after the occurrence but investigating officer projected to have examined him on the same day. There was another eye-witness who had turned hostile. The conviction was set aside. *Zafar* v. *State*, 2003 Cr LJ 1218 (SC) : 2003 (SC) 931 : 2003(3) SCC 51 : 2003(1) Supreme 763 : 2003(2) Crimes 93 (SC).

In the instant case, the eye-witness though not chance witness as he had brought lunch to his uncle (victim) in the grazing field but there was missing link in evidence as after serving lunch why he waited for two hours, in grazing field when incident took place. The conduct of the eye-witness was unusual as though he saw accused persons heading towards his uncle with weapons, he hid behind tree, however, when he saw his father in neighbouring field he did not join him. There were material contractions between evidence of eye-witnesses and medical evidence indicating suspicion about presence of eye-witnesses. There was considerable doubt on regard to place of incident and also as to lodging of FIR at place of occurrence after deliberations. Police was unable to find any blood on spot though body was lying at spot when the police came. It was held that the acquittal of accused was justified. *Ram Sewak* v. *State of MP*, 2004 Cr LJ 3043 (SC) : AIR 2004 SC 4592 : 2004 (4) Scale 698 (SC) : 2004 (3) Supreme 501 : 2004 (3) SLT 400 (SC).

The prosecution case was that the accused instigated or exhorted his father to shoot deceased. There was considerable discrepancy in the statements of prosecution witnesses or the language used by accused to exhort and the manner and the place where the said exhortation was given. The complaint filed did not reveal that the accused had exhorted or instigated his father to shoot. It was held that the conviction of accused with the aid of Section 34, IPC was not proper. *Abdul Wahid* v. *State of Rajasthan*, AIR 2004 SC 3211 : 2004 Cr LJ 2850 : 2004(3) Crimes 75 (SC) : 2004(4) Supreme 103 : 2004(4) Scale 719.

The accused were assailed to have opened fire on the members of the prosecution party who were sitting on the front seat of the jeep and this caused immediate death of two persons and injuries to others. The prosecution witness was doubtfully present on scene and motive of murder could not be proved. Trial Court acquitted the accused but High Court reversing the findings of trial Court had convicted the accused. On appeal

Supreme Court setting aside the conviction held that High Court has committed error in interfering with the order of acquittal as order of trial Court was not suffering from the vice of perversity. *Shailendra Pratap* v. *State of U.P.*, 2003 Cr LJ 1270 (SC) : AIR 2003 (SC) 1104 : 2003(1) SCC 761 : 2003(1) Crimes 324 (SC) : 2003(1) Supreme 160.

The accused was charged for committing the murder of deceased but post mortem report and medical evidence as to actual occurrence of incident, its place and time were not unanimous. The eye-witnesses, wife and mother-in-law of deceased stated that deceased had taken meals just before the incident but medical report stated that stomach including both intestines were empty. It was held that serious dispute as to actual time of incident was fatal to the prosecution case and accused was entitled to the acquittal. *Moti* v. *State of U.P.*, 2003 Cr LJ 1694 (SC) : AIR 2003 (SC) 1897 : 2003(9) SCC 444 : 2003(2) Supreme 806 : 2003(2) Crimes 62 (SC).

In *State* v. *Raja*, 2003 Cr LJ 1816 (All) : 2003 All LJ 41 : 2003(46) All Cri C 49 : 2003(1) All Cri LR 402 : 2003(1) All Cri R 42, there was contradiction between medical report and oral evidence and the acquittal was held proper.

The accused persons were convicted under Sections 302/149 and 148 but on appeal it was found that injuries sustained by accused were not explained whereas it was necessary. It was held that true genesis and manner of occurrence was not disclosed. The conviction of accused was set aside. *Lakhwinder Singh* v. *State*, 2003 Cr LJ 1694 (SC) : AIR 2003 (SC) 1897 : 2003(9) SCC 444 : 2003(2) Supreme 806 : 2003(2) Crimes 62 (SC).

In the instant case, several discrepancies and short-comings were noticed in the evidence in respect of recovery of pistol and empty cartridges. There was nothing to show that the gun to which reference was made was the weapon of assault. The custody of empty cartridges recovered from the spot was not established. It was not explained as to where the empty cartridges were till then lying and with whom. It was not clear from evidence that it was hidden in such a way so as to making it difficult to be noticed. The evidence tendered was totally silent as to in whose custody were the bullets, empty cartridges and the pistol. It was held that the discrepancies and short-comings as noticed above considerably erode credibility of the prosecution version. That being so, the prosecution could not be said to have established the accusation against the accused beyond reasonable doubt and the accused would, therefore, be entitled to be acquitted. *Anter Singh* v. *State of Rajasthan*, AIR 2004 SC 2865 : 2004 Cr LJ 1380 : 2004(1) Supreme 1005 : 2004(2) Crimes 38 (SC) : 2004(2) JT 332 : 2004(1) JCC 470.

In the instant case 39 persons of a rival groups in a village was alleged to have assaulted and killed two persons. The evidence of the eye-witness, who was injured, claimed that he did not get medically examined being afraid of the accused persons would not be tenable. He claimed to have stated before the police officers about the incident and on the basis of that the first information report was recorded. Thereafter, there was no reason for him to be apprehensive as claimed not to go for medical treatment. If really he was so terrified it cannot be understood as to how after two days the fear vanished and he went for treatment. The conduct of the father of deceased was equally shrouded in mystery. Though the Police post was just in front of his house, he did not choose to inform the police and the FIR was lodged after considerable length of time.

Further, there were clear contradictions between the versions of PW-1 and PW-2. The conduct of PW-4 regarding search of dead bodies who could not trace the dead body was highly improbable as the dead bodies were found 15 to 20 yards from place of occurrence. There was no definite information in FIR *vis-à-vis* the crime. Calling dog squad by police showed that the names of the assailants were not known. In the circumstances the acquittal of the accused was held justified. *Gorle S. Naidu* v. *State of AP*, 2004 Cr LJ 924 : AIR 2004 SC 1169 : 2004(1) Crimes 212 (SC) : 2003(8) Supreme 893 : 2003(10) JT 170 : 2003(10) Scale 698.

The deceased was attacked by the accused persons at midnight while he was sleeping alongwith three other persons. Two of eye-witnesses turned hostile and did not support the prosecution case. Story of naming accused by deceased to his mother was falsified by medical report which stated that the injuries sustained could have caused instantaneous death. None of eye-witnesses could have identified assailants as it was dark night. The guilt was not proved beyond doubt and conviction was set aside. *Baikunth Mahto* v. *State*, 2003 Cr LJ 2135 (Jhar) : AIR 2003 Jhar HCR 569.

In the instant case there was material contradiction in prosecution evidence in respect of time and date of incident. The witnesses from whom most important of recoveries re stamps *etc.* were made were not examined. There was no material to show that the blood-stained towel was concealed as such of manner that I.O. could not have noticed it on the day of inquest itself. Acquittal of accused was held proper. *State of Tamil Nadu* v. *Surinder*, 2004 Cr LJ 913 : AIR 2004 SC 1216 : 2003(8) Supreme 730 : 2004(1) Crimes 141 (SC) : 2003(10) JT 190.

The accused was alleged to have given an axe blow on the head of deceased resulting into his death but medical evidence was inconsistent with the alleged manner of occurrence and solitary evidence of son was not corroborated by any independent evidence. The conviction of accused was set aside. *Khadi Oraon* v. *State*, 2003 Cr LJ (NOC) 87 (Jhar) : Air 2003 Jhar HCR 303 : 2003(1) JCR JHA 2914 : 2003(1) JLR 146.

In an Allahabad case also where the eye-witness had failed to explain the injuries sustained by accused, the benefit of doubt was given to the accused. *Ram Asrey* v. *State*, 2003 Cr LJ 2276 (All) : 2003 (46) ACC 392 (All) : 2003 All LJ 808 : 2003 (46) All Cri C 392.

In *Brij Pal Singh* v. *State of MP*, 2003 Cr LJ 2533 (SC) : AIR 2003 (SC) 2460 : 2003(11) SCC 219 : 2003(4) JT 378 : 2003(4) Crimes 40 (SC) : 2003(2) Supreme 866 the evidence of eye-witnesses was contrary to the opinion of the ballistic expert. The eye-witnesses deposed that the accused-appellant had fired shot by 12 bore gun but missed the target and hit the wall. As per ballistic expert the truth was otherwise. The eye-witnesses were all relatives and their evidence was contradictory also. The accused were held entitled to acquittal.

The accused were alleged to have strangulated the deceased to death for not bringing enough dowry but prosecution could not establish that there was any demand of dowry. Apart from this who committed the murder could also not be established. The statement of co-accused under Section 313 Cr PC that deceased had consumed poison and he saw her husband pressing her neck neither implicated him nor could be made use of by prosecution to prove the guilt of accused persons. The acquittal of accused persons was held proper. *Subimal Sarkar* v. *Sachindra Nath Mandal*, 2003 Cr LJ 1274

(SC) : AIR 2003 (SC) 1108 : 2003(2) SCC 566 : 2003(1) Supreme 252 : 2003(1) Crimes 324 (SC).

In a Supreme Court case the accused had killed his classmate from whom he had borrowed money. The evidence showed that the money was paid back and no other evidence to link the accused was available. The recovery made at the instance of accused was not reliable as people knew it in advance that there was going to be such a recovery. The conviction of accused was, therefore, set aside as presumption under Section 114(a) that accused was perpetrator of crime could not be raised. *Babu Das* v. *State of MP*, 2003 Cr LJ 2536 (SC) : 2003(9) SCC 86 : 2003(4) JT 289 : 2003(3) Supreme 562 : 2003 SCC (Cr) 1749 : 2003(2) Crimes 520 (SC).

Three persons were charged under Section 302/34 for causing death of deceased but main accused was convicted under Section 302 and remaining other two under Section 302/34. On appeal it was found that prosecution witness of occurrence did not withstand cross-examination and they did not know the names of assailants. The evidence of father of deceased was also not found reliable and worthy of credence in view of inconsistencies and improbabilities of material facts. It was held that case of prosecution is not proved beyond doubt and conviction of accused was liable to be set aside. *Atul Singh* v. *State*, 2004 Cr LJ 111 (All) : 2003 All LJ 2742 : 2003(2) All Cri R 1917 : 2003 All LJ 2782.

In a case conviction was set aside when there was no blood on the person of deceased, delay in lodging FIR was not explained and the probability of the eye-witness was ruled out. *Nagappa* v. *State*, 2003 Cr LJ 796 (Kant) : AIR 2003 Kant HCR 279 : 2003(2) Kant LJ 578.

The accused was alleged to have killed the deceased and his 12 years old son but testimony of wife and daughter of deceased was not trustworthy as the same was full of the controversy and chances of false implications could not be ruled out. The acquittal of accused in these circumstances was held proper. *State* v. *Krishna Pal*, 2003 Cr LJ 1115 (All) : 2003 All LJ 221 : 2003(46) All Cri C 47.

In a case, the complainant was only eye-witness who had concealed himself in a fodder room at the relevant time. But this fact was not established beyond doubt. Other evidence including recovery of pistol was also not relevant. It was held that the conviction was not proper. *Ganga Singh* v. *State*, 2003 Cr LJ 653 (All) : 2002 All LJ 2659 : 2002(3) All Cri R 2652.

In a Supreme Court case, there was long-standing enmity between eye-witness and family of accused and incident had taken place at a village in the month of June and there was no reason for witnesses to go to another on bicycle in hot summer season. There was also contradiction between his testimony and medical report and no cycle of witness was found on spot. The conviction of accused was held not sustainable. *Baldev Singh* v. *State of MP*, 2003 Cr LJ 880 (SC) : AIR 2003 (SC) 2098 : 2003(9) SCC 45 : 2003(1) Supreme 306 : 2003(1) Crimes 384 (SC).

The accused persons were uprooting the crops when son of witness questioned their presence in the field. The son was killed instantly but witness who could have been main target was spared. This fact had caused serious doubt about the presence of said witness at place of incident. The other eye-witnesses were partisan witnesses. The conviction based on such evidence was not considered proper and conviction of the accused was set aside. *State of UP* v. *Bhagwant*, 2003 Cr LJ 2337 (SC) : AIR 2003 (SC) 2293 : 2003(10) SCC 74 : 2003(3) Supreme 439 : 2003(2) Crimes 464 (SC).

The version of eye-witness was unreliable and their presence on spot was also doubtful. The co-accused had no motive to join accused in fatal assault. It was held that the acquittal of accused was proper. *Mohan Singh* v. *Prem Singh*, 2003 Cr LJ 11 (SC) : AIR 2002 (SC) 3582 : 2002(10) SCC 236 : 2002(4) Crimes 453 (SC) : 2002(7) Supreme 163.

Where the death was due to shock and haemorrhage no culprit was named in FIR as it was not sure that death was caused due to fatal injury inflicted by accused and above all the testimony of eye-witnesses was found unreliable, conviction of accused was set aside. *Lacheppu* v. *State*, 2003 Cr LJ 668 (All) : 2002 All LJ 2721 : 2002(45) All Cri C 1035 : 2002(3) All Cri R 2471.

In a M.P. Case, the accused alleged to have caused the death of deceased but no evidence linking the accused with alleged crime could be produced. The conviction of accused was set aside by extending to him the benefit of doubt. *Natta* v. *State*, 2003 Cr LJ 2222 : 2003(1) Crimes 502 : 2003(2) Cur Cri R 575 : 2003(1) MPLJ 613.

In a Supreme Court case, where a lady and her 8 months old daughter was killed different versions of a witness were recorded and thus credibility of said witness was sufficiently impeached. It was held that he certainly did not come in the category of witness on whom implicit reliance could be placed as there was no evidence to corroborate his testimony and therefore the conviction based on such evidence was liable to be set aside. *Sadhu Ram* v. *State*, 2003 Cr LJ 2331 (SC) : AIR 2003 (SC) 3530 : 2003(11) SCC 231 : 2003(2) Crimes 307 (SC) : 2003(3) Supreme 357.

In an Allahabad case the evidence of relation witnesses *i.e.* brother, sister-in-law and mother of deceased was contradictory and full of falsehood and embellishment and no independent witness was produced. The medical report also did not support prosecution story that deceased was assaulted by bricks. It was held that the defence version that informant brother had killed deceased on account of suspicion of illicit intimacy of deceased with his wife appeared to be probable and conviction was not justified. *Jai Narain* v. *State*, 2003 Cr LJ 168 (All) : 2002 All LJ 2415 : 2002(3) All Cri R 2264 : 2003(1) All LJ 73.

The accused in a case was alleged to have murdered the dairy owner with whom he was employed but extra judicial confession made to the person who had no intimacy with accused was found not reliable. It was held that conviction was liable to be set aside as guilt of accused was not proved beyond reasonable doubt. *Chhotu* v. *State*, 2003 Cr LJ (NOC) 82 (P&H) : AIR 2004 Jhar HCR 561 : 2004(1) DMC 260 : 2004(1) JCJR 33.

The death of accused was caused due to the strangulation. Recovery of dead body, chappals, bags and books belonging to deceased at instance of accused was made and deceased was last seen in the company of deceased. The conviction of accused for offence under Section 302/364 was held proper. *Suresh Dutt* v. *State*, 2003 Cr LJ 3342 (Raj) : 2003(3) Crimes 15 : 2003(4) Raj LW 2552 : 2003(3) WLC 655.

Accused along with deceased stayed in a hotel during the night and in early morning left the hotel asking the waiter to take care of their uncle who was in room and they will come back very soon. Recovery of articles belonging to deceased was found not reliable. The only proof that accused had hired a taxi could not itself form basis of conviction. The conviction was quashed and judgment of High Court was reversed. *Shivraj Bapuray Jadhav* v. *State*, 2003 Cr LJ 3542 (SC) : AIR 2003 (SC) 3578 : 2003(6) SCC 392 : 2003(5) Supreme 65 : 2003(3) Crimes 161 (SC) : 2003(3) JT 160.

In a Supreme Court case, the clash was between two persons belonging to difference political parties but it took twelve hours to lodge the FIR whereas police station was only at hundred meters distance. The names of assailants were not mentioned to the doctor who had examined the deceased and injured witness was another circumstance against the prosecution. Hence possibility of implication of accused persons as a result of after thought due to political bitterness could not be ruled out. Hence conviction order of High Court was set aside and acquittal order of trial Court was restored. *Rajeevan* v. *State of Kerala*, 2003 Cr LJ 1572 (SC) : AIR 2003 (SC) 1813 : 2003(3) SCC 355 : 2003(2) Supreme 852 : 2003(2) Crimes 265 (SC).

125. Medical evidence.—Medical evidence being only opinion evidence can not nullify absolutely unimpeachable evidence of eye-witnesses. *Pran* v. *Daula*, 1997 (1) Crimes 107 (SC).

In a murder case, the wife had tried to rescue her husband, and had sustained some injury also. Her presence at the spot was found natural and her evidence was corroborated by medical evidence. It was held that conviction of accused was proper. *Brij Rani* v. *State of MP*, 2003 Cr LJ 3756 (SC) : AIR 2003 (SC) 3566 : 2003(3) Crimes 238/(SC) : 2003(5) Supreme 301.

In the instant case, the accused husband and his parents were harassing the deceased wife by demand of dowry on various occasions. Even a month prior to the date of occurrence wife was compelled to bring dowry amount from her father and since the deceased did not bring the dowry amount demanded by the accused, the accused with the intention to commit murder of the deceased, had beaten her severely with force as a result of which the victim, who was pregnant by five months had fallen down. sustained hurt and started bleeding and died, further in order to screen the death of the victim. the accused poured kerosene on her dead body and closing the door and locking it from outside lighted match stick and threw the same through the open window of the kitchen and set fire to the dead body of the victim and ran-off from the scene.

The medical witness who was an expert witness knowing the medical science having studied and practiced in the field not only on her findings at the time of post mortem examination but also from out of the findings of the chemical analysis report was definitely able to arrive at the conclusion confirming the case of the prosecution that the deceased did not die of self-immolation committing suicide but it was a death due to asphyxia and after the death, pouring the kerosene, the burnt injuries found on the body of the deceased and therefore they could not have been caused by the deceased and all the circumstances leading to the death to have been caused and then for the burn injuries which were found on the body of the deceased to occur, all the evidences suggest only the accused to have committed the offence and in these circumstances. the conclusion of the trial Court that it was the accused who committed the murder and the other acts of burning the body, pouring kerosene and torching the same through the window standing from outside in order to make it appear that it was a suicide was proper and was rightly held guilty under Ss. 302 and 201 IPC and Sec. 4 of the Dowry Prohibition Act. *Dhandapani v. State*, 2005 CriLJ 2847 (Madras).

126. Death Sentence.—If after considering the material on records, the Court comes to the conclusion that the case belongs to the rarest of rare category, the acquittal or sentence of life imprisonment of Trial or High Court should not be considered to be a mitigating factor. *Devender Pal Singh* v. *State of Bihar*, 2003 Cr LJ 918 (SC) : AIR 2003 (SC) 886 : 2003(2) SCC 501 : 2003(1) Supreme 316 : 2003(1) Crimes 393 (SC).

Death sentence—Imposition—Considerations.—In a death sentence matter, it is not only the nature of the crime but the background of the criminal, his psychology, his social conditions and his mindset for committing the offence are also relevant. See also *Ravji alias Ram Chandra v. State of Rajasthan*, [1996 (2) SCC 175 : AIR 1996 SCW 132], this Court held as under:

> "...The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should"respond to the society's cry for justice against the criminal"...."

Dilip Premnarayan Tiwari & Anr vs State of Maharashtra, 2009 AIR SCW 7592 : AIR 2010 SC 361 : 2010 CriLJ 905 (SC) : 2009 (15) JT 1 (SC) : 2009 (14) Scale 489 (SC) : 2009 (8) Supreme 108 (SC) : 2009 (9) SLT 1 (SC) : 2010 (1) Crimes 3 (SC).

Brutal acts done by accused—Rarest of rare case. The defence of drunkenness can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The onus of proof about reason of intoxication due to which the accused had become incapable of having particular knowledge in forming the particular intention is on the accused. Basically, three propositions as regards the scope and ambit of Sec.85, IPC are as follows : (i) The insanity whether produced by drunkenness or otherwise is a defence to the crime charged; (ii) Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into account with the other facts proved in order to determine whether or not he had this intent; and (iii) The evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind is affected by drink so that he more readily give to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. In the present case, the plea of drunkenness can never be an excuse for the brutal, diabolic acts of accused. The trial Court and the High Court have rightly treated the case to be one falling in rarest of rare category thereby attracting the death sentence. *Bablu alias Mubarik Hussain v. State of Rajasthan*, 2007 CriLJ 1160 (SC).

In imposition of death sentence no rigid formula or standard could be fixed. Only a broad guideline consistent with legislative policy indicated by legislature in Section 354(3) Cr PC alone shall be considered for invoking the extreme penalty of death sentence. There is nothing wrong in pronouncement of sentence by Trial Court on same day on which conviction was passed specially when no request is made by accused for hearing of case for sentencing on some other date. *Gurdev Singh* v. *State of Punjab*, 2003 Cr LJ 3764 (SC) : AIR 2003 (SC) 4187 : 2003(7) SCC 258 : 2003(3) Crimes 242 (SC) : 2003(5) Supreme 320.

Both the sides were armed with deadly weapons, the case is not worth consideration, for award of a sentence graver than the life imprisonment, that is to say the death penalty. *Rahul Singh vs. State of H.P.*, 2010 (3) Cri LJ 3117 (HP).

It is true that the act of the appellant is barbaric and gruesome. Three helpless persons are done to death while asleep in a room which they thought to be safe after bolting the door from inside. The door is locked from outside to ensure that no one escapes. However, Court also finds that the appellant is not a professional or a hardcore killer. The prosecution has not been able to bring on record the exact manner in which the incident has occurred, the genesis or the sequence of the events, but evidence establish only the circumstances which leave no scope for any other hypothesis than the guilt of the appellant. But how the act was committed is not established. In this set of circumstances, it would be stretching a bit too far to put this case in the category of rarest of rare cases. Court has no material to come to the conclusion that the appellant would be a risk and menace for the society in future and his elimination is the only remedy for the safety of society. Further the appellant has a disabled wife and eight children to look after. We are, therefore, of the view that the punishment of death is a bit too harsh.

Foregoing discussion would result into partly allowing the appeal preferred by the convict appellant by altering the sentence from death penalty to imprisonment for life while confirming his conviction for the offence of murder. He shall suffer imprisonment for life, that is, till he breathes his last breath. *State of Gujarat vs. Fatehsinh Ramlal Chauhan*, 2010 (2) CrLJ 2473 (Guj).

In the instant case the accused being one of relatives was on visiting term with deceased and he eliminated his entire family including an infant of three years of age. There was no provocation and motive was to gain some financial benefit and evidence showed cold blooded and premeditated approach of accused. It was held to be a rarest of rare cases and imposition of death sentence was affirmed. The age of accused and dependency of his old parents was not considered. *Dayanidhi Bisoi* v. *State of Orissa*, 2003 Cr LJ 3697 (SC) : AIR 2003 (SC) 3915 : 2003(9) SCC 310 : 2003(5) Supreme 74 : 2003(3) Crimes 167 (SC).

The unarmed and helpless family members were attacked by their own servant and three of them were killed but fourth one had saved herself by locking in bath room. The evidence of this injured witness about sequence of events that happened from voices and conversation she heard clinchingly pointed to involvement of the accused. Considering the brutality of manner in which the crime was committed it was held to be a rarest of rare case and death penalty was held justified. *Om Prakash* v. *State of Uttaranchal*, 2003 Cr LJ 483 (SC) : 2003(1) SCC 648 : 2002(8) Supreme 589 : 2003(1) Crimes 180 (SC) : 2003 SCC (Cri) 412.

Imposition of Death sentence—Social issues—Multiple murders, outcome of inter-caste marriage.—Sushma was the younger sister of this accused and it is a common experience that when the younger sister commits something unusual and in this case it was an inter-caste, inter-community marriage out of the secret love affair, then in the society it is the elder brother who justifiably or otherwise is held responsible for not stopping such affair. It is held as the family defeat. At times, he has to suffer taunts and snide remarks even from the persons who really have no business to poke their nose into the affairs of the family. This was further aggravated because of the so-called higher status of a Brahmin family on the part of Dilip and so-called non-Brahmin status of Prabhu. It has come on record that Sushma was moved to Andheri at the house of Shashidharan and this ought to have added as a spark which resulted in tornado. Dilip undoubtedly was a young person not even having crossed his 25 years of life and not having any criminal antecedent. If he became the victim of his wrong but genuine caste considerations, it would not justify the death sentence. The murders were the outcome of social issue like a marriage with a person of so-called lower caste. However, a time has come when we have to consider these social issues as relevant, while considering the death sentence in the circumstances as these. The caste is a concept which grips a person before his birth and does not leave him even after his death. The vicious grip of the caste, community, religion, though totally unjustified, is a stark reality. The psyche of the offender in the background of a social issue like an inter-caste-community marriage, though wholly unjustified would have to be considered in the peculiar circumstances of this case.

No doubt, the murder was brutal. However, it has been pointed out that this was not a diabolic murder nor had the murderers acted in depravity of their minds by disfiguring the bodies. The incident must have taken place barely within 10-15 minutes when they came, assaulted the family members and left. True it is that the two ladies who were assaulted were helpless and so were Krishnan and Prabhu. But when we weigh all the circumstances, particularly, about the mindset of Dilip, the cruel acts on the part of the accused would not justify the death sentence. The disturbed mental feeling or the constant feeling of injustice has been considered by this Court as a mitigating circumstance in *Om Prakash v. State of Haryana*, 1999 (3) SCC 19, where the accused had committed the murder of seven persons. That is also an indicator to the fact that mere number of persons killed is not by itself a circumstance justifying the death sentence. In a death sentence matter, it is not only the nature of the crime but the background of the criminal, his psychology, his social conditions and his mindset for committing the offence are also relevant. *See also Ravji alias Ram Chandra v. State of Rajasthan*, 1996 (2) SCC 175.

Once this Apex Court decide not to award the death sentence to accused No. 1. Dilip, the accused No. 3, Manoj also deserves not to be given death sentence. Even he is a person without any criminal antecedents and he appears to have joined the company of Dilip only out of his commitment as he was shown to be a resident of the same house. We, therefore, do not think that even he deserves death penalty. Accused No. 2. Sunil has comparatively a lesser role. Admittedly, he has not assaulted Krishnan or Prabhu, to begin with. Who has assaulted Prabhu and Abhayraj is still not clear, as it could also be that in the assaults the leading role could have been taken by the unknown accused. In that view, he also does not deserve the death sentence. The question is then how are these accused persons to be dealt with. Ordinarily, they would be liable to be awarded the life imprisonment. *Dilip Premnarayan Tiwari & Anr. vs State of Maharashtra*, 2009 AIR SCW 7592 : AIR 2010 SC 361 : 2010 CriLJ 905 (SC) : 2009 (15) JT 1 (SC) : 2009 (14) Scale 489 (SC) : 2009 (8) Supreme 108 (SC) : 2009 (9) SLT 1 (SC) : 2010 (1) Crimes 3 (SC).

Imposition of Death sentence—When permissible?.—It needs to be reiterated that the choice of the death sentence has to be made only in the rarest of the rare cases and that where culpability of the accused has assumed depravity or where the accused is found to be an ardent criminal and menace to the society and; where the crime is committed in an organized manner and is gruesome, cold-blooded, heinous and atrocious; where innocent and unarmed persons are attacked and murdered without any provocation. *State of Punjab vs. Manjit Singh*, AIR 2009 SC 2888 : 2009 (8) JT 482 : 2009 (8) Scale 622 : 2009 (9) SCR 864 : 2009 (5) SLT 480.

Death sentence—Many persons murdered not by itself sufficient to justify death sentence.—When we weigh all the circumstances, particularly, about the mindset of Dilip, the cruel acts on the part of the accused would not justify the death sentence. The disturbed mental feeling or the constant feeling of injustice has been considered by this Court as a mitigating circumstance in *Om Prakash v. State of Haryana*, [1999 (3) SCC 19] where the accused had committed the murder of seven persons. That is also an indicator to the fact that mere number of persons killed is not by itself a circumstance justifying the death sentence. In fact in one other case reported as *Ram Pal v. State of U.P.* 2003 (7) SCC 141, total 21 persons were killed as the accused trapped them in a house and burnt the house. *Dilip Premnarayan Tiwari & Anr vs State of Maharashtra*, 2009 AIR SCW 7592 : AIR 2010 SC 361 : 2010 CriLJ 905 (SC) : 2009 (15) JT 1 (SC) : 2009 (14) Scale 489 (SC) : 2009 (8) Supreme 108 (SC) : 2009 (9) SLT 1 (SC) : 2010 (1) Crimes 3 (SC).

Death sentence—Number of deaths—Not determinative factor for awarding death sentence.—So far State's appeal as regards sentence is concerned, it is to be noted that number of deaths in a case would not be the determinative factor for awarding the death sentence. Even in the case of single victim death sentence can be awarded taking into consideration the circumstances of the case. In the instant case looking to the background facts it cannot be said that the High Court by altering the sentence from death to life has acted inappropriately. *Aqeel Ahmad v. State of U. P.*, AIR 2009 SC 1271 : 2008 (17) SCR 1330 (SC) : 2009 (1) JT 136 (SC) : 2008 (16) Scale 251 (SC) : 2009 (2) SLT 11 (SC).

Death sentence—Rarest of rare cases.—Extreme poverty had driven the appellant to commit the gruesome murder of three of his very near and dear family members – his wife, minor son and daughter.

There is nothing on record to show that appellant is a habitual offender. He appears to be a peace loving, law abiding citizen but as he was poverty stricken, he thought in his wisdom to completely eliminate his family so that all problems would come to an end. Precisely, this appears to be the reason for him to consume some poisonous substances, after committing the offence of murder. No witness has complained about his bad or intolerable behaviour in the past. Many people had visited his house after the incident is indicative of the fact that he had cordial relations with all. He is now about 35 years of age and there appear to be fairly good chances of the appellant getting reformed and becoming a good citizen.

Thus, looking to the matter from all angles and after giving our serious consideration to the whole matter, we are of the opinion that it is not a fit case where it would fall within the category of "rarest of rare case" and, therefore, death sentence as awarded to him by learned trial Judge and confirmed by High Court deserves to be set aside and quashed and is accordingly done so by us instead he is held guilty of commission of offence under Sec. 302 of the IPC on three counts and is awarded life imprisonment for the same. *Sushil Kumar vs. State of Punjab*, AIR 2010 SC 832.

Where act of accused is cruel in committing murder but not a rarest of rare type of murder therefore death sentence imposed on accused modified to imprisonment for life. *Krushna Naik* v. *State of Orissa*, 2005 Cr LJ 1343 (Ori) : 2005(29) All ind Cas 588 : 2005(2) Crimes 361 : 2005(99) Cut LT 283 : 2005(30) OCR 253 : 2005(1) Orissa LR 284.

Where accused committed crime in most barbaric manner to deter others from challenging supremacy of accused in village in broad day light in a pre-planned way then in absence of any mitigating circumstances in favour of accused, death sentence imposed on accused warrants no interference. *Holiram Bordoloi* v. *State of Assam*, 2005 Cr LJ 2174 (SC) : AIR 2005 (SC) 2059 : JT 2005(4) SC 249 : 2005(3) Supreme 232.

Where accused sacrificed a child of only one year before Goddess Kali for personal gain and to promote his fortunes, it was held that such unprovoked killing of defenceless child fell into rarest of rare cases and thus imposition of death sentence was justified. *Sushil Murmu* v. *State of Jharkhand*, 2005 (3) East Cr C 20 (SC).

While determining sentence in a case of rarest of rare cases, guide lines laid down by Apex Court in Machi Singh and Bachan Singh case to be kept in mind. *Sushil Murmu* v. *State of Jharkhand*, 2005(3) East Cr C 20 (SC).

Where deceased, a child of less than 6 years, was raped and thereafter brutally murdered then case falls under category of rarest of rare cases and as such imposition of capital punishment warrants no interference. *State of UP* v. *Satish*, 2005 Cr LJ 1428 (SC) : AIR 2005 (SC) 1000 : 2005(2) Supreme 13 : 2005(1) Crimes 146 SC : 2005 SCC (Cr) 642.

The five accused entered into the office of the deceased persons and started indiscriminate firing inside the office and committed the murder of deceased persons. The **deceased** thereafter ran away. It was held that as there was no evidence that the accused were hardened criminals and dangerous persons that to spare their life will endanger the society or community, the case was not the rarest of rare case calling for the death penalty was not made out. *Rajesh Sharma* v. *State of Uttaranachal*, 2005 Cr LJ 2846 (Uttr.) : 2005(2) Crimes 359 : 2005(118) DLT 60 : 2005(1) FAC 140.

The object of punishment has been succinctly stated in Halsbury's Laws of England (4th Edition; Vol. II; Para 482) thus :—

> "The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is

> deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided".

In *Dinesh vs. State of Rajasthan*, 2006 AIR SCW 1123 = 2006 (3) SCC 771, it is held:

> "An undeserved indulgence or liberal attitude in not awarding adequate sentence in such cases would amount to allowing or even to encouraging 'potential criminals'. The society can no longer endure under such serious threats. Courts must hear the loud cry for justice by society in cases of heinous crime of rape and impose adequate sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court".

In this case, the learned Additional Sessions Judge forgot the necessity of awarding due sentence. He had shown undue leniency in awarding a sentence lesser than the minimum sentence, that too, after finding that the appellant deserved no leniency and liable to be punished deterrently. He had assigned no reason to award a lesser sentence. The sentence awarded for offence under Section 302, IPC is illegal. But in view of our finding in appeal that the conviction under Section 302 is to be altered to one Section 304 Part II and we having been found that a sentence of rigorous imprisonment for ten years with fine would meet the ends of justice, no separate order is warranted in this Revision Case. Accordingly, the Revision Case is disposed of. We hope that the learned Additional Sessions Judge would take lessons. *Mohanan vs. State of Kerala*, 2010 (3) Cri LJ 2920 (Ker).

Imposition of Death sentence—Social issues—Multiple murders, outcome of inter-caste marriage.—Sushma was the younger sister of this accused and it is a common experience that when the younger sister commits something unusual and in this case it was an inter-caste, inter-community marriage out of the secret love affair, then in the society it is the elder brother who justifiably or otherwise is held responsible for not stopping such affair. It is held as the family defeat. At times, he has to suffer taunts and snide remarks even from the persons who really have no business to poke their nose into the affairs of the family. This was further aggravated because of the so-called higher status of a Brahmin family on the part of Dilip and so-called non-Brahmin status of Prabhu. It has come on record that Sushma was moved to Andheri at the house of Shashidharan and this ought to have added as a spark which resulted in tornado. Dilip undoubtedly was a young person not even having crossed his 25 years of life and not having any criminal antecedent. If he became the victim of his wrong but genuine caste considerations, it would not justify the death sentence. The murders were the outcome of social issue like a marriage with a person of so-called lower caste. However, a time has come when we have to consider these social issues as relevant, while considering the death sentence in the circumstances as these. The caste is a concept which grips a person before his birth and does not leave him even after his death. The vicious grip of the caste, community, religion, though totally unjustified, is a stark reality. The psyche of the offender in the background of a social issue like an inter-caste-community marriage, though wholly unjustified would have to be considered in the peculiar circumstances of this case.

No doubt, the murder was brutal. However, it has been pointed out that this was not a diabolic murder nor had the murderers acted in depravity of their minds by disfiguring the bodies. The incident must have taken place barely within 10-15 minutes when they came, assaulted the family members and left. True it is that the two ladies who were assaulted were helpless and so were Krishnan and Prabhu. But when we weigh all the circumstances, particularly, about the mindset of Dilip, the cruel acts on the part of the accused would not justify the death sentence. The disturbed mental feeling or the constant feeling of injustice has been considered by this Court as a mitigating circumstance in *Om Prakash v. State of Haryana*, 1999 (3) SCC 19, where the accused had committed the murder of seven persons. That is also an indicator to the fact that mere number of persons killed is not by itself a circumstance justifying the death sentence. In a death sentence matter, it is not only the nature of the crime but the background of the criminal, his psychology, his social conditions and his mindset for committing the offence are also relevant. *See also Ravji alias Ram Chandra v. State of Rajasthan*, 1996 (2) SCC 175.

Once this Apex Court decide not to award the death sentence to accused No. 1, Dilip, the accused No. 3, Manoj also deserves not to be given death sentence. Even he is a person without any criminal antecedents and he appears to have joined the company of Dilip only out of his commitment as he was shown to be a resident of the same house. We, therefore, do not think that even he deserves death penalty. Accused No. 2, Sunil has comparatively a lesser role. Admittedly, he has not assaulted Krishnan or Prabhu, to begin with. Who has assaulted Prabhu and Abhayraj is still not clear, as it could also be that in the assaults the leading role could have been taken by the unknown accused. In that view, he also does not deserve the death sentence. The question is then how are these accused persons to be dealt with. Ordinarily, they would be liable to be awarded the life imprisonment. *Dilip Premnarayan Tiwari & Anr. vs State of Maharashtra*, 2009 AIR SCW 7592 : AIR 2010 SC 361 : 2010 CriLJ 905 (SC) : 2009 (15) JT 1 (SC) : 2009 (14) Scale 489 (SC) : 2009 (8) Supreme 108 (SC) : 2009 (9) SLT 1 (SC) : 2010 (1) Crimes 3 (SC).

The confirmation of death sentence cannot be based only on the precedents and on aggravating facts and circumstances of any other case. The essential and relevant mitigating circumstances of the particular case always play a role of negative elements against the positive theory of death punishment. In the present case, admittedly there was no eye-witnesses. The whole conviction was based on circumstantial evidence. The prosecution proved through respective witnesses all connected circumstances to per point the guilt of the accused persons. Accused 'S' played vital role but he was missing. He was a young man having no earlier criminal records. It was held that in facts and circumstances of the case no "rarest of rare" case was made out and therefore the death penalty imposed on "S" was liable to be set aside. *State of Maharashtra* v. *Sahebrao*, 2005 Cr LJ 2788 (Bom) : 2005 All LJ 1607 : 2005(51) All Cric 899 : 2005(2) All ci R 1161 : 2005(29) All inad Cas 547 : 2005(3) Rec Cri R 283.

After the accused was spelled by the prosecution party as one of the culprits and he was confronted with that accusation, that he retaliated and dealt blow with full knowledge that the same might in the ordinary course of nature cause death. It was held that the case was not "rarest of rare" and, therefore, death sentence was liable to be modified to life imprisonment. *Krishna Naik* v. *State of Orissa*, 2005 Cr LJ 1343 (Orissa) : 2005(2) Crimes 361 : 2005(30) OCR 253.

Where a child of less than 6 years was raped and thereafter brutally murdered, it was held that the case fell on "rare of rarest" category and awarding death sentence was proper. *State of UP* v. *Satish*, 2005 Cr LJ 1428 (SC) : AIR 2005 (SC) 1000 : 2005(2) Supreme 13 : 2005(1) Crimes 146 SC : 2005 SCC (Cr) 642.

127. Appreciation of Evidence.—The only overt act attributed to A3 and A5 is that they have beaten P.W. 1 and P.W. 2 with sticks. P.W. 2 was examined by Dr. Venugopal (P.W. 9) and found two incised injuries. None of them could be attributed to a blow with a stick. P.W. 1 was examined by the same doctor and he noticed one small lacerated wound on the left wrist, a contusion on the left knee and an incised injury on the left ear. The contusion on the left knee could very probably be the result of any contact with hard objects while tumbling down it was a small contusion. It is difficult for us to countenance the situation that three lathi worn youthful sons-in-law would have inflicted all the blows with the sticks on P.W. 1 lady ultimately resulting in just one minor lacerated injury on her left wrist. The roles were attributed to the three sons-in-law as a result of the deliberations made during the interval between the time of occurrence and the lodging the FIR. That interval is quite good enough for embellishment and exaggerations after the deliberations with the relatives for whom P.W. 1 was waiting before the FIR was lodged by her. *Boya T. Venkatewarlu and others v. State of A.P.* AIR, 2002 SC 2419 : 2002 (10) SCC 208 : 2001 (5) JT 309 : 2001 (5) Supreme 675 : 2001 (4) SLT 489.

In a case, the accused were said to have attacked the deceased as a result of which he succumbed to his injuries. The High Court found the witnesses to be unreliable for the reasons recorded by it. The High Court considered the evidence of the witnesses and pointed out that infirmities in their evidence which discredited their testimony. It was held that appreciation of the evidence by the High Court was neither perverse nor were the findings recorded not supported by evidence on record and that the Supreme Court was not justified in interfering with the possible reasonable conclusion which could be arrived at on the basis of evidence on record. *State of UP* v. *Sunder Singh*, 2005 Cr LJ 2186 : 2005 SCC (Cri) 905 : AIR 2005 (SC) 2238 : 2005(3) Supreme 359 : 2005(2) Crimes 106 (SC) : 2005(3) SCC 734.

128. Awarding of Sentence–Interpetation of Judgement.—A perusal of the operative part of the judgment of the High Court clearly shows that so far as the punishment under Section 302 is concerned, it has disagreed with the Sessions Court and altered the sentence to one of life imprisonment from death. It has nowhere stated that it is also awarding a fine or that it was confirming the fine awarded by the Sessions Court for the offence under Section 302, IPC. In the absence of any such specific recording it should be deemed that the High Court has awarded only a sentence of life imprisonment for an offence under Section 302, IPC. *Rachhpal Singh v. State of Punjab*, AIR 2002 SC 2710 : 2002(6) SCC 462 . 2002(5) JT 388 : 2002(5) Scale 308 : 2002(5) Supreme 118.

Court can sentence accused to imprisonment for *rest of his life* or term excepting 14 years. When a murder convict comes to Supreme Court carrying a death sentence awarded by the trial Court and confirmed by the High Court, the Court may find that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment which, subject to remission, normally works out to a term of 14 years would be grossly disproportionate and inadequate. If in such cases the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court, i.e., the vast hiatus between 14 years' imprisonment and death. The Court, therefore, can substitute a death sentence by life imprisonment for rest of life of convict or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.

The formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of the rare cases.

Section 45 of the Penal Code defines "life" to mean the life of the human being, unless the contrary appears from the context. Section 53 enumerates punishments, the first of which is death and the second, imprisonment for life. Section 57 provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. Section 57 of the Penal Code does not in any way limit the punishment of imprisonment for life to a term of twenty years. Section 57 is only for calculating fractions of terms of punishment and provides that imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. It is now conclusively settled that the punishment of imprisonment for life handed down by the Court means a sentence of imprisonment for the convict for the rest of his life. As regards provisions for remission of sentence under Criminal P. C. and the prisons Act and Rules they can apply only to sentences of fixed term and life imprisonment, being for the rest of life, is by nature indeterminate. The remission rules are, however, applied to life convicts by deemed conversion of life imprisonment into a fixed term of 20 years. The deemed conversion of life imprisonment into one for fixed term by executive orders issued by the State Governments apparently flies in the face of a long line of decisions by Supreme Court and has no statutory sanction. Life convicts are therefore, granted remission and released from prison on completing the fourteen year term without any sound legal basis. Moreover, remission is allowed to life convicts in the most mechanical manner without any sociological or psychiatric appraisal of the convict and without any proper assessment as to the effect of the early release of a particular convict on the society. The grant of remission is the rule and remission is denied in the rarest of the rare cases. *Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka*, 2008 CriLJ 391 (SC).

129. Death Sentence reduced to life Imprisonment.—The medical evidence of the present case also creates a heavy shadow of doubt in the presence of the witnesses because of their occular testimony being at variance with the medical evidence. It is consistent case of both these witnesses that the appellant at the time of incident was having a Pharsa while his unknown companions were having spears and they all had caused injuries to the deceased from their respective weapons. A perusal of the post mortem report shows that injury No. 8 was a bone deep lacerated wound. Doctor Agrawal P.W. 3 has admitted in his cross-examination that this injury was the result of lathi below. It was certainly an injury caused by a hard blunt object. How this injury was sustained by deceased has not been explained by both these witnesses. In addition to that contrusions all around both the wrists were also found. This also indicates that perhaps both the hands of the deceased were tied with a rope before he was mercilessly assaulted. None of the witnesses stated so. Neither in the F.I.R. nor in his statement before the Court the first informant gave any explanation of the delay in F.I.R. Since the F.I.R. was lodged with a considerable delay, possibility of the false nomination of the appellant on account of manipulation and consultation cannot be ruled out. *Sita Ram v. State of U.P.*, 2002 Cri LJ 2915 (All.) : 2002 (44) ACC 1118 : 2002 (2) A Cri R 1054 (All).

Reverting back to the present case, it is no doubt true that both the respondents behaved in a most cruel manner, killed four persons while they were asleep. Three, out of the four deceased persons, were murdered within the precincts of a Gurdwara. But, there are certain mitigating circumstances in the case which cannot be lost sight of. Both the respondents, as is disclosed from the records, had illicit relationship with the third accused namely Bhinder Kaur and when she narrated her woes and the harassment, both the accused persons, as it appears from the record, lost their balance and acted in a cruel manner by entering into the house of Sewa Singh-deceased in the dead night and killing Sewa Singh in the house and other three sons in the Gurdwara. Thereafter, they also gave threat to everybody outside the house by stating that they have killed those persons and, therefore, no one should dare to come near them. This behaviour on the part of the accused-respondents would show that they acted in the manner being driven more by infatuation and also being devoid of their sense on coming to know about the ill treatment meted out to Bhinder Kaur. Though the act of the accused is a gruesome one but it was a result of human mind going astray. No doubt, they acted in a ghastly manner for which, in our considered view, they have been adequately punished. The High Court has given its reasons for not awarding the death sentence and also relied upon a Supreme Court decision for the purpose.

In view of the aforesaid discussion, keeping in view entire facts and circumstances of the case, the reasons given by the High Court for altering and converting capital sentence to a sentence of life are found to be cogent and reasonable. We do not intend to interfere with the said judgment and order passed by the High Court. Therefore, the life sentence awarded to all the three accused persons by the High Court stands upheld. *State of Punjab vs. Manjit Singh*, AIR 2009 SC 2888 : 2009 (8) JT 482 : 2009 (8) Scale 622 : 2009 (9) SCR 864 : 2009 (5) SLT 480.

The appellant though hailing from a poor family had no criminal background and it could not be reasonably postulated that he will not get rehabilitated or that he would be a menace to the society. The boy of tender age would also once for all be deprived of the parental protection. Keeping in view all these aspects, in the opinion of the court, it could not be said that the imposition of life imprisonment would not adequately meet the requirements of the case or that only an imposition of the extreme punishment alone would do real or effective justice. Therefore, the sentence of death commuted to imprisonment for life. *Vashram Narshibhai Rajapara v. State of Gujarat*, 2002 Cri LJ 2930 (S.C.) : AIR 2002 SC 2211 : AIR 2002 SCW 2314 : 2002(2) Crimes 306 : 2002(4) Scale 95.

The accused was charged for committing the murder of three persons and assaulting the other four but had done this due to extreme mental and emotional disturbance. This was not considered in rarest of rare cases and death sentence was reduced to imprisonment for life. *State of Rajasthan* v. *Pappu*, 2002 Cr LJ (NOC) 214 (Raj) : 2002(4) Raj LW 1956.

Where the accused after killing the deceased had stolen his gold ring and chain, it was held that prosecution had made out its case against the accused under Section 302 and death sentence was converted into life imprisonment. *Kurale Pullaiha* v. *State*, 2003 Cr LJ 1060 (AP) : 2002(2) ALD (CRI) 659 : 2003(1) Andh LT (Cri) AP 58.

Death sentence—Imposition—Considerations.—In a death sentence matter, it is not only the nature of the crime but the background of the criminal, his psychology, his social conditions and his mindset for committing the offence are also relevant. See also *Ravji alias Ram Chandra v. State of Rajasthan*, [1996 (2) SCC 175 : AIR 1996 SCW 132], this Court held as under:

> "...The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should"respond to the society's cry for justice against the criminal"...."

Dilip Premnarayan Tiwari & Anr vs State of Maharashtra, 2009 AIR SCW 7592 : AIR 2010 SC 361 : 2010 CriLJ 905 (SC) : 2009 (15) JT 1 (SC) : 2009 (14) Scale 489 (SC) : 2009 (8) Supreme 108 (SC) : 2009 (9) SLT 1 (SC) : 2010 (1) Crimes 3 (SC).

In a case according to circumstantial evidence accused and her husband had killed her parents, brother and grand mother and their bodies were hidden in septic tank behind the house. The motive was to misappropriate the property of deceased and confessional statement of approver pointed towards the accused. The charge of murder was proved beyond doubt but seeing the probabilities of reforms in accused persons, the death sentence was modified to life imprisonment. *State of Jharkhand* v. *Saiyed Rizwan*, 2003 Cr LJ 2098 (Jhar) : AIR 2003 Jhar HCR 513 : 2003(1) Cur Cri R 399 : 2003(2) JCR JHA 235.

Incidentally, the prosecution involved both the father and the son whereas the father has to wait outside, the son was completing his part of duty in a most heinous killing of four persons. The Sessions Court, however in the absence of iota of evidence of even his presence outside the door acquitted the father through convicted the son under Section 302 and the High Court converts the sentence of death penalty to that of life imprisonment but the State has also appealed against the High Court's finding and as noticed above Mr. Sushil Kumar appearing for the State in no uncertain terms submitted that State's appeal is by reason of the fact that a social evil ought not to be allowed to be in the midst of the society since the accused Ravi is not only an evil but a social menace. State's anxiety to put a man in the gallows is however not every plainly understandable neither it is understanding as to the State's attitude being eye for an eye and tooth for a tooth – it is true that it is the responsibility to maintain law and order but the State on the other hand also maintains reformatory schools and if the State is failed to bring the accused to books in a Court of law can the State's failure be countenanced by the apex Court? Why was not Sukhdayal examined? Why there weren't any independent witness? Mr. Sushil Kumar had no answer. Obviously erudite as he is, only contended that the records otherwise would be sufficient to bring home the charge and the penalty imposed by the Sessions Court. We are however not in a position to lend any credence to the submissions of Mr. Sushil Kumar that the death penalty ought not to have been transformed to that of life imprisonment as is sought to be done by the High Court. *Deepak Kumar* v. *Ravi Virmani*, AIR 2002 SC 1320 : 2002 Cr LJ 1781 : (2002) 2 SCC 737 : 2002(1) Supreme 458 : 2002(1) JT 555 : 2002(1) Sale 570.

Where prosecution successfully prove its case that accused running an Ashram and known as Goodman had raped 13 Ashram girls and committed murder of one of them who were mostly orphans and destitutes therefore conviction and sentence of life imprisonment needs no interference. *Kamalanatha* v. *State of T.N.*, 2005 (3) East Cr C 78 (SC) : AIR 2005 (SC) 2132 : 2005(5) SCC 194 : 2005(3) Crimes 24 (SC) : 2005(4) Supreme 501.

The accused slit the neck of deceased with a shaving razor in the ward of jail hospital. There was sufficient evidence to point out the guilt of accused but both parties were rivals in their trade and accused as well as deceased had criminal and anti social antecedents. The crime committed in this case was not extremely brutal, grotesque, diabolical, revolting or dastardly and Court, therefore, did not consider it rarest of rare cases and sentence of death was modified to a sentence of R.I. for life. *State of Jharkhand* v. *Anil Sharma*, 2003 Cr LJ 1739 : AIR 2003 Jhar HCR 436 : 2003(1) East Cri C 131 : 2003(1) JLJR 155.

The accused had committed murder by pouring acid on his near relative, maternal uncle's son due to some family dispute but prosecution failed to prove that the accused was a threat to society and was not amenable for reformation. The death sentence of accused was reduced to imprisonment for life. *The Public Prosecutor* v. *Pathuraji Narasimha Rao*, 2003 Cr LJ (NOC) 229 : AIR 2003 Jhar HCR 1124 : 2003(9) All Ind Cas 599 : 2003(2) BLJR 1389.

The accused had shot dead three Police personnel who were his colleagues because constable (deceased) had initiated action against him. It was held that killing was without premeditation and motive was out of panic reaction and in state of frenzy. Death sentence was commuted to imprisonment for life. *Gyasuddin Khan* v. *State of Bihar*, 2004 Cr LJ 395 (SC) : AIR 2004 (SC) 210 : 2003(9) JT 1 : 2004(1) Crimes 90 (SC) : 2003(8) Supreme 499.

The incident in question was sequel to murder of close relatives of accused by members of victim's family. The incident was sufficient to provoke the accused persons who had jointly perpetrated the crime and were convicted and awarded different punishment *i.e.* death sentence to accused and imprisonment for life to co-accused as his age factor was taken into the consideration. The accused awarded death penalty preferred an appeal questioning the sentence of death on various grounds. It was held that role played by appellant was similar to the role played by the other accused persons who were given lesser sentence. The appellant was not leader of gang and was in custody for nearly 17 years. These were circumstances which should have been considered as mitigating circumstances in awarding the punishment. The death sentence of accused appellant was accordingly converted to imprisonment for life. *Ram Pal* v. *State of UP*, 2003 Cr LJ 3760 (SC) : AIR 2003 (SC) 4168 : 2003(7) SCC 141 : 2003(5) Supreme 297 : 2003(3) Crimes 234 (SC).

The accused persons in pursuant to criminal conspiracy had caused death of an under trial by hurling explosive substance at his back. This was not rarest of rare cases where death penalty could be imposed. *Farooq* v. *State of Kerala*, 2002 CrLJ 2534 (SC) : AIR 2002 SC 1825 : 2002 (4) SCC 697 : 2002 (2) Crimes 183 (SC) : 2002 (3) Supreme 199.

In absence of any exceptional circumstances, life imprisonment imposed on accused for committing murder though intentionally cannot be enhanced. *Prem Sagar* v. *Dharambir*, 2004 Cr LJ 17 (SC) : AIR 2004 (SC) 21 : 2004(1) SCC 113 : 2003(8) JT 76 : 2003(4) Crimes 372 (SC) : 2003(7) Supreme 502.

Held, in this case the argusome murder was perpetrated in cold blooded, pre-meditated and well organized manner. It calls for deterrent punishment. Such gruesome and cold blooded murder with a view to grab the property is not only delict the law but also have a deleterious effect in civil society. At the time of granting leave, this Court did not issue notice for enhancement of punishment. However, considering the nature of the crime and the manner in which it has been perpetrated, the ends of justice would warrant that the appellant should be in jail in terms of Section 57 of the Indian Penal Code. We direct that the appellant shall not get the benefit of any remission either granted by the State or by Government of India on any auspicious occasion. *Reddy Sampath Kumar* v. *State of A.P.*, 2005 CrLJ 4131 : AIR 2005 SC 3478 : 2005 SCC (Cri) 1710 : 2005 (7) SCC 603 : 2005 (4) Crimes 1 (SC) : 2005 (7) Scale 270 : 2005(6) Supreme 228.

Where accused convicted for murdering his elder brother giving knife blows on his chest and abdomen but without any pre-planning, it will not fall within the category of rarest of rare cases. On perusal of the evidence, the manner and time of the alleged occurrence. *Held* that it is a case of simple murder to attract Section 302 of the Indian Penal Code, which took place without any pre-planning. This case does not come under the preview of 'rarest case among the rear cases' to confirm capital punishment. In such circumstances the death sentence, commuted to life imprisonment. *The State of Bihar v. Manoj Sahu alias Manoj Prasad Sahu*, 2002 Cri LJ 2278 (Jhar.) : AIR 2002 Jhar HCR 437 : 2002(2) JCR Jha 8 : 2002(1) JLJR 759.

The deceased was picked up from his cot, thrown on the ground and was then repeatedly shot while two accused were catching hold of him. This evidence of eye-witnesses was not found probable. The conviction of accused was held not proper. *Jontam* v. *State*, 2003 Cr LJ 4646 (All) : 2003 All LJ 2412 : 2003(47) All Cri C 150 : 2003(2) All Cri R 1646.

The accused killed the deceased by firing the shot but presence of eye-witness on spot was found doubtful as he had strong enmity with accused and was having motive to falsely implicate the accused. There was inordinate delay in filing the FIR. It was held that accused was entitled to benefit of doubt. *Shiv Bali* v. *State of UP*, 2003 Cr LJ 4637 (SC) : 2003 All LJ 2367 : 2003(46) All Cri C 1155 : 2003(2) All Cri R 1856.

In a Supreme Court case, the accused was alleged to have suddenly put his gun against the deceased and fired. Accused, thereafter allegedly pressed neck of deceased and strangulated him. The witnesses, who were forest officials got scared and ran straight up to third village without caring to go back to help the victim or even informing villagers of the villages, they had crossed of the incident. Tehir conduct was most unnatural. No motive for offence was established. Although firing was allegedly done by placing gun on back, no charning or blackening of skin was observed by doctor around wounds. No strangulation mark was found on dead body. Special report reached Magistrate after many days. In the circumstances it was held that prosecution case and veracity of eye-witnesses both were doubtful and, therefore, the accused was liable to be acquitted. *Badam Singh* v. *State of MP*, AIR 2004 SC 26 : 2004 Cr LJ 22 (SC) : 2003(4) Crimes 439 (SC) : 2003(8) Supreme 7 : 2003(9) Scale 222 : 2003(8) JT 547.

Where the deceased was alleged to have been shot and he was profusely bleeding after receiving gun shot and the eye-witnesses who were accompanying the deceased stated that they carried the deceased on their shoulder while one of them held the chest of the deceased, the possibility of these witnesses clothes being not blood-stained was next to impossible and therefore, the presence of these eye-witnesses at the place of occurrence was extremely doubtful. Their presence also became suspect on the date of incident in the village because of the material contradictions in their evidence I.O. *State of Rajasthan* v. *Taran Singh*, 2004 Cr LJ 654 (SC) : (2003) 12 SCC 341 : AIR 2004 SC 1080 : 2003(4) Crimes 456 (SC) : 2003(8) Supreme 36 : 2003(8) JT 115.

Seizure of firearms and recovering the empties and sending them for examination by the ballistic expert would have only corroborated the prosecution case but not sending them to the ballistic expert is not fatal in view of the categorical testimony of eye-witnesses about the whole incident. *State of Punjab* v. *Hakam Singh*, 2005 Cr LJ 4111 : 2005 SCC (Cri) 1679 : 2005(7) SCC 408 : 2005(6) Supreme 261 : 2005(7) Scale 43.

In another Supreme Court case it was held that non-sending of gun to ballistic expert, when the firing from gun was not disputed could not be said to be fatal. *Ramesh Shish Rai* v. *Jagdish Singh*, 2005 Cr LJ 669 : 2005 SCC (Cri) 1611 : 2004(4) Crimes 306 : 2004(10) JT 594 : 2005(10) SCC 598.

The accused was alleged to have fired at deceased over a wordy altercation between deceased and accused relating to grazing of cow. Eye-witness had seen the incident from a distance of 30 feet. Weapon of offence was not recovered and non-recovery of weapon from the house of accused appellant did not extend to his benefit. The appeal was, therefore, without any merit and was dismissed. *Krishna Gope* v. *State of Bihar*, 2003 Cr LJ 3890 (SC) : AIR 2003 (SC) 3114 : 2003(10) SCC 45 : 2003(3) Crimes 343 (SC) : 2003(5) Supreme 606.

In a case the accused at the dead of night armed with gun entered into house of deceased, fired at deceased and injured his daughter who had identified the accused in the light of glowing earthenware. The evidence showed that shots were repeated and that enabled the injured eye-witness to identify the accused but could not correctly recognise the other accused who was wrongly named in FIR. It was held that if during investigation case was found correct against one accused only and not against another one, it did not mean that the whole prosecution story was false. Hence conviction of main accused under Section 302/307 was fully justified. *Krishna* v. *State*, 2003 Cr LJ 4075 (All) : 2003 All LJ 2012 : 2003(46) All Cri C 930 : 2003(2) All Cri R 1259.

Where the accused was not satisfied with the petition of joint family property and one day when a dispute arose about fixing door in cattle shed, he fired the shot and killed an innocent boy. The Apex Court set aside the acquittal and conviction order of trial Court was restored. The Court observed "In view of the unsatisfactory nature of disposal of the appeal and the inherent improbabilities and irregularities in the conclusions, the unreasoned impugned judgment of High Court warrants reversal. *Rama Kant Rai* v. *Madan Rai*, 2004 Cr LJ 36 (SC) : AIR 2004 (SC) 77 : 2003(4) Crimes 310 (SC) : 2003(7) Supreme 326 : 2004(1) Recent Cr 83.

Where accused after firing gun at deceased and killing him, gave blow on head of another victim which could have led to his death, it was held that the accused was guilty of offences under Sections 307 and 302, IPC. *Narain* v. *State*, 2005 Cr LJ 2005 (All) : 2005 All LJ 984 : 2005(51) All Cri C 636 : 2005(1) All Cri R 983.

The accused was alleged to have fired at the deceased and constable on duty had arrested the accused on spot. No other eye-witness was available and wife and father of deceased were not examined. The firing was not from close range and mutilated condition of body showed that body was thrown there after committing the murder. It was held that the accused was entitled to the acquittal. *Alimulah* v. *State*, 2003 Cr LJ 3912 (All) : 2003 All LJ 1893 : 2003(47) All Cri C 69 : 2003(2) All Cri R 1237.

The deceased died of gunshot injuries and extra-judicial confession was made before the witnesses who were inimically deposed towards him. This was found not reliable and presence of witness at the time of incident was doubtful. The acquittal of accused under the circumstances was held proper. The Court observed that inference of guilt could be justified only when all the incriminating facts were found to be incompatible with incidence of accused. *State of Rajasthan* v. *Rajaram*, 2003 Cr LJ 3901 (SC) : 2003(10) SCC 434 : 2003(7) JT 437 : 2003(4) Crimes 53 (SC) : 2003(6) Supreme 223.

In the instant case, the specific allegation was that the accused fired at the deceased from his gun hitting him on his back. The medical evidence was to the effect that on the back of the deceased there was only an exit wound and there was no entry wound on the back of the deceased. It was held that the presence of eye-witness was doubtful and that the accused was entitled to benefit of doubt. *State of UP* v. *Shiv Kumar*, 2005 Cr LJ 2604 : AIR 2005 SC 2992 : 2005(11) SCC 212 : 2005(2) Crimes 153 (SC) : 2005(3) Supreme 564.

Irked by the remark of deceased, some of the members of the Barati party protested and it led to heated exchange of words and mutual abuses. At that stage, the acquitted accused exhorted the appellant to attack the persons of the group who were involved in the scuffle. It appeared that the three appellants of the Barati party were carrying arms which was not unusual for the Baratis to carry in those rural areas. Then, according to the prosecution case, the three appellants, fired at deceased persons and they died at the spot. Three other persons, namely Dwarka Prasad, Kurva and Ujagar Singh also sustained injuries from the shots fired at them by the accused. Held it was difficult to believe that accidental firing would have taken place from all the three guns handled by the three appellants at about the same time. Therefore, there was no hesitation in rejecting this contention. *Suresh Chandra* v. *State of U.P.*, 2005 Cr LJ 3449 : AIR 2005 (SC) 3120 : 2005 (6) SCC 130 : 2005 (5) Supreme 364 : 2005 (6) JT 397 (SC) : 2005 (5) Scale 629.

A rustic village woman cannot explain about bore of gun or rifle. The wife of the deceased whose presence in the house was quite natural and she having clearly identified the respondent who fired the gun at her husband should be enough to establish the factum of whole prosecution story. To expect from her to give the description in a photogenic manner is asking too much.

Sometimes while appreciating the testimony of rustic villagers we are liable to commit mistake by losing sight of their rural background and try to appreciate testimony from out rational angle. When a lady is confronted with number of intruder in her house armed with deadly weapons and showering bullets she cannot give a very accurate and photogenic version as whole thing happened in a few minutes. Therefore, while appreciating such testimony Court should give due regard to their rural background and the whole scenario in which the incident happened. She has narrated the whole incident as it happened and also stated that her husband also fired and that shot killed one of accused. That lends considerable support to the testimony of this witness. If she really wanted to give a wrong version of incident she could have totally exonerated her husband. But she has categorically stated that the shot fired by her husband from the gun hit one of accused. Whether both the shots fired by her husband hit deceased-accused or one, she cannot depose in such a photogenic manner. But she admitted that one of the shots hit her deceased-husband when there was exchange of fire from the accused side. She had categorically deposed that accused fired a shot from the rifle hitting on the back side of the buttock of her deceased husband. Her testimony cannot be rejected. *State of Punjab* v. *Hakam Singh*, 2005 Cr LJ 4111 : 2005 SCC (Cri) 1679 : 2005(7) SCC 408 : 2005(7) Scale 43 : 2005(6) Supreme 261.

It is true that two innocent children lost their lives for no fault of theirs. We also notice that *Dharia* is a weapon, which is ordinarily to be found in the house of any farmer or agriculturist in that area as stated by PW-3. He seems to have used the weapon as lying in the house. The offence was obviously not committed for lust of power or otherwise or with a view to grab any property nor in pursuance of any organized criminal or anti-social activity. Chances of repetition of such criminal facts at his hands making the society further valnerable are also not apparent.

Therefore, the case will not fall in the category rarest of rare cases. Therefore, death penalty commuted to life imprisonment *Dharamendra Singh alias Mansing Ratansingh v. State of Gujarat*, 2000 Cri LJ 2631 SC.

The High Court altered death punishment to life imprisonment, however no finding for awarding fine. It will be deemed that High Court awarded only sentence of life imprisonment and not of fine.

It is on record that the appellants are owning agricultural land though the extent and fertility on the same is not available. It is also seen that they own a tractor and a trolly are normally owned by farmers having large extent of land. They also own a Maruti car, which also indicates that appellants are reasonably affluent. On this basis, it is reasonable to conclude that the appellants are capable of paying at least Rs. 1 lakh per head as compensation. Therefore, the court modify the order of the High Court by reducing the compensation payable from Rs. 2 lakhs each Rs. 1 lakh each and direct the appellants to pay the said sum, totaling Rs. 2 lakhs, as directed by the High Court. *Rachhpal Singh v. State of Punjab*, 2002 Cri LJ 3540 (SC) : AIR 2002 (SC) 2710 : 2002(6) SCC 462 : 2002(5) JT 388 : 2002(5) Scale 308 : 2002(5) Supreme 118.

130. Injuries.—Perusal of the entire evidence gives an impression that there was prior enmity between deceased and the accused persons and on the given day the accused persons assaulted him, but, then most of the injuries were dealt on the lower parts of the body, which reveals that they had no intention to murder. *Garjan Sahu and Ors. vs. State of Orissa*, 2010 (2) CrLJ 1880 (Ori).

From the evidence on record, Court finds that there had been an altercation between the deceased and the appellant, before the shots were fired. The fact is testified by witness who stated that the two quarrelled with each other, because of the land dispute, before the shots were fired. The first shot was fired by the appellant in the air, which suggests that he did not have any intention to kill the deceased, who was his real brother, but wanted only to browbeat and scare him and assert his dominance over him, may be on account of the fact that the deceased was younger to him. It was only the second shot, which caused the death. This shot was also not aimed at any vital part of the body. It was aimed just below the right shoulder. The shot, as per the opinion of Doctor Sharma, was fired from a distance of only 6-7 feet. Appellant was a Home Guard volunteer and, therefore. he was supposed to have been trained at handling the firearms, before he was so appointed. His firing a shot from a distance of only 6-7 feet, aiming the upper chest, just below the right shoulder, suggests that he did not intend to cause the death, though he can be presumed to have had the intention to cause an injury, which could have caused death. Therefore, we hold the appellant guilty not of the offence of murder, under Section 302 of the Indian Penal Code, but of offence of culpable homicide not amounting to murder, punishable under Section 304 (first part) of the Indian Penal Code. *Jodh Raj. vs. State of H.P.*, 2010 (2) CrLJ 2488 (HP).

131. Conduct of witness.—*Post-event conduct* varies from person to person. The conduct of witness in going to the house of his uncle instead of reporting the incident to the police cannot be said to be unnatural, impairing the creditworthiness of his evidence. The post-event conduct of a witness varies from person to person. It cannot be a cast iron reaction to be followed as a model by every one witnessing such event. Different persons would react differently on seeing any serious crime and their behaviour and conduct would, therefore, be different. [See : *Rammi @ Rameshwar vs. State of M.P.*, 1999 (8) SCC 649]. Therefore, having witnessed a dastardly murder, it was not unnatural for the said witness to go to his uncle and, therefore, the Courts below were justified in not rejecting his evidence merely on that score. *Babasaheb Apparao Patil vs. State of Maharasthra*, AIR 2009 SC 1461 : 2009 (1) JT 55 : 2008 (15) Scale 205 : 2008 (16) SCR 769.

132. Conversion of offence—Permissibility.—It is obvious that even though there is no specific charge framed and the offence under other section is made out, the Court can record a finding under such a charge, which is punishable with lesser sentence for a cognate offence.

In a situation, where both the charges under Ss. 302, IPC and 306, IPC cannot be levelled against the accused, but, if the circumstances suggest conclusively that the offence was sufficiently proved to the extent of the offence under S. 306, IPC, this Court, being an appellate Court, can always hold that the accused has committed an offence under S. 306, IPC and the conviction for the said offence can safely be recorded. *Godugula Adellu v. State of A.P.*, 2008 CriLJ 206 (AP).

133. Time of death—Determination.—Time of occurrence cannot be fixed with precision merely based on opinion expressed in text books on medical jurisprudence which sets only broad indicators.—*Dasari Siva Prasad Reddy vs. Public Prosecutor, High Court of A.P.*, AIR 2004 SC 4388 : 2004 (6) JT 489 (SC) : 2004 (7) Scale 59 (SC) : 2004 (6) Supreme 281 (SC) : 2004 (3) Crimes 313 (SC).

Medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerised or mathematical fashion so as to be accurate to the last second. The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of occurrence because that would be a matter of speculation, in the absence of reliable evidence on the question as to when exactly the deceased had his last meal and what that meal consisted of.

The time required for digestion may depend upon the nature of the food. The time also varies according to the digestive capacity. The process of digestion is not uniform and varies from individual to individual and the health of a person at a particular time and so many other varying factors.

Factors were also noted by HWV Cox in his book referred to by learned Counsel for the appellant. (See Seventh Edition, at pages 300 to 302). An author's view which is opinion based on certain basic assumptions only cannot be substitute for evidence let in to prove a fact which invariably depends upon varied facts, and according to the peculiar nature of a particular case on hand. The only inevitable conclusion is that the plea is without any substance, apart from the fact that the said plea pertaining to mere appreciation of facts was not raised before the High Court.—*Ram Bali vs. State of Uttar Pradesh*, AIR 2004 SC 2329 : 2004 (Supp-1) JT 211 (SC) : 2004 (4) Scale 611 (SC) : 2004 (3) Supreme 547 (SC) : 2004 CrLJ 2490 (SC) : 2004 SCC (Cr) 2045 (SC) : 2004 (2) Crimes 493 (SC).

134. Intention to cause death—Determination.—The intention to cause death or at all events intention of causing bodily injury which is sufficient in the ordinary course of nature to cause death was made out. The circumstances to bring the case under Exception (4) to Section 300 do not exist.—*Pulichera Nagaraju v. State of Andhra Pradesh*, AIR 2006 SC 3010 : 2006 (6) Supreme 339 (SC) : 2006 (9) SRJ 236 (SC) : 2006 CrLJ 3899 (SC) : 2006 (3) Crimes 233 (SC).

* * * * *

Sec. 303. Punishment for murder by life-convict.—Whoever, being under sentence of *imprisonment for life*, commits murder, shall be punished with death.

Synopsis

1. Amendment....1695
2. Scope of....1695
3. Applicability....1695
4. Witness....1695
5. Procedure....1695
6. Charge....1695

1. Amendment.—The words in italics were substituted by the words "transportation for life" by Act 26 of 1955 Section 117 and Schedule with effect from 1.1.1956.

2. Scope of.—This section is violative of Articles 14 and 21 of the Constitution. AIR 1983 SC 473 : 1983 CrLJ 811; AIR 1983 CrLJ 111; AIR 1984 SC 1120 : 1984 CrLJ 928.

3. Applicability.—(Case laws before the section was struck down as *ultra vires* in AIR 1983 SC 438). When the Provincial Government under Section 401, Cr. Pro. Code, remitted the remainder of the sentence of transportation of a person, without condition he cannot be said to be one under a sentence of transportation for life. AIR 1943 Sind 114 : 44 Cr LJ 530 ; 40 Cr LJ 530 ; 40 Cr LJ 490 : AIR 1938 Rang 124. Section 303 cannot be confined only to cases where a person undergoing sentence of imprisonment for actually and in fact himself commits an act which results in death of the victim. The said section would apply in cases where a person under going sentence of imprisonment for life is convicted either under Section 302, read with Section 34 or under Section 302 read with Section 149. The legal effect of such conviction in either case is that he must be deemed to have committed the murder as much as the actual murder has 1962 SCD 1024 : (1963) 2 SCJ 416 : AIR 1963 SC 118 : AIR 1961 SC 1494 : (1961) 2 Cr LJ 969 ; Section 303 can not be confined only to cases where a person undergoing sentence of imprisonment for life actually and in fact himself commits an act which results in the death of the victim. AIR 1963 SC 118 : (1962) 2 Ker LP 28 ; AIR 1976 SC 133 : 1975 Cr LJ 624 ; 1982 Cr LJ 136.

An order of acquittal, annulling or voiding a conviction operates from motivity. AIR 1976 SC 133 ; *see* also 1979 Cr LJ 1285. Section 303 is a like a proviso to Section 302 and a Court trying a person can apply the provision of Section 303 if it is brought to its notice that the person tried is under a sentence of life imprisonment. AIR 1973 SC 786.

4. Witness.—The evidence by street hawkers and vendors are not merely 'chance' witness and it cannot be discarded on this score. (1986) 1 Crimes 490 : 1984 Cr LJ 41 (NOC) (Ori) : (1984) 57 Cut LT 27 : (1984) Ori LR 51.

5. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable—Triable by Court of Session.

6. Charge.—I (name and designation of Session Judge) hereby charge you.............(name of the accused) as follows:—

That you on or about....................(date) at........................(time) and at...................(place) while being under a sentence of imprisonment for life, committed made by intentionally or knowingly causing the death of.................(name of the deceased) and thereby committed an offence punishable under Section 303, I.P.C.—and within my cognizance.

"And I hereby direct that you be tried in the Court on the said charge".

* * * * *

Sec. 304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder, shall be punished with *imprisonment or life, for* imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

Synopsis

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2. Scope........1697
3. Onus........1706
4. Sections 304 and 323........1707
5. Sections 304 and 324........1708
6. Sections 304 and 325........1709
7. Sections 304, Part I and 34........1709
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1. Amendment—The words in italics was substituted for the words "transportation for life" by Act 26 of 1955, Section 117 and Schedule with effect from 1.1.1956.

2. Scope.—A greater latitude of discretion is given to the Judge in apportioning the punishment of culpable homicide when it does not amount to murder ; for he is empowered to pass any sentence ranging from transportation for life to a small fine. In general, the Court makes no distinction, either in its definitions and penal provisions, between cases in which a man causes an effect designedly and cases in which he causes it with knowledge that he is likely to cause it. But this section awards a more severe punishment to culpable homicide in which the act causing death, is done intentionally for the purpose of causing death than it does to these homicide in which the act is done with the knowledge that it is likely to cause death but without intention to cause it."—*Morgan aid Macphierson.*

There is a fine distinction between the class of cases that framers of death code contemplated while prescribing the two parts of Section 304, IPC. The first part of the section postulates a more serious class of offences where the courts can infer that there is a clear intention. To cause death whereas the second part of the Section contemplates a slightly lesser class of offences where there is knowledge that the act is likely to cause death, but where the intention to cause death is not present.

Though there is a fine distinction between the two classes of offences, there is still a very clear cut difference between them and we need to record that the courts are required to give effect to the difference on the basis of the special facts of each case. To quote an example, if the weapon used happens to be a small club, the manner in which the blow is inflicted *viz.* the degree of force used and more importantly the part of the body at which it is aimed would be a prime relevance, but the Courts would still take cognizance of the fact that the use of this sort of a weapon would signify the intention of really causing the hurt rather than of killing. The real difference is between the aspect of intention and knowledge and as we shall demonstrate. If on the other hand the weapon used is a lethal weapon such as a dagger and the blow is aimed at a vital part of the body, the only legatimate inference which the courts will draw is that the accused definitely intended to kill. *Loki* v. *State of Karnataka* 2000 Cri LJ 149 (Kant).

There were several factors which made the prosecution version unreliable. It was noted that the First Information Report was purportedly lodged on 22.03.1989 but the same was received by the Illaqa Magistrate after a long time *i.e.* on 24.03.1989 though the Court of the Illaqa Magistrate was situated at less than half a kilometer. Additionally the number of injuries as stated by the so called eye witness, PW. 3 was at great variance with the medical evidence. It also noted that the medical examination conducted at 3.30 P.M. by Dr. M.M. Sharma, PW. 1 showed that the injuries were caused within duration of 6 to 12 hours. His specific evidence was that the deceased could have received the injuries at about 10 AM on 22.03.1989 and he had not received injuries within six hours. According to the prosecution version the occurrence took place at 3.30 PM and the medico legal examination was done at 5.30 pm.

Delayed dispatch of FIR to Magistrate and distinction between witness and Medical witness. Though some of the factors highlighted by the High Court may not create a dent in the prosecution version but the cumulative effect certainly casts a shadow upon the credibility of the prosecution version. The view taken is a possible view. Therefore, no interference is called for. *State of Haryana vs. Krishan,* 2008 (15) SCC 208 : 2008 (12) JT 627 : 2008 (15) Scale 129.

The courts have from time to time illustrated the distinction in different decisions and we need to refer to only three of them, the first reported is *Kulwant Rai* v. *State of Punjab,* AIR 1982 SC 126 wherein the Supreme Court held that on an application of these principles in a somewhat similar situation, that since there was no intention on the Part of the accused to cause death, that the case would fall under Section 304, part II IPC. The next decision is reported in AIR 1998 SC 289, 1998 Cri LJ 495, (*Sudhir Samanta* v. *State of West Bengal*) wherein the Supreme Court on the basis of the nature of the injuries reduced the conviction from one under Section 302, IPC to Section 304, Part I IPC. The last decision is reported in AIR 1998 SC 3115 (1998 Cri LJ 4560) (*State of Punjab* v. *Gurcharan Singh*) wherein again the Supreme Court took note of the fact that the incident took place on the spur of the moment without any specified intention and one blow was inflicted in the course of a sudden incident and the conviction was again the course of a sudden incident and the conviction was again reduced from section 302, IPC to one under Section 304, Part I IPC.

The first part of Section 304, is intended only on those cases in which the act of the accused person would be culpable homicide amounting to murder, but to the fact that it was committed in circumstances which render one or other of the exceptions in

Section 300 applicable. 3 PR 1911 Cr : 9 PWR 1911 : 87 PLR 1911 : 87 LR 1911 : 10 Ind Cas 852 : 12 Cr LJ 274 AIR 1942 Oudh 368; 43 Cr LJ 211; AIR 1940 Rang 259 : 42 Cr LJ 124 : AIR'1939 Rang 525 : 40 Cr LJ 725 ; 41 CWN 570 : ILR (1937) 2 Cat 280.

The second part of this section applies (*inter alia*) to those rather rare cases of deliberate assault where the act of assault can be separated from the injury caused with the result that knowledge of likelihood to cause death can be proved without intention to cause vital injury being established. AIR 1943 Nag 145 : 44 Cr LJ 512 , *see* also AIR 1945 Lah 43, Part II has no application where injuries are, inflicted with intention of causing hurt, AIR 1935 Rang 391 : 37 Cr LJ 186. Where intention is absent and knowledge can be attributed Part II is applicable. AIR 1935 Lah 80 ; AIR 1937 Rang 243 : 39 Cr LJ 114. In certain cases according to the circumstances knowledge is presumed. AIR 1938 Lah 618 : 39 Cr LJ 927 : 177 IC 642 : AIR 1933 Lah 883 : 35 Cr LJ 65 ; AIR 1930 Bom 483 : 32 Cr LJ 289, Second Part of this section is to be read with last few words of Section 299 and has no connection with Section 300 or with the exceptions mentioned therein and must not be confused with culpable homicide not amounting to murder. AIR 1943 All 344 : 45 Cr LJ 97 : ILR 1943 All 853.

The documentary and oral evidence of the doctor, as adduced, that he also treated the patient and conducted the post-mortem examination made it crystal clear that the deceased remained under treatment in hospital for 8 days and died after 8 days of the incident in question. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries. *Maniben vs. State of Gujarat,* 2009 (8) SCC 796 : 2009 (3) Crimes 298 (SC) : 2009 (12) JT 82 : 2009 (12) SCR 753 : 2009 (10) Scale 654 : 2009 (5) Supreme 700.

According to this section there are two degrees of guilt, the graver one depends on the intention proved or to be inferred from all the circumstances and the less serious of which does not depend on intention at all. AIR 1940 Rang 259 : 44 Cr LJ 124. Where death is caused by the accused under grave and sudden provocation an offence under Part I has been committed. AIR 1939 Lah 436 : 40 Cr LJ 868 ; AIR 1939 Sind 97 : 40 Cr LJ 375 ; AIR 1935 Rang 156 : 39 Cr LJ 561 ; 38 PLR 43 ; AIR 1937 Rang 540 : 39 Cr LJ 255 AJR 1938 Pesh 10 : 39 Cr LJ 401 : AIR 1936 Nag 103 : 17 Cr LJ 607. Where death is caused exceeding the right of private defence an offence under section is committed. AIR 1939 Lah 393 : 40 Cr LJ 904 ; AIR 1939 Lah 534 : 41 Cr LJ 150 : AIR 1942 Mad 58 : 201 IC 390 : 40 Cr LJ 904 ; AIR 1939 Lah 534 : 41 Cr LJ 150 : AIR 1943 Mad 58 : 201 IC 390 ; AIR 1937 Oudh 54 : 37 Cr LJ 931 ; AIR 1934 Oudh 207 : 35 Cr LJ 801 ; 35 Cr LJ 639 : AIR 1933 Lah 1048. Part I is applicable where death was caused under grave and sudden provocation. ILR 1939 Lah 278 : AIR 1939 Lah 471 ; 40 Cr LJ 928 : AIR 1939 Lah 426.

Section 304 must be interpreted as providing punishment for offence of culpable homicide in all cases where the accused cannot be convicted of murder. 140 Ind Cas 49 : 39 Cr LJ 849 : 28 NLR 233 : AIR 1932 Nag 121 (FB), Part I applies where there is guilty intention and Part II applies where there is no such intention but there is guilty knowledge. 130 Ind Cas 884 : 35 CWN 456 : 32 Cr LJ 598 : 58 Cal 1138 : AIR 1931 Cal 545 ; AIR 1932 Lah 372 : 1932 Cr C 490 : 33 PLR 474 : 33 Cr LJ 445 : 1937 Rang LR

393; AIR 1933 Oudh 269 : 35 CrLJ 58. Where the offence is under Section 304, the accused must be given clear notice of part under which he is charged. AIR 1934 Sind 23.

When an intention to cause death or bodily injury was not proved and was not even likely, a conviction under the first clause of Section 304, I.P. Code, is untenable. SC 123 Oudh. A person who beats another brutally and continuously, so that death results, is guilty of murder or culpable homicide not amounting to murder, according as there may or may not have been grave provocation. 5 WR Cr 78. A person who causes death by acts done with the knowledge that they are likely to cause such bodily injury as was dangerous to life, is guilty of only culpable homicide (Section 304) and not of murder (Section 302). The provocation contemplated by Section 300 should, be of a character to deprive the offender of his self-control. In determining whether it was so, it is admissible to take into account the condition of mind in which the offender was at the time of the provocation. 2 M 122 : 1 Weir 302 ; *see* also 19 WR Cr 35 ; 7 WR Cr 77 : 18 All 497 ; 1 WR Cr 33. The burden of proving grave and sudden provocation is on the accused. AIR 1932 Lah 11 : 33 Cr LJ 186. In case of sudden quarrel and provocation the accused is guilty under Section 304. AIR 1932 Lah 302 : 33 Cr LJ 577 : *see* also AIR 1933 Lah 869 : 1933 Cr C 1114 ; AIR 1931 Lah 189 : 32 Cr LJ 1205 : 134 Ind Cas 583 ; 33 PLR 546 : 33 Cr LJ 446 : 137 Ind Cas 267 : AIR 1932 Lah 3 : AIR 1933 Oudh 41 ; 144 Ind Cas 160 : 1933 Cr C 589 : 34 Cr LJ 804 : AIR 1934 Pesh 38. Where knowledge and intent are absent, and the deceased is the aggressor conviction should be under Section 326. AIR 1933 Lah 733 ; *see* also AIR 1931 Lah 103 : 33 Cr LJ 183 : 1931 Cr C 167 ; AIR 1932 Oudh 279 : 9 Own 655 ; but *see* AIR 1933 Oudh 269 : 1933 Cr C 596 : 10 OWN 482. In case of merciless and determined beating with hands and feet conviction should be under Section 304. AIR 1933 Lah 883 : 1933 Cr C 1177 ; *see* also AIR 1933 Rang 27 : 1933 Cr C 1014.

Framing of charge. The deceased was a patient of asthma which could cause asphyxia which was ultimately said to be the cause of death. It is also clear that notwithstanding his serious respiratory problem, the deceased was kept in a windowless room which was full of dust and cobswebs which are known allergens for triggering an asthma attack, which can be fatal, as in this case. The injuries found on the body of the deceased may have been caused during attempts at resuscitation, but all the said circumstances can only be considered during a proper trial and not on the basis of surmises at the time of framing charge where on the strength of the charge sheet only a *prima facie* satisfaction about the commission of an offence has to be arrived at by the trial Court. Therefore, while rejecting the submissions made that there were no materials on record to frame charge against the accused persons even under Sec. 323/34 IPC, we cannot but observe that on a *prima facie* view of the matter, there is ground to proceed against the accused persons even under Sec. 304 Part II IPC. The High Court had erred in quashing the charge framed against the accused persons under Sec. 304 Part II and observing that in view of the materials on record only a charge under Sec. 323 could be brought against the accused persons. *Indu Jain vs. State of Madhya Pradesh*, AIR 2009 SC 976 : 2009 CrLJ 951= 2008 (15) SCC 341 : 2008 (12) JT 524 : 2008 (14) SCR 1137 : 2008 (15) Scale 168 : 2009 (2) SLT 72..

There was no common object and in any event the present appellant was not a member of any unlawful assembly. Having held so, the High Court ought not to have altered the conviction as recorded by the trial Court. Accordingly, the appeal is allowed. The order of the trial Court *vis-a-vis* the present appellant is restored and that of the High Court vis-a-vis the present appellant stands quashed. If the appellant has served the sentence as imposed by the trial Court, the bail bonds executed for giving effect to order shall stand discharged. Otherwise, the appellant shall surrender forthwith to serve the remainder of sentence. *Komal vs. State of Madhya Pradesh*, AIR 2009 SC 1958 : 2009 (1) Crimes 373 : 2009 (11) SCC 55 : 2009 (2) Scale 479 : 2009 (1) SCR 1142 : 2009 (2) Supreme 25 : 2009 (2) SLT 480.

Where injuries inflicted on the deceased with the intention of causing hurt. Clause 2 of Section 300 comes into application. 1935 Cr C 1114 : AIR 1945 Rang 391. If in a case of murder the prosecution has failed to prove the intention which is necessary in order that an accused should be convicted of murder, then it fails to prove that the accused is guilty of murder and the accused should not be convicted of murder even in the alternative. If the prosecution can prove the knowledge which is necessary for the conviction of an offence under Section 304. Part II, and not in the alternative. AIR 1938 Sind 63 : 31 SLR 48 ; *see* also AIR 1938 Pesh 10. Where the accused struck only one blow with a stick on the head of the deceased, and that too after the latter had struck him on the thigh with a heavy stick and upto that point the accused merely appeared to have intended to give the deceased an ordinary beating with his stick, and ordinary beating was all that seemed to have been required by the motive suggested for the attack, it cannot be assumed in the circumstances of the case that the accused intentionally struck a blow which he knew was likely to cause death. The offence committed by him does not therefore fall under Section 304, Part II, but one under Section 325. AIR 1928 Lah 714.

Similarity of cases. The High Court did not accept the stand of the prosecution regarding applicability of Sec. 304 Part II read with Sec. 149 IPC. It was held that in respect of the respective acts committed by each one of them the matter is required to be considered. From the post mortem certificate it was noticed that the first injury was caused by main accused with aruval on the neck and the corresponding injury caused the death. At the same time, other accused have attacked the deceased and contributed corresponding injuries. Therefore, it was held that main accused had to be convicted in terms of Sec 302, IPC. So far as others are concerned the acts attracted Sec. 304 Part II, IPC.

Appellant has submitted that while others were convicted for offence punishable under Sec. 304 Part II, IPC he alone has been convicted under Sec. 302 IPC. According to him, there is a parity between the co-accused persons. The High Court has indicated the reasons for which the appellant's case was treated differently. The trial Court and the High Court have noted that the appellant had given a fatal blow on the neck with aruval and the injury caused by such act proved fatal. Therefore, there is no substance in the plea of the appellant that he stood on similar footing as that of co-accused persons. *Jagebar Ali vs. State of Tamil Nadu*, AIR 2009 SC 1774 : 2009 CrLJ 1711 : 2009 (1) Crimes 237(SC) : 2009 (11) SCC 108 : 2009 (2) JT 17 : 2009 (1) Scale 674 ; 2009 (1) SCR 407.

In absence of a specific charge for a distinct offence under Section 304B, IPC accused cannot be convicted on that account under Section 302, IPC. *Suresh Kumar* v. *State of Haryana*, 2005 Cr LJ 2131 (P&H) : 2005(2) All Cri LR 731 : 2005(2) DMC 342 : 2005(2) Hindu LR 47 : 2005(2) Rce Cir R 427.

Case of the prosecution would go to show that when the accused and the injured witness Rajammal were undressed for having sexual intercourse for money the deceased person Mani had demanded money from the accused and since the accused did not pay the money deceased Mani had caused injuries with stone on the accused which infuriated the accused to cause injuries against the said Mani which lead to his death. The said circumstances would go to show that the injury sustained by the accused on his left chest and the case of the prosecution that the demand of money for the alleged illegal sexual intercourse had enraged the accused to sustain sudden provocation against the deceased Mani and the accused had caused injuries to the deceased Mani only on such provocation of the said deceased Mani.

Therefore, the prosecution did not prove any enmity as envisaged in the charges framed against the accused and when there was no previous enmity in between these two persons there could not be any understanding between the accused and the deceased person to have unlawful and illegal sexual intercourse with the said Rajammal by the accused for money.

In the said circumstances, this Court is of the view that the offence committed by the accused against the deceased Mani would fall under Section 304, Part I, IPC since it was not intentionally done but only a culpable homicide not amounting to murder. *Eswaran @ Shanmugavel vs. State*, 2010 (3) Cri LJ 3180 (Mad).

Where evidence of witnesses, that demand soon before her death was made by accused-husband and she was subjected to cruelty and harassment by her husband to meet his unlawful demand of dowry then conviction of accused was held justified and proper. *Prem Nath* v. *State of Haryana*, 2005 Cr LJ 2244 (P&H) : 2005(2) DMC 342 : 2005(2) All Cri LR 731 : 2005(2) Rec Cri R 427.

The distinction between the intention to cause injury sufficient in the ordinary course of nature to cause death, and the intention to cause injury likely to cause death depends upon the degree of probability of death resulting from the act committed. Apart from cases falling within the second clause of Section 300, if, from the intentional act of injury committed, the probability of death resulting is high the finding should be that the accused intended to cause death or injury sufficient in the ordinary course of nature to cause death, and the conviction, should be murder unless one of the exceptions applies ; if there was probability in a less degree of death ensuing from the act committed the finding would be that the accused intended to cause injury likely to cause death, and the conviction should be of culpable homicide not amounting to murder. 5 LBR 80 : 10 Cr LJ 359 : 3 Ind Cas 710. The accused who professed to be a specialist in witchcraft beat a woman who was believed to be passed by an civil spirit with the object to exercising the spirit. The woman died of the beating protesting that she was not possessed and refusing to be beaten. *Held*, that the accused was guilty of an offence under the second part of Section 301, I.P. Code 44 Ind Case 679 : 19 Cr LJ 475. The difference between the two parties of Section 304, I.P. Code, is that under the first part the crime of murder is first established and the accused is then given benefit of one of the exceptions while under the second part of the same section the crime of murder is never established at all. 69 Ind Cas 454 : 23 Cr LJ 726. If the act of the accused falls within either of the clauses 1, 2 and 3 of Section 300 but is covered by any of five Exceptions it will be punishable under the first part of Section 304 : and if the act falls within clause 4 of Section 300 but is covered by any of the Exceptions it will be punishable under the second part of Section 304, 103 Ind Cas 841 : 28 Cr LJ 761 : AIR 1927 Sind 232 : 32 PR 1887 Cr. Where the cause of death was single *lathi* blow a sentence of 7 years' rigorous imprisonment and fine of Rs. 400 is unduly severe. In such a case the sentence of fine is unnecessary. 5 LLJ 180 ; 1928 Lah 416 ; 5 Lah LJ 414 : 1923 Lah 170. The first part of Section 304 applies where there is no guilty intention and the part applies where there is no such intention but there is guilty knowledge, AIR 1931 Cal 345 : 35 CWN 456 : 130 Ind Cas 884 Section 304, applies to the following classes of cases (i) where the case falls under one or other clause of Section 300 but is covered by the exceptions to that section (ii) where injury caused is not one of the higher degree of likelihood, covered of the expression "sufficient in the ordinary course of nature to cause death but is of a lower degree of likelihood generally spoken of as an injury "likely to cause death" and the case does not fall under clause (2) of Section 300 (iii) where the act done is with the knowledge that death is likely to ensue but there is no intention to cause death or and injury likely to cause death it may be that there is no intention to cause any injury at all or there may be an intention to cause simple or grievous hurt but not an injury likely to cause death. 1952 ALJ 546 ; *see* also 1953 Cr LJ 1516 : AIR 1953 Trip 7. Section 304 divides the offence of culpable homicide into two grounds of guilt, the graver of which depends on the intention proved or to be inferred from all the circumstances and the lessserious of which does not depend on the intention at all. AIR 1960 Andh Pra 141 : 1960 C LJ 303 : 1960 Mad LJ (Cr) 265.

If the offence is not culpable homicide the section is not applicable. 1979 Cr LJ 1092 : AIR 1979 SC 1434 ; *See* also 1971 Cr LJ 1654 ; 1963 (1) Cr LJ 762 : AIR 1963 HP 18. Where the culpable homicide falls under any of the 4 of clauses of Section 300 and none of the exceptions applies, the culpable homicide is murder and is punishable under Section 302 and not under this section. AIR 1976 SC 2445 : 1976 Cr LJ 1888 ; 1983 Cr LJ 993 : AIR 1983 SC 614 ; AIR 1980 SC 573 : 1980 Cr LJ 412 ; AIR 1979 SC 1711 : 1979 Cr LJ 1196.

Trial for offence which come under Section 304/34 I.P.C. Appeal was made against. Conviction, there was delay in F.I.R. and unfair investigation. Majority of witnesses turning hostile—Eye-witnesses was found not reliable. Hence conviction, was held not sustainable. *Puran Ram* v. *State of Rajasthan*, 1995 R Cr C 607 (Raj).

Where there was custodial death Courts should not insist for direct evidence. It was held that such cases should be dealt with in a realistic manner. *State of Madhya Pradesh* v. *Shyamsunder Trivedi*, 1995 MLJ (Cr) 656 (SC) : 1995(4) SCC 262 : 1995(4) JT 445 : 1995(3) Scale 343.

The injuries to testicles was not opined to be direct cause of death. The death took place after two days of incident. Hence offence amounts to one punishable under Section 323 and not under Section 304, Part II of Code. *Pirthi* v. *State of Haryana*, 1995 JIC 554 (SC) : (1995) 1 East Cr C 439 (SC) : AIR 1994 (SC) 1582 : 1993(4) Scale 35 : 1994 Cr LJ 2187 : 1994 SCC (Cr) 402.

Where there was single fatal head injury and other injuries being minor. Use of non-deadly weapon. Offence was held under Section 304, Part II. *Madhusudan Sathpathy* v. *State of Orissa*, 1995 SCC (Cr) 155 (SC) : AIR 1994 (SC) 474 : 1994 Cr LJ 144.

A statement made under Section 162. Cr. P.C. counter a deposition at the trial stage but is not a defence or Court witness. 1986 Cr LJ 427 (Ori) : AIR 1986 SC 467 : (1986) 1 SCJ 166.

According to the evidence of the autopsy surgeon, the head injury caused to the victim was, not doubt, sufficient in the ordinary course of nature to cause death but on the material on record it would be *hazardous* to hold that the appellant had the *mens rea* for the offence covered under Part I of Section 304. However, in dealing the fatal blow on the head with such force as to result in fracture the appellant can certainly be ascribed the knowledge that death was likely to be caused thereby. 1988 (1) Crimes 138 (MP).

In the instant case, the accused threw a bomb on the head of the deceased. The head of the deceased was completely smashed and his brain part came out and it, resulted in the instant death of the deceased. The bomb was thrown from a close range and the fact that the accused too sustained injuries was indicative of that fact. It was pleaded by the defence that the entire incident had happened on a sudden quarrel and there was no premeditation or serious intention on the part of the accused to cause the death of the deceased. It was also pointed out that the accused had been undergoing imprisonment since 1992. The above pleas were held not sufficient to bring the offence within the purview of Section 304 Part I. *Rama Mangaruji Chacherkar v. State of Maharashtra* 2002 Cri LJ 573 (SC) : AIR 2002 (SC) 283 : AIR 2001 SCW 5000 : 2002(1) Crimes 202.

The accused was convicted on the charge of hitting the head of deceased with a wooden bat as a result of which he died. Presence of the only eyewitness to the occurrence was also found to be doubtful. Medical evidence was also found to be contrary to circumstantial evidence. *Held*, that conviction of the accused Section 304 could not be sustained and accused was entitled to acquittal. 1987 Cri LJ 6 (Delhi).

When accused persons with common intention beard deceased violently, they must have knowledge that they were likely to cause death and as such case falls under Section 304, Part II. *Dilip Singh* v. *State of Haryana*, 1993 Cri LJ 2092 (SC).

The testimony of both eye-witnesses is corroborated by medical evidence and doctor has stated that injuries on deceased could have been caused by knife which was recovered at instance of the appellant. The appellant grappled with deceased and gave knife blow and did not repeat the blow. The appellant intended to cause an injury which is likely to cause death. Hence that does not fall under Section 302, IPC but under Sec. 304, Part I, IPC. *Ram Babu Kumar* v. *State of Punjab*, (1994) 2 CC Cases 452 (P & H).

The primary requirement of an offence to fall under Section 300 is that there must have been an intention to kill but when such intention is prompted by any of the exceptions. In this case Exception-I, the offence would be under Section 304, Part I. But in the present case there is absolutely no evidence that the appellant ever had any intention of killing the deceased. He had merely picked up a stone and threw it at the deceased because of the insulting abuses made at him. It was a sudden and impulsive act without any premeditation or intention to kill. The offence committed hence was one where the appellant would be presumed to have the knowledge that the act was likely to cause death though there was no intention to cause death. In such circumstances, the offence was under Section 304, Part II, I.P.C. and not under Section 304. I. His conviction as under Section 304, Part I, I.P.C. is liable to be set aside and instead he is liable to be convicted under Section 304, Part II. *Gopa Bagarty* v. *State*, (1994) 1 Crimes 1171 at p. 1172 (Ori).

It is apparent that accused caused single injury with *lathi*. The possibility of verbal altercation between the parties and of blow having landed on the head of the deceased by chance cannot be ruled out. Hence the offence falls in the ambit of Section 304, Part II, I.P.C. and substantive sentence of imprisonment is reduced to five years' rigorous imprisonment and fine imposed by trial Court is set aside. *Puran Singh* v. *State of Punjab*, (1994) 2 CC Cases 509 (P & H).

It is difficult to hold that the appellant intended to cause the injuries to the liver and the spleen which unfortunately proved to be fatal. Having regard to the nature of the weapon used and the part of the body on which blows were dealt, it is difficult to hold that he intended to cause the death or intended to cause that particular injuries to the liver and the spleen. However, under the circumstances he must be attributed to have the knowledge that by dealing such blows he was likely to cause the death of the deceased in which case the offence is one punishable under Section 304. Part II, I.P.C. *Karam Singh* v. *State of Punjab*, 1994 SCC (Cri) 64 at p. 65 (SC) : 1993 Cr LJ 3673.

- Trial for offence which fell under Section 304, eye-witness not stating in F.I.R. that accused assaulted the deceased—However during trial the eye-witness deposing that the accused assaulted the deceased with *Farshi*. Hence the deposition of the eye-witness not reliable. *Ramesh Maruti Patil* v. *State of Maharashtra*, (1994) 1 East Cr C 426 (SC) : 1994 Cr LJ 8 : AIR 1994 SC 28 : 1994 JIC 406.

Where there was *Phalli* injury upon the head of deceased and had no second injury, offence does not fall under Section 302, I.P.C. The offence shall be deemed under Section 304. Part II, I.P.C. *Rajinder Singh* v. *State of Haryana*, (1994) 2 Recent Cr R 68 : (1994) XXI Cr LT 298 (P & H) (DB).

The report was lodged by deceased's daughter promptly. Injury was found sufficient to cause death in ordinary course of nature. The presence of blood of the same group on *kulhari* and *payajama of* accused lend assurance to the case finding of trial Court that appellant committed the offence. No interference called for. *Sahwag Singh* v. *State of Punjab*, 1994 (2) Crimes 621 (P & H).

Giving of one blow with pair of scissors on vital part of body infers that accused had knowledge that it would cause death though he may not have intended to commit murder and hence conviction falls under Section 304, Part II, IPC. *Mavila Thamban Nambiar* v. *State of Kerala*, 1997 (1) Crimes 72 (SC) : AIR 1997 (SC) 687 : 1997(1) JT 367 : 1997(1) Scale 145 : 1997(1) Supreme 452.

In *Sahen* v. *State of U.P.*, 2001 Cri LJ 401 (All) the circumstances which emerged in the prosecution evidence itself indicated that on account of accused having *Manjha* which could have gone to the deceased, some annoyance was cansed to the deceased who feeling aggrieved started abusing the accused and then both of them exchanged abuses and grappled with each other. In such a factual situation it could not be said with certainty that the accused had aimed the blow an a particular part of the body of the deceased and thereby had intended to cause injury which ultimately proved fatal. The held that the accused was guilty only under Section 304, Part I of the IPC.

3. Onus.—The onus is on the accused under Section 105 of Evidence Act of show that there were extenuating circumstances which reduced the offence of culpable homicide not amounting to murder. AIR 1943 Pat 397 : 45 Cr LJ 213.

When accused and deceased being in drunken state quarrelled themselves and accused gave several stone blows on head of deceased, accused liable to be convicted under Section 304, IPC. *Gayadhar Naik* v. *State of Orissa*, 1997 Cri LJ 1950 (Ori).

Merely because there was a quarrel and accused persons claimed to have sustained injuries, that does not confer a right of private defence extending to the extent of causing death as in this case. Though such right cannot be weighed in golden scales, it has to be established that the accused persons were under such grave apprehension about the safety of their life and property that retaliation to the extent done was absolutely necessary. No evidence much less cogent and credible was adduced in this regard. The right of private defence as claimed by the accused has been rightly discarded.

It is to be noted that Heeralal has stated that the appellant had assaulted both legs, thigh and hands of the deceased with pharsa. He chopped both the legs of the deceased who died instantaneously. Beerbali's (P.W.5) evidence was also to similar effect.

In the instant case, in a brutal manner the appellant had chopped both legs of the deceased and with the weapon caused other injuries on the body of the deceased. Above being the position, there is no scope for interference in this appeal. *Radhe v. State of Chhattisgarh*, AIR 2008 SC 2878 : 2008 (10) SCR 110 (SC) : 2008 (11) SCC 785 : 2008 (7) JT 386 (SC) : 2008 (9) Scale 638 (SC) : 2008 (6) SLT 409 (SC) : 2008 (7) SRJ 174 (SC) : 2008 CrLJ 3520 (SC) : 2008 (3) SCC (Cr) 928 : 2008 (3) JCC 2083 (SC).

Accused and deceased were together in car of accused during time in which deceased must have inhaled carbon monoxide which resulted in her death.

Sitting in the car, with all its window glasses closed and switching on the engine of the car and the air conditioner, either for taking some rest or for talking with anyone, by parking the car in the car shed with its door closed, with a view to have some privacy, is not uncommon. Therefore, no *mens rea* could be attributed against the accused in doing the said acts which do not constitute ingredients of any offence much less, the one under Section 304, Part II of IPC.

Further, it is the very case of the prosecution that the deceased and the accused were deeply in love with each other to the knowledge of their parents and other members of their respective families. It is also its further case that the accused and the deceased had decided to marry each other and the parents of both of them had consented to the same. Therefore, it could be not even be imagined that the accused could do or omit to do, any act, knowing fully that such act or omission could take away the life of the deceased.

In order to attribute against the accused, the knowledge required for the offence under Section 304, Part II of IPC the prosecution has to establish that he switched on the engine and the air conditioner while sitting with the deceased inside the car by parking it in his garage with its door and window closed, fully knowing that the engine of the car would emit carbon monoxide and the person inhaling the same would die. No material on record, collected by the I.O. during investigation, including the report as to Narco Analysis Examination performed on the accused, establishes that he did the said acts fully knowing that by doing so he was likely to cause inhalation of carbon monoxide by himself and the deceased and it could result in the death of the deceased.

Therefore, Court is of the considered opinion that even if entire material on record, including the statement of the accused made before CW 28, Dr. Malini, the Assistant Director of FSL, during his Narco Analysis Examination is accepted at its face value, it could not be held that the accused did any act or that he omitted to do any act, which, he was bound to do, and thereby caused inhalation of carbon monoxide by the deceased which resulted in her death. On the other hand, it is the case of the prosecution that the accused himself had inhaled carbon monoxide while sitting in the car along with the deceased talking to her and he made all the possible efforts *bona fidely*, which any one could have made under the said circumstances, in getting the life of the deceased saved. That being so, it could not be held that the death of the deceased was homicidal. If the accused had 'knowledge' that the engine would emit carbon monoxide which could be dangerous to human life, and that there was possibility of himself and the deceased inhaling the same and that its inhalation could result in any severe breathing problem, or death, he would never have chosen to sit in the car along with the deceased in that condition. Therefore, the contention of the Counsel for the respondent-CBI that when the accused himself felt breathlessness, he should be taken to have had the knowledge that if the deceased were not taken to the hospital for immediate treatment, she might die cannot be accepted.

In view of foregoing discussion, Court is of the considered opinion that the entire material on record collected by the Investigating Officer, even if taken as its face value, is not sufficient to come to conclusion that there is any ground for presuming that the accused has committed the offence under Section 304, Part II of IPC, so as to frame charge against him for the same. On the other hand, the said material shows that there is no sufficient ground for proceeding against the accused for the said offence and hence, the accused-petitioner deserves an order of discharge under Section 227, Criminal Procedure Code. *Pradeep Kumar vs. State of Karnataka*, 2010 (3) CrLJ 2672 (Kant).

The deceased was only a boy of 15 years and the accused was also in the threshold of youth at the relevant time. After perusing the evidence, it appears that there was no intention of murder, but then in course of punishing the deceased for his past conduct, the accused appears to have crossed the limit without knowing the consequence. *Buchu alias Shyamsundar Hembram vs State of Orissa*, 2010 Cri LJ 1070 (Orissa).

4. Sections 304 and 323.—Knowledge that the act was likely to cause death must be presumed. 1964 All Cr R 271 : 1964 All WR (HC) 292 ; AIR 1953 MB 262 : 1954 Cr LJ 6 ; AIR 1959 Ker 372 : 1959 Mad LJ (Cr) 641 : 1959 Cr LJ 1331 ; 39 Mys LJ 293 : 1961 (2) Cr LJ 515 ; ILR 1955 Patiala 399.

In F.I.R. no reference of injuries on accused side made—Allegation that the accused inflicted injury by *pharsa* on deceased—But medical report not indicating any *pharsa* injury—Origin of incident becoming doubtful—Statement of deceased under Section 161, Cr. P.C. cannot be reliable—*Held*, conviction not sustainable. With the background of the case it becomes highly doubtful as to whether the statement of the deceased as recorded by the Investigating Officer which might be admissible under Section 32 of the Indian Evidence Act could and should be taken to be truthful statement at all. Firstly, that was a statement which had gone uncross-examined and secondly, four eye-witnesses who had tried to prove the prosecution case did not come out with any explanation of injuries of the accused inasmuch as they did not also explain the absence of *pharsa* injury on the deceased. Therefore, the said statement of deceased also does not hold the prosecution case and the trial Court had rightly refused to place reliance on the said testimony, may be on the ground that it was inadmissible in evidence because even its admissibility does not advance the prosecution case. Thus the entire prosecution story appears to be doubtful. The result is that it cannot be said that the prosecution has succeeded in proving the case against the appellant beyond reasonable doubt. *Budhi* v. *State of U.P*, (1994) 1 Crimes 966 at p. 970 (All).

Absence of common intention. Offence does not fall under Section 304. It falls under Section 323. *Bharamarbar Prusty* v. *State of Orissa*, (1995) 8 OCR 411 (Ori).

When accused gave a push on chest of deceased who fell down on stone resulting in death, there was no intention to cause any injury or damage to deceased on part of accused and hence offence under Section 323, IPC only is made out. *Pichapillai* v. *State*, 1996 Cri LJ 3634 (Mad).

Where there was no evidence to prove that accused pushed deliberately to deceased from stair on stepping stone; conviction under Section 304, Part II was held to be altered to one under Section 325. *Bakkiaraj* v. *State by Inspector of Police*, 1997 Cri LJ 429 (Mad).

5. Sections 304 and 324.—The determination of the nature of offence depends necessarily on the answer to the question. What degree of injury should the accused be deemed in the circumstances of the case to have intended or to have known himself to likely to inflict as a result of the blow aimed at him. AIR 1947 All 132 : 1957 Cr LJ 336.

Complainant party already received compensation from Civil Court subsequent claim cannot be awarded. Once claim awarded no other relief. *Jassa Singh* v. *State of Punjab*, (1994) 2 CC Cases 115 : 1994 Cr LJ 916 (P & H).

After the incident, which occurred at about 6 or 7 a.m., by the time the deceased was taken to the hospital, there was a lapse of 6 to 6½ hours. Even after recording F.I.R at 8.15 a.m., it was more than five hours thereafter that the deceased reached the hospital. Thus the evidence on record rendered the version of P.Ws. 1 and 2 that the accused dealt blows on the chest of the deceased was held doubtful by the court which observed that "it is difficult to fathom as to at what point of time, the deceased might have received the injuries on the chest. The possibility of the deceased having received these injuries after the lodging of the F.I.R. at 8.15 a.m. and before he reached the hospital at about 1.30 p.m. cannot be ruled out."

In view of the above, the conviction of the accused for the offence punishable under Section 304 Part II, IPC cannot be sustained, but from the acceptable evidence of P.Ws. 1 and 2, what is proved beyond reasonable doubt is that the accused dealt blow with the spade on the head of the deceased, resulting in simple injury. These acts of the accused do constitute the offence under Section 324, I.P.C. In the result the appeal is allowed partly." *Thathadi Appala Naidu* v. *The Inspector of Police Gagapathingaram* Circle, 1999 Cri LJ 1186 (AP).

In a case the accused not being a Gynecologist pressed and squeezed stomach of complainants' wife thereby inducing delivery of child. The child was born alive, and was taken to clinic of child specialist where he died within 20 minutes. It was held that it could not be said that the accused undertake to conduct the delivery with the intention of causing such badly injury to the child as was likely to cause death of the child and, therefore, no *prima facie* case under Section 304-II of the IPC existed against the accused and the order framing charge under Section 304-II could not be sustained under law. *(Dr.) Arun Dewangan* v. *State of Chhatisgarh*, 2006 Cr LJ 1440 (Chattis).

6. Sections 304 and 325.—The line between culpable homicide not amounting to murder and grievous hurt is a very thin and subtle one. In the one case the injuries must be such as are likely to cause death ; in the other, the injuries must be such as endanger life. 223 IC 195 : 47 Cr LJ 378 : AIR 1946 Bom 38 (FB) ; *see* also AIR 1945 Lah 43 : 220 IC 325 ; *see* also AIR 1953 Trip 9 : 1954 Cr LJ 1516 ; AIR 1957 All 132 : 1957 Cr LJ 336 : 1956 All LJ 532 ; Madh Bh 1955 Cr 179 : 1955 HCR 1173.

7. Sections 304, Part I and 34.—A charge of common intention to commit culpable homicide not amounting to murder is absolutely unreal and in nearly every practical case must be ridiculous. It is difficult to suppose that two or three persons who have the right of private defence would even in real life have a sort of discussion to reach the common intention of exceeding that right. If a judge directs a jury that they can on certain facts bring in a verdict of a common intention to commit homicide not amounting to murder, under Section 304, Part I, read with Section 34, I.P. Code, a more confusing way of putting a case before a jury cannot be imagined. In such a case it is not enough for the Judge merely to explain the application of Section 34, I.P. Code, but he should deal with the evidence to point out what, if any, there is to support such a theory. Where this is not done. the conviction cannot be supported, 1LR (1937) 2 Cal 250 : 41 CWN 570. Where the injuries inflicted on person are not such as sufficient in the ordinary course of nature to cause death, but are merely injuries, which are likely to cause death, then the accused is guilty under Section 304. Part I and not under Part II. AIR 1953 All 189 : 1953 Cr LJ 455 ; *see* also 1965 (2) Cr LJ 331 : AIR 1965 All 417.

Part I of Section 304 applies to cases of causing such bodily injury as is likely to cause death if either it is not covered by clauses two and three of Section 300 or though so covered, falls with any of the exceptions. AIR 1957 SC 324 ; 1957 Cr LJ 420 ; AIR 1975 SC 179 : 1975 Cr LJ 243 ; AIR 1980 SC 267 : 1980 Cr LJ 211 ; AIR 1979 SC 1454.

The accused did not intend to cause death of the deceased. In the moments of anger he did cause such bodily injuries to her as were sufficient in the ordinary course of nature to cause death. The particular injury caused on the neck of the deceased by the appellant proved fatal. There might not be an intention of the accused to cause the death of the deceased by causing that bodily injury to her, but his act could have given him knowledge of the likely consequences of the act intentionally done by him. The act so done by him constituted the offence, punishable under section 304, Part I IPC. *Jahid* v. *The State*, 1999 Cri LJ 4430 (Raj).

During the marriage ceremony of the son of Parwati where the women folk, who were participating in the festivities, were teased by the deceased in an inebriated state. The resultant fall-out was the immediate response to the said incident with the intention of preserving the honour and dignity of the said women. It is on account of the said incident that subsequently the accused persons assaulted Ishwar and when he tried to run away, they chased him and on being caught, he was fatally injured by Anil @ Balli and Sucha Singh with knives. Although, it has been urged that the Appellants herein had knowledge that both Anil and Sucha Singh were carrying knives, the same is not borne out from the evidence and their role in the incident in chasing the victim and, thereafter, holding him, was more likely to teach him a lesson as was sought to be projected as his defence. In the absence of any common intention, the conviction of the Appellants under Section 302 with the aid of Section 34 cannot be sustained. It is no doubt true that the evidence of PW. 5 the complainant and PW. 7 another eye-witness was corroborated by the injuries on the body of the victim, but that by itself would not establish common intention as far as the appellants in the present appeal are concerned.

The role attributed to them would, in our view, attract the provisions of Section 304 Part I IPC and not Section 302 read with Section 34 IPC. The appeal as far as the appellants' conviction under Section 302 read with Section 34 IPC must, therefore, succeed and their conviction must be altered to one under Section 304 Part I read with Section 34 IPC. *Raju and Anr. vs. State of Haryana*, 2010 (2) CrLJ 1924 (SC).

The fact that both accused came armed with guns and gunshots were fired from both the guns aiming the victim resulting in his death, necessarily means that both of them shared common intention to commit murder. Hence both the accused were guilty of an offence punishable under Section 302, read with Section 34, I.P.C. *Chandrakant Mahadu Mhaire and others* v. *State of Maharashtra*, (1994) 1 Bom CR 97.

The appellants co-shared the common intention with other co- accused who were incidentally his servants. Though benefit of doubt was extended to others and they were let off on technical grounds the same benefit cannot be extended to appellant against whom the case has been proved to the hilt. *Sheo Shanker* alias *Chhotey* v. *State of U.P.*, 1995 UP Cr R 45 (All).

Offence fell under Section 304, I.P.C. It was alleged that 17 persons caused injuries with their respective weapons on different parts of the bodies of the deceased—15 was acquitted and two were convicted—Appeal was filed against the same. Whether conviction of two accused was not justified under Sections 304, Part II/34, I.P.C. Convictions under Sections 148 and 323/149, I.P.C. confirmed. *Phani Bhushan Das* v. *State of West Bengal*, (1994) 3 RCR 638 (SC) : 1994(6) JT 57 : AIR 1995 (SC) 70 : 1994(4) Scale 136 : 1995 Cr LJ 551.

When deceased was drunk with no enmity with accused who on quarrel regarding some payment inflicted a solitary gupti blow causing death, conviction under Section 304, Part I is proper. *Kumar Nanaso Jadhav* v. *State of Maharashtra*, 1997 (1) Crimes 8 (Bom).

When appellant and deceased were friends and quarrel arose over trivial matter in a liquor drinking party and knife injury inflicted on non-vital part *i.e.* thigh which resulted in fatal, offence is covered under Section 304, Part II, IPC. *Radhey Shyam* v. *State of Rajasthan*, 1997 (1) Crimes 337 (Raj).

When occurrence took place in sudden quarrel and in heat of passion death caused because of single hit by wooden log. There was no intention to cause death and conviction altered to one under Section 304, Part I, IPC. *Perumal* v. *State*, 1997 Cri LJ 1773 (Mad).

Considering the injury on the left anterior aspect of thorax in the intercostal space, just lateral to the left lateral border of the body of sternum and which was sufficient to cause death in the ordinary course of nature, the offence committed by appellant would fall under Section 304, Part I of the Indian Penal Code. *Gurkirpal Singh* v. *State of Punjab* 1999 Cri LJ 2176 (P&H).

Non-examination of the fingerprint expert has not, in any way, affected the case of the prosecution because it has come on record that before the seizure of the weapon of offence many persons had handled it. Though the report of the Serologist is not available on the record, yet the report of the Chemical Analyser clearly and unequivocally shows that the clothes of the appellant and the weapon of offence were stained with human blood. Non ascertainability of the blood group cannot be made a basis to discard the evidence of the witnesses who otherwise inspire the confidence of the Court and are believed. No fault can be found with the judgment of the High Court by which the findings of the acquittal recorded by the trial Court were set aside. *Keshavalal v. State of Madhya Pradesh* AIR 2002 SC 1221 : 2002(3) SCC 254 : 2002(2) JT 628 : 2002(2) Scale 410 : 2002(2) Supreme 184 : 2002(2) Crimes 92 (SC).

8. Section 304 (2)—Applicability of.—Clause (2) applies when the act is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death. 1951 AWR (HC) 477 : 1951 ALJ 464 : (1951) 1 MLJ 675 ; 1952 Cr LJ 1271 : AIR 1952 Assam 157 ; AIR 1956 SC 116 : 1956 Cr LJ 29 . *Camilo Vaz* v. *State of Goa*, 2000 Crl. LJ 1816 (SC) *see also* 1963 (1) Cr LJ 762 : AIR 1963 HP 18. Where it was held that Part II comes into play when death is caused by doing an act with the knowledge that it is likely to cause death and when such act is the infliction of bodily injury that infliction must be intentional. 1963 (1) Cr LJ 762 : AIR 1963 HP 18 ; 1964 Cur LJ 74 : (1964) 2 Cr LJ 197 : AIR 1964 Punj 321 ; *see* also 30 Cut LT 556 ; AIR 1984 SC 759 : 1984 Cr LJ 478 (only one blow with knife—Incident occurring on spur of moment, the accused was held to be guilty of offence under Section 304, Part II). Part II applies to acts which are done without any intention to cause death or such bodily injury as is likely to cause death but which are done with such knowledge AIR 1972 SC 855 : 1972 Cr LJ 582 ; *see* also AIR 1979 SCJ 1532 : 1939 Cr LJ 1135; AIR 1983 SC 529 : 1983 Cr LJ 961.

Accused and deceased were together in car of accused during time in which deceased must have inhaled carbon monoxide which resulted in her death.

Sitting in the car, with all its window glasses closed and switching on the engine of the car and the air conditioner, either for taking some rest or for talking with anyone, by parking the car in the car shed with its door closed, with a view to have some privacy, is not uncommon. Therefore, no *mens rea* could be attributed against the accused in doing the said acts which do not constitute ingredients of any offence much less, the one under Section 304, Part II of IPC.

Further, it is the very case of the prosecution that the deceased and the accused were deeply in love with each other to the knowledge of their parents and other members of their respective families. It is also its further case that the accused and the deceased had decided to marry each other and the parents of both of them had consented to the same. Therefore, it could be not even be imagined that the accused could do or omit to do, any act, knowing fully that such act or omission could take away the life of the deceased.

In order to attribute against the accused, the knowledge required for the offence under Section 304, Part II of IPC the prosecution has to establish that he switched on the engine and the air conditioner while sitting with the deceased inside the car by parking it in his garage with its door and window closed, fully knowing that the engine of the car would emit carbon monoxide and the person inhaling the same would die. No material on record, collected by the I.O. during investigation, including the report as to Narco Analysis Examination performed on the accused, establishes that he did the said acts fully knowing that by doing so he was likely to cause inhalation of carbon monoxide by himself and the deceased and it could result in the death of the deceased.

Therefore, Court is of the considered opinion that even if entire material on record, including the statement of the accused made before CW 28, Dr. Malini, the Assistant Director of FSL, during his Narco Analysis Examination is accepted at its face value, it could not be held that the accused did any act or that he omitted to do any act, which, he was bound to do, and thereby caused inhalation of carbon monoxide by the deceased which resulted in her death. On the other hand, it is the case of the prosecution that the accused himself had inhaled carbon monoxide while sitting in the car along with the deceased talking to her and he made all the possible efforts *bona fidely*, which any one could have made under the said circumstances, in getting the life of the deceased saved. That being so, it could not be held that the death of the deceased was homicidal. If the accused had 'knowledge' that the engine would emit carbon monoxide which could be dangerous to human life, and that there was possibility of himself and the deceased inhaling the same and that its inhalation could result in any severe breathing problem, or death, he would never have chosen to sit in the car along with the deceased in that condition. Therefore, the contention of the Counsel for the respondent-CBI that when the accused himself felt breathlessness, he should be taken to have had the knowledge that if the deceased were not taken to the hospital for immediate treatment, she might die cannot be accepted.

In view of foregoing discussion, Court is of the considered opinion that the entire material on record collected by the Investigating Officer, even if taken as its face value, is not sufficient to come to conclusion that there is any ground for presuming that the accused has committed the offence under Section 304, Part II of IPC, so as to frame charge against him for the same. On the other hand, the said material shows that there is no sufficient ground for proceeding against the accused for the said offence and hence, the accused-petitioner deserves an order of discharge under Section 227, Criminal Procedure Code. *Pradeep Kumar vs. State of Karnataka*, 2010 (3) CrLJ 2672 (Kant).

The High Court was right in altering the conviction from one under Section 302 to Section 304, Part II. having regard to the fact that the death occurred after 24 hours of inflicting injury and also the type of weapon used for causing the iniury *Rakesh Singh* v. *State of H.P.*, 1996 Cr LJ 2311 (SC) : AIR 1996 (SC) 3173 : 1996(4) JT 53 : 1996(9) SCC 89 : 1996(3) Scale 346 : 1996(3) Supreme 430.

In a Supreme Court case, the evidence on record showed that the accused picked up the gun, un locked it loaded it with cartridges and shot the gun from a close range of about 4/5 ft. aimed at chest of the deceased. The accused took plea that on the date of occurrence he had invited guests to attend the dinner and the deceased was one of them. He was heavily drunk. The accused dissuaded him from returning to his place and advised him to come on the next day. But the accused paid little heed. To scare the accused, the deceased picked up the gun lying there, loaded the same with blank cartridges which only create noise. But the deceased tried to snatch it from him. In the scuffle when the deceased pulled the barrel of the gun accidentally it got fired and the deceased sustained injuries on his chest. After seeing the injury, the accused was totally shocked and fled away. The after accused persons denied their involvement in the occurrence. In view of the scenario described by the prosecution witnesses and the evidence of ballistic expert, the offence committed by the accused was covered by Section 304, Part-II. *Shankar Narayan Bhadalkar* v. *State*, AIR 2004 SC 1966 : 2004 Cr LJ 1778 (SC) : 2004(3) JT 211 : 2004(3) Scale 78 : 2004(3) Supreme 652.

In a Jharkhand case, the accused gave single blow on the head of deceased with wooden bar which was lying at the spot resulting into his death. Deceased was not shifted to hospital immediately but was hospitalized next day thus he could have been saved by timely medical help. Intention to kill could not be inferred. Conviction of accused under Section 302 was altered to one under Section 304, Part-II. *Mahendra Raut* v. *State of Bihar (New Jharkhand)*, 2004 Cr LJ (NOC) 82 (Jhar) : AIR 2004 Jhar HCR 581 : 2003(3) JLJR 776.

The deceased asked the wife of the accused whether she had tea. The accused got irritated and inflicted severe blow with wooden block on head of deceased. The deceased succumbed to injuries after 18 hours, the court held that "I do not think that deceased committed any crime in asking the wife of the appellant whether she had tea. Even assuming that the appellant had been married recently and such a conduct of the deceased irritate him there was a limit to which he could go. It should be born in mind that just about an hour before fatally assaulting the deceased the appellant had locked him inside the room of his house and assaulted him with slippers. To inflict a sever blow with a wooden block on the head of the deceased for such an act, about an hour thereafter in my opinion, would not justify the substantive sentence of the appellant being reduced to the period already undergone, as contended by Mr. Marwadi. But be that as it may a sentence of 5 years R.I. on these facts is certainly excessive. I feel that considering the overall circumstances the ends of justice would be squarely satisfied if the substantive sentence of 5 years' R.I. awarded to the appellant is reduced to 2½ years, R.I. and he is directed to pay a fine of Rs. 2,500/- and to undergo 6 months R. I. In default."

The deceased went to the shop of the accused with a request to give him 9 lighted petromax and on the latter's refusal, there was exchange of words which was followed by a scuffle. The witness who happened to be in the shop intervened and separated them. A tea shop owner near the shop of the accused also reached the place of incident and held the deceased with a view to take him away. The accused who was then sitting on a stool, picked up a pair of scissors lying on the table in front of him and caused a step injury on the right side of the chest of accused. The accused again tried to inflict one more blow which landed on the right cheek of accused who thereafter fell down on the ground. It was held by the Hon'ble Apex Court that the offence of the appellant would more appropriately fall under section 304, Part II of the Indian Panel Code as the appellant had given one blow with a pair of scissors on the vital part of the body of deceased and therefore, it would be reasonable to infer that he had knowledge that any injury with the pair of scissors on the vital part would cause death though he may not have intended to commit the murder – *Mavila Thamban Nambiar* v. *State of Kerala*, 1997 SCC (Cri) 726 : 1997 Cri LJ 831 : AIR 1997 (SC) 687 : 1997(1) JT 367 : 1997(1) Scale 145 : 1997(1) Supreme 452.

The appellant had given one blow but the blow no doubt was quite severe, as a result of which the intestines had protruded out. The appellant had no animosity against the deceased and he was involved because of the altercations with PW.I- The scenario in which the appellant had been stated by the eye witnesses to have given one blow on the deceased, it could not be said that he gave the blow in question either with the intention of causing murder of the deceased or he can said to have the requisite knowledge that the death would otherwise be the inevitable result. In such a situation even on accepting the prosecution case, it was bold that the accused did not commit the offence under section 302 but under Part II of Section 304 IPC. *K. Rama Krishnan Unithan* v. *State of Kerala*, 1999 Cri LJ 2101 (SC) : AIR 1999 (SC) 1428 : 1999(3) SCC 309 : 1999(2) JT 235 : 1999(2) Scale 128 : 1999(3) Supreme 162.

The quarrel between the two took place all of a sudden and in the heat of the moment the appellant had picked the stove and had thrown it towards the deceased. Since the appellant had thrown a burning stove on the deceased he would have known that his act was likely to cause burns resulting in death. In view of the facts and circumstances of the case he can be said to have committed an offence under section 304 Part II, IPC. *Hari Shankar* v. *State of Rajasthan*, 1999 Cri LJ 2902 (SC) ; See also *Mohan Lal* v. *State of Rajasthan*, 2006 Cr LJ 1333 (Raj).

Accused is a Police Constable, who beat a fragile old man of 60 years weighing only 38 kg. The ribs of the deceased were broken, which resulted in his death. The court held that the case squarely fell within the ambit of section 304 Part-II IPC because he was presumed to intend the consequencies of his act. *State of Kerala* v. *Balakrishan*, 1999 Cri LJ 5038 (SC).

It was established by the prosecution that when deceased arrived, the accused picked up a stone and dropped it on his head from the roof of his house, from which it could be safely inferred that the accused had the knowledge that he by his said act was likely to cause death of deceased. The seizure memo indicated that it was a large stone weighing about 15 kilograms. Thus, from the size of the stone used in causing the injury and the manner in which it was thrown from the roof of the house on the deceased, there was clear indication that the accused fully knew that he by his said act was likely to cause death of deceased. Under these circumstances, the trial court had in no way erred in convicting the appellant of offence under Section 304, Part-II of the Indian Penal Code. *Santosh* v. *State of M.P.*, 2000 Cri LJ 1140 (M.P.)

Accused made an attempt to end her life by jumping into well along with a female child in her lap. The child died in the incident. The accused had been suffering from colic pain right from the time of her delivery and even after her prolong treatment by village doctor she could get no relief from griping pain of belly. Taking into consideration the old illness of tuberculosis coupled with severe and continuous stomach pain.

general mental condition of the appellant was not normal, otherwise she would not have decided to carry on and die with her newly born baby. Her mental condition indicated that at the time of incident, she was gripped with an idea to end her life and also to end the life of the newly born baby so that she may not be starved to death without her mother. The offence of accused therefore, fell under the category of offence punishable under Section 304, Part II, I.P.C. The offence under Section 309, I.P.C. was also found proved against the accused. "*Baijanti Bai* v. *State of M.P.*, 2000 Cri LJ 3253 (M.P.).

In *State of U.P.* v. *Indrajeet*, 2000 Cri LJ 4663 (SC). The accused a carpenter by profession caused injuries by using implement used in carpentary which is not really such a deadly weapon so as to cause *per se* any serious wound or a grievous hurt or injury to the victim. Of the two injuries found inflicted on the body of the victim, only one was found to be a serious one, which was considered in the normal course to be sufficient to cause death. Though the intrusion into the hut by the respondent in the early hours of the morning may be construed to be with a sinister intention or purpose, out from the type of the weapon he was carrying, it could not be either reasonably or legitimately postulated that it was with the intention of committing the murder of the victim or inflicting upon the victim such a grave, serious injury sufficient to cause her death, particularly when he would be fully aware of the fact that in the hut the father and the mother of the deceased would also be present at that time. Apart from any positive motive being either attributed in the case, or alleged or proved by the prosecution, there was no clinching circumstance or evidence to reasonably establish the culpability of the accused for a charge of murder. Absence of intention to cause the death coupled with the lack of knowledge that death would be inevitably cause on account of the injury would make the offence fall only under Section 304, Part II, IPC, and not under Section 302, IPC. Consequently, in the absence of any motive or intention to kill and having regard to the type of weapon used and the number as well as the nature of injuries found inflicted, the case on hand could not appropriately be said to be one warranting the application of Section 302, IPC.

There was a scuffle between the deceased and appellant, which lasted only for five minutes as per the evidence of informant and in which, admittedly, only one blow by chhura was given by the appellant. In view of these facts it cannot be inferred that there was pre-meditation for committing the murder of deceased and the appellant inflicted single injury by chhura with the intention of causing of death of the deceased. The possibility of giving chhura blow by the appellant by whipping out a chhura from his waist to the deceased in the heat of passion and in agitated mental state which was the result of provocation caused to him by the verdict of panchayati which went in favour of the deceased with whom he had stranged relations cannot be ruled out. So Section 304 Part II was held attracted. *Paras Kumar* v. *State of Bihar*, 2000 Cri LJ 112 (Pat.).

All the appellants were armed with sharp edged weapons. Each one of them could have beheaded the deceased by using the sharp side. They did not even use it from that side. In fact, not a drop of blood was shed. Not even an abrasion was caused. It was the prosecution's own case that each one of them had used the weapon from the blunt side. Still further, the weapons were not wielded with full force. One blow with full force could have smashed the skull or at least caused a crack in the cranium. The statement of doctor showed that the injuries to the deceased could be the result of these weapons if used lightly. He further clarified that chances were very rare that such injuries being caused by forceful blow with the heavy blunt weapon. No fracture of the skull was caused. The use of the weapons from the blunt side and that too without applying full force indicated that the appellant did not have the intention to cause death or to inflict injuries which may be sufficient to cause death in the ordinary course. It was to teach him a lesson for having complained to the Panchayat. The case fell within the purview of Section 304 Part II. *Dev Singh* v. *State of Punjab*, 2000 Cri LJ 347 (P&H).

It had not been spelt out in evidence as to which injury was caused to the deceased by the accused individually or who was the author of the fatal blow dealt to the deceased. But the fact remained that the appellants, armed with danda, lathi, had participated in the incident. It was said that the occurrence took place on account of some minor incident which had taken place earlier in the day time between the deceased on the one hand and the accused. In view of the facts and circumstances of the case, the intention of the accused could only have been to cause injuries to the deceased and they did not share any common intention to cause death of the deceased. The conviction of the accused was altered from one under Section 302 of the IPC to one under Section 304, Part II read with Section 34 of the IPC. *Martam Sinku* v. *State of Bihar*, 1999 Cri LJ 4159 (Pat.).

In *Sanjay Goel v. State of U.P.* 2002 Cri LJ 625 (All) the accused was in love with the deceased and wanted to marry her. The deceased came in contact with another boy and was gradually developing a cold feet towards the accused. The accused managed to meet the deceased in her room in hostel at Kanpur and was there for three hours prior to occurrence. But accused and the deceased consumed arsenic poison purchased by the accused. The deceased died but the accused survived on account of his strong physique and vomitting. Administration of person by accused to the deceased was not established. The Hon'ble High Court after going through the evidence made the following observations :—

"In the circumstances we are of the opinion that this is not a case of murder or homicide but is a case of an attempt to commit sucide by both. As we have already come to the conclusion that it was the appellant who had successfully persuaded the victim Mamta to be a party to his desire to end their lives, therefore the knowledge that the death as a result of this conjoint effort of both or anyone of them may occur cannot be excluded in the circumstances of the case. From the evidence it is apparent that she was naive and lacked enough will power to resist this appellant.

The evidence further shows that her parents were reluctant to this relationship. Thus, there is every possibility of this appellant having prevailed on her and they both accordingly consumed poison. In the end we find the appellant guilty of the offence of culpable homicide not amounting to murder under the second category because the knowledge that it will result in her death was very much present there. Since we have come to the conclusion that she succumbed to him as a result of an artful persuasion of the appellant for which he had sufficient time, calm and peace present in the surrounding, the deceased being a gullible partner to his personality, therefore, we hold the appellant guilty for the above offence."

9. Section 304 Part II and Section 34.—In AIR 1950 Pesh, 24, *Mohd. Shafi, J.* observed : "Common intention should not be mixed up with 'common object' in Section 149, Penal Code. Both are not in any way synonymous. Under Section 149, Penal Code a person who is a member of an unlawful assembly is guilty of the offence committed by another member of the unlawful assembly, although he had no intention to do it because it is done in the prosecution of the common object of the assembly of which both were members. Similarly the 'same' or 'similar' intention should not be confused with common intention. The dividing line between the two as pointed out by their Lordships of the Privy Council in AIR 1945 PC 118 : 46 Cr LJ 689, is very thin, yet is very material and substantial. A person in doing an act may have the same or similar intention with another person doing the same act, yet he may not have a common intention with him so as to invoke the aid of Section 34, Penal Code, in convicting him. In the latter case, there is always an element of pre-planning before an act is actually done between two or more persons. Under Section 299, Penal Code, if any person causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he likely by the act to cause death, commits an offence of culpable homicide. Under Section 300, IPC culpable homicide is murder if the act by which death is caused is done with the intention of causing death, or secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause death of a person to whom the harm is caused : or thirdly, if it is done with the intention of causing bodily injury to any person and bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or, if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, and commits such act without any excuse for incurring the risk of causing death or such bodily injury as above said. Culpable homicide is not murder, if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident, if the offender, in the exercise in good faith of the right of the private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence, if the offender, being a public servant or aiding a public servant for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill will towards the person, whose death is caused, and lastly, if it is committed without presumption in a sudden fight in the heat of passion upon a sudden quarrel and without the offender, having taken undue advantage or acted in a cruel or unusual manner. If culpable homicide is murder, it is punishable under Section 302, Penal Code, if it is not, it is punishable under Section 304 (Part II), Penal Code.

If however, the person committing an act which results in the death of another person does it with the knowledge that it is likely to cause death but without any intention to cause death or such bodily injury as is likely to cause death, he is guilty under Section 304 (Part II), Penal Code. Since the element of intention is missing in the last mentioned case, the question of two or more persons having a common intention does not at all arise. It is, therefore, that the majority of the High Courts in pre-partitioned India including this High Court AIR 1942 Pesh 51 : 43 Cr LJ 766, have held that Section 34, Penal Code, will in no case apply to an offence falling under Section 304 (Part II), Penal Code. No hard and fast rule, however, can be laid down as regards the application of Section 34, Penal Code, to an offence falling under Part I of Section 304 Penal Code. Every case shall have to be decided on its own merits. Reading the two parts of Section 304, Penal Code, together one is led to irresistible conclusion that while the intention to commit the death is missing from the second part, it is very much present in the first, and when a person commits the death of another person even if he may be unavoidably driven to it, can have common intention with another person committing the death under the same compulsion. It is true that some cases in which a person commits the death of another person, without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in an unusual manner, he may have same or similar intention with another person, but not the common intention, yet the possibility of his common intention with another person developing during the course of the event cannot altogether to be excluded".

In a Full Bench case of the Allahabad High Court reported in AIR 1951 All 21 (FB), the question referred to the Full Bench was, "Whether it is possible to convict an accused person of an offence under Section 304. Part II, read with Section 34, Penal Code" In answering the question in the affirmative, *Wali Ullah, J.*, said. "On a comprehensive and careful review of the authorities referred to above and, in particular the provisions of the group of sections beginning with Section 32 and ending with Section 38, Penal Code, it is clear to my mind, that the. expressions "common intention" and "in furtherance of common intention of all", in Section 34 must be interpreted against the background afforded by the basic principles of the sections of group. If "common intention" be limited to what is known as *mens rea* or guilty mind, necessary for the constitution of the crime, actually committed, it would undoubtedly make the basic principle contained in Sections 35, 37 and 38 unworkable. It seems to me, therefore, that the legislature intended that the two expressions in Section 34 must be interpreted in a wide sense so as to cover even a case where more persons treat the one act in a co-operative spirit, but not with an intention shared by all to commit a particular crime......Section 34 no where says that all persons who are acting in pursuance of a common plan are necessarily guilty of the same offence. The common intention animating all those who are acting in concert within the meaning of Section 34 must, therefore, be an intention to do particular criminal act or bring about a particular result, not necessarily the act or the result which constitutes the crime charged. Here the word 'intention' is used in a much wider sense and is not confined to what is described a volitional intention, *i.e.*, something willed and therefore intended.....

"I now come back to the specific question which we have to answer, *viz.*, whether it is possible to convict an accused person of an offence under Section 304, Part II, read with Section 34, Penal Code. Section 304, Part II, Penal Code, provides punishment for culpable homicide not amounting to murder when such an offence is committed without intention either to cause death or to cause such bodily injury as is likely to cause death, but is committed by doing an act with knowledge that it is likely to cause death. If Section 34 be interpreted as I have endeavoured to do, it seems to me that there is no difficulty in punishing with its aid a number of person under Section 304, Part II. If the common intention of Section 34 is not necessarily confined to an intention to commit the very crime with which the accused is charged, a number of persons may act in pursuance of a common intention with this result that the doer of a particular part would, be deemed to be the doer of the whole and, if any or all persons participating in the action is or are shown to have a knowledge that the act is done either singly or jointly with others is likely to bring about death, every such person can be punished under Section 304, Part II. There is no possible conflict between the kind of knowledge contemplated by Section 304 Part II, and the kind of common intention contemplated by Section 34 in pursuance of which the group of persons in question started the operation. As mentioned above, the axiom laid down by Section 34 and the basic principle running through Sections 35, 36, 37 and 38 mean only this that any one of the joint participators in the act is to be deemed to be the doer of the entire act". The Full Bench thus answered the question in the affirmative. "We therefore answer the first question in the affirmative and hold that it is possible to convict a person of an offence under Section 304, Part II read with Section 34, Penal Code, provided the Court is of opinion that each person taking part in committing the crime in furtherance of the common intention of all had knowledge that this act was likely to cause death." The following cases have been overruled by the above Full Bench case, namely, AIR 1943 All 271 : AIR 1936 All 437 ; 29 All 282 : 5 Cr LJ 130 ; 40 All 103 : 43 IC 438 : 1887 AWN 236 and 13 Cr LJ 265 : 9 ALJ 180.

In AIR 1950 Ass 98, *Thadair*, C.J., observed : "The question whether in point of law. Section 34, Penal Code, applies to a case where accused persons are charged with and found guilty under Section 304, Part II, Penal Code, came up before a Division Bench of the Calcutta High Court reported in AIR 1944 Cal 339 : 45 Cr LJ 771. *Lodge* and *Dass*, JJ., differed, *Khondkar, J.* agreed with *Lodge, J.*, and referred to the case reported in 31 CWN 314 : AIR 1927 Cal 324 : 28 Cr LJ 334. in which the following observations were made. There is yet another objection to the charges and verdict. It is that Section 34, which is based on a common intention, cannot possibly be used in Part II of Section 304, which expressly excludes intention. Personally I do not think that it could be used with part I either except possibly in a very rare case...... With reference to these observations, *Lodge. J.*, remarked. 'With great respect to the learned Judge, I am not quite able to discover whether he did or did not discuss it or give any reason for his decision. But it is clear from a perusal of the judgment that the learned Judge decided the case upon other consideration and that the decision of that case did hot depend on the interpretation of Section 34. The learned Judge's remarks, therefore, on the applicability of Section 34 to Section 304, Part II may be considered as *obiter dicta*......Though the question of the true interpretation of Section 34 has been considered in many reported cases. In the majority of those cases, the term 'criminal act' was examined and the Courts did not attempt to explain the meaning of the phrase in furtherance of the common intention of all........In the result therefore, I hold that there is no difficulty in applying Sections 34 and 35 to cases of culpable homicide punishable under Section 304(2)'. with great respect we think, the view taken by *Lodge* and *Khondkar, J.*, is right". In the above case *Khondkar J.*, observed :

"It follows that, as already indicated, I cannot concur with my brother *Das* in view that the principle of Section 34 can never be applied to an offence punishable under the Second Part of Section 304". "He came to this conclusion by giving the words 'common intention' occurring in Section 34 a meaning varying with the facts of each case. In his view 'common intention' referred to in Section 34 could not be given a constant connotation. It varied with the facts of each particular case. In this view of the matter.

he could not hold that Section 34 could never be applied to an offence punishable under Section 304, Part II. He however made certain observations which considerably reduced the scope of the applicability of Section 34 to cases falling under Section 304, Part II. His observations are as follows:

'Before I have this subject, however, I ought to add that I am inclined to endorse the observations of *Henderson, J,* that in actual facts, cases in which the principle enunciated in Section 34 can be applied to an offence punishable under Part II of Section 304, are not of very frequent occurrence. Cases of the type out of which the appeals here dealt with have arisen, are really cases in which the offence committed is in fact murder punishable under Section 302. In order to allay the qualms of juries who, in this province, are notoriously averse to returning affirmative verdicts of capital charges, Judges frequently go to the artificial length, in leaving open an avenue to a verdict under Section 304, Part II, where the evidence shows that it is either murder or nothing". All the reported cases on this point have been referred to and discussed by Full Bench of the Allahabad High Court in the case reported in AIR 1951 All 21 : 1950 ALJ 802. A particular knowledge is an essential ingredient of the offence under Section 304, Part II unless a Court records a finding that each person taking part in committing the crime in furtherance of the common intention of all, had the knowledge that their act was likely to cause death. The accused cannot be rightly held guilty under Section 304, latter part. AIR 1953 All 491 : 1953 Cr LJ 1111 : 1953 ALJ 346. It is logically wrong to hold that Section 34 can never be applied to a case under the 2nd part of Section 304, 1953 Cr LJ 1815 : AIR 1953 Punj 262.

Deceased in her dying declaration, had attributed acts of carrying vessel containing acid and throwing content thereof on her only to accused. Both accused were demanding illicit body relations with her as also entering into her house.

It cannot be said with certainty that co-accused had accompanied main accused to house of deceased with common intention to commit murder. Appellant is, therefore, liable to be convicted under Sections 326 and 304, Part II and not under Section 300.

In absence of any active role played by the appellant or overt act being done by the appellant it cannot be said with certainty that the appellant had accompanied the main accused to the house of the deceased with a common intention to murder the deceased. In view thereof, the conviction of the appellant under Section 302 read with Section 34 IPC cannot be sustained.

It can be said with certainty that the appellant had the intention to inflict bodily harm on the deceased otherwise the appellant would not have accompanied the main accused to the house of the deceased. Since the appellant was present at the scene of occurrence and simply watched the main accused throwing acid on the deceased without preventing the accused from doing so clearly establishes that the appellant had intended to cause injury to and also disfigurement of the deceased and as such is liable to be punished under Section 326 IPC. Also since the appellant could be said to be possessing knowledge that the throwing of acid is likely to cause death of the deceased, a case under Section 304 Part II is also made out. *Bengai Mandal alias Begai Mandal vs. State of Bihar*, AIR 2010 SC 686.

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A conviction under Section 304, Part II read with Section 34 is legal and valid. Part II of Section 304. can be read together with Section 34, notwithstanding that Part II of Section 304 speaks only of knowledge while Section 34 deals with common intention. It is an error to view that Section 304 is divorced from common intention whatsoever, (1964) 1 SCWR 344 : (1964) 2 SCA 656 : 1964 (2) Cr LJ 350 : (1964) Cr LJ (SC) 152 : 1964 All Cr 187 : AIR 1964 SC 1263 ; *see* also AIR 1960 Punj 310 : 1960 Cr LJ 851. If the result of beating is death of the victim and if the beating was done by a group of persons in furtherance of the common intention and if each of the assailants possess the knowledge of that the beating is likely to cause death, the offence would come under Section 304, read with Section 34, I.P.C., 1975 Cr LJ 789.

The accused persons (A-3 and A-4) took picked up a quarrel with PW1, PW2 and deceased. Though the deceased and PW1 and PW2 ignored the assault and proceeded further the said accused persons chased them and took up a quarrel again. Accused No. 1 came there along with others and used violence and injuries were caused to deceased due to which he ultimately died. It was held that it was a clear case of doing a criminal act in furtherance of the common intention and convicting the accused for the offence under Section 304-II read with Section 34, IPC, no error of law had been committed. *Saravanan* v. *State of Pondicherry*, 2005 Cr LJ 117 (SC) : 2005(1) SCJ 54 : AIR 2005 (SC) 57 : 2005 SCC Cr 161 : 2004(2) Crimes 323 (SC) : 2004(8) Supreme 98.

The High Court acquitted one of accused convicted of the offence of murder by the Sessions Court as he made a gift of three acres of land in favour of the widow of the deceased as compensation on account of the loss of life of husband and converted the conviction of another accused from Section 302 to Section 304A, the order of the High Court would be liable to be set aside. AIR 1984 SC 1029 : 1984 Cr LJ 832.

In a case, death was caused by an axe and it was done in retaliation of an earlier incident between accused and deceased's son. The doctor confirmed the homicidal death but he did not say anything about sufficiency of injury causing death in the ordinary course of nature. It was held that the offence fell under Section 304, Part-II. *Surjan Singh* v. *State*, 2003 Cr LJ 233 (MP).

When it was case of single knife blow and deceased did not die instantaneously conviction falls under Section 304, Part II, IPC. *Kripasing Sheetala Prasad Srivastava* v. *State of Maharashtra*, 1997 (1) Crimes 38 (Bom).

The death was due to hemorrhage and shock resulting from the injury. But there are other circumstances also that have to be taken care of. It transpires in the statement of injured Braham Prakash, P.W.3 that accused Devinder Singh had given knife blow. He had suddenly taken out the knife and caused only one injury. He did not care to repeat the same. It was towards the back side of the chest. These facts clearly show that there was not the intention but one can say that it likely to cause death without intention to cause death. Therefore, Devinder Singh must be held guilty of the offence punishable under Section 304, Part II of the Indian Penal Code. *Prithvey Singh v. State*, 2002 Cri LJ 2874 (Del.) : 2002(2) Cur Cri R 36 : 2002(96) DLT 785.

Keeping in view the medical evidence, and the nature and manner of assault on the deceased as emerging from eyewitness account of the three eyewitnesses, the High Court was well justified in holding that respondents Nos. 2 to 11 could be held guilty of the offence of murder and that their offence could only be culpable homicide not amounting to murder, punishable under Section 304, Part II, IPC, because all of them could be attributed with the knowledge that injuries caused by them were likely to result in the death of the injured. The view taken by the High Court is sound and suffers from no error. It is a reasonable view based on proper appreciation of evidence. *Kripal Singh v. State of Madhya Pradesh and Others*, AIR 2002 SC 2547 : 2001(10) JT 341 : 2002(3) Supreme 89 : 2002(2) Crimes 166 (SC).

From the evidence of PW1 it appears that both the accused and the deceased were in a friendly mood when one asked for a glass of juice from the other. Shortly thereafter while the deceased has left the shop of PW1, the accused went behind and gave the blow in question and further, the blow in question had been given from the back side and only a single blow had been given. In these circumstances, it is difficult for us to hold that the accused can be said to have had the necessary intention for causing the murder of the deceased while giving the blow in question, though ultimately the blow had become fatal. We, therefore, set aside the conviction of the appellant under Section 302 and convict him under Section 304, Part II and sentences him to imprisonment for 5 years.

Deshraj Yadav v. State of M.P., 2002 Cri.LJ. 407. M.P. So far as quantum of punishment is concerned, the plea of learned counsel was that the accused is in custody since 19.9.1997 and may be sentenced for the period he has already undergone. Learned counsel submitted that even the Apex Court in a spate of judgments has awarded by and large five years imprisonment for offence under Section 304, Part II, IPC. He being a family member of the deceased may be considered sympathetically. Learned Public Prosecutor opposed it.

Held also punishment shall be commensurate to the crime. Even if a crime is committed with a close member of the family that by itself will not be considered as a mitigating circumstance. Misguided leniency encourages a criminal and the society suffers and plea for reduction in view of delay or accused having married and settled was not found to be tenable ground by the Apex Court for an offence under Section307, IPC vide judgment in 1995 Supp (3) SCC 686: (AIR 1996 SC 546.) *Chinadural v. State of Thaminl Nadu.* Sentencing requires care and caution. *Umed Singh v. State of Rajasthan.* 2002 Cri LJ414 Raj. H.C.

The inadequacy as well as excessive harshness of the sentences both are detrimental to the interest of the Society, inasmuch as it should be guided by the intention of the court to afford an accused an opportunity to reform himself. It becomes necessary all the more in the cases of this nature. Bearing in mind the principles and the fact that the learned Additional Sessions Judge has failed in complying with the provisions of Section 235(2) of the CrPC in the present case, we are invested with an obligation to apply ourselves decisively and effectively to inflict a sentence upon this appellant which may not either suffer from leniency or harshness, it should tend towards efficacious and legitimately genuine sentence. *Sanjay Goel v. State of U.P.* 2002 Cri LJ 625 (All) : 2001 All LJ 2713 : 2001(3) All Cri R 2389 : 2002(1) Rce Cri R 356.

Where it was contended that the case is covered under Section 304. Part II, I.P.C. and not under Section 302, because there is nothing on the record to show that the appellant had the intention of causing death or causing such bodily injuries as were sufficient in the ordinary course of nature to cause death. There was merit in this submission. The injuries were caused by rubber belt and also by bamboo stick. None of the injuries except injury No 4. were sufficient in the ordinary cause of nature to cause death. There is nothing on record to show how injury No 4. was caused except the statement of S.I. Bijoy P.W.22 the investigation the appellant disclosed to him that in the process of assault the head of the victim happened to hit the cot as a result of which she died. As such, the case is covered under Section 304, Part II IPC. *Udai Man Gurung. v. State of Sikkim,* 2002 Cri LJ 691, Sikkim. H.C. : 2001(3) Crimes 364.

10. Cases.—If in case it is difficult to determine whether the offence proved to have been committed by the accused is culpable homicide or murder, the proper course is to convict the accused of the lesser offence. LBR (1872-1892), 459. Where a sweeper had been appointed as a *Rakha* by a *Jat* to watch his crops of gram and on account of the former stealing the staff quarrel ensued and he was strangled to death by the latter. *Held,* that the culprit was guilty of no offence punishable by the second part of Section 304, I.P. Code, and a sentence of 4 year's rigorous imprisonment was quite sufficient. 6 PWR 1913 Cr : 66 PLR 1912 : 15 Ind Cas 318 : 13 Cr LJ 478. In a case of culpable homicide, when a man is killed by a blow, the intention of the accused is a presumption of law. He is presumed to have intended the natural and necessary consequence of his act, even if he is drunk. 12 Cr LJ 524 : 12 Ind Cas 292 : 4 Bur LJ 252 ; 1923 Lah 516. Where the accused threw his stick at the deceased with such force that it hit him in the head with the point and made a punctured wound which caused his death, *held,* that the accused was not liable to be punished under Section 304A, because injury was intentionally caused to the deceased. Rat Un Cr C 673. A person cannot be convicted under this section on mere probability. Rat Un Cr C 636 : Cr Reg 4 of 1894. The prisoner, a fully developed adult man, was charged with causing the death of his wife a girl about eleven years and three months. The death was caused by haemorrhage from a laceration in the upper part of the vagina caused by the prisoner having sexual intercourse with her. *Held,* that the prisoner was guilty of an offence, under Section 338 and not under Sections 304, 304A or 325 of the Penal Code. 18 Cal 49.

Where the accused found his sister having illicit connection with another man and in a sudden passion killed them both on the spot, *held*, that the accused received very grave and sudden provocation, sufficient to reduce the case to a culpable homicide not amounting to murder. 18 All 497 : AWN 1896. 161. Where there was a fight between the deceased and the accused, but the deceased struck the first blow, and no motive sufficient to induce the accused to deliberately murder the deceased was proved, *held*, that the accused were guilty of culpable homicide only though the deceased died as a result of the injuries inflicted by the accused. 5 MLT 207 : 4 Ind Cas 1116. Conviction in alternative under Secs. 325 and 304. Part II, is not proper AIR 1933 Lah 865 : 1933 Cr C 1112 : 146 Ind Cas 221. Where the accused, the Jail Superintendent, on being attacked with shoe by prisoner thrusted wooden substance in his rectum which caused his death, he is guilty of offence under Sec. 304 (2) and not under Sec. 325. AIR 1932 Lah 199 : 1932 CrC 220 : 33 PLR 49 : 33 CrLJ 365 Ind Cas 729. Where the accused kills a woman above 18 years with her consent, he is guilty of culpable homicide not amounting to murder. AIR 1931 Mad 436 : 60 MLJ 616 : 32 Cr LJ 659 : 54 M 504.

Where the deceased met his death in an affray and the evidence given in the Court is obviously not reliable and the medical evidence shows that there was only one long cut on the body of the deceased and it could not possibly be determined who caused it, a conviction under Section 304. I.P.Code, cannot be sustained. 165 Ind Cas 889 : 38 Cr LJ 89. The punishment to be inflicted for an offence under Section 304, for murder of the adulterer caused by sudden provocation by the husband of the woman is discretionary. The principal object in view by which the Courts should be guided is a sufficient determent punishment. UBR (1892-1896) Vol. I, 1213.

The High Court has noted that from the side of the complainant which includes deceased also, five persons have received in total as many as 15 injuries. The main injury on the head of the deceased has been attributed to A1. Similarly, Gulam Rasul, Jan Mohammad son of Sultan and another Jan Mohammad, have also received wounds on the head. Injury on the head of Gulam Rasul was an incised wound caused by a Farsa. Jan Mohammad son of Sultan had received an incised wound on the head. The other Jan Mohammed had received lacerated wound on the head. The other injuries on the persons of all the other injured persons are in the shape of bruises or lacerated injuries most of which have been caused by lathies.

The prosecution evidence clearly shows that the common object of the unlawful assembly was to commit the murder of Habib and it was not just an assembly at a particular point of time where the accused persons had assembled with Frasa and lathis in order to cause injury on the complainant including Habib-deceased who had gone for filing nomination papers for the Panchayat election.

The High Court found that the purpose of the unlawful assembly was to stop Habib, his brother Gulam Rasul and their supporter from either contesting the election or supporting the persons who filed the nomination. They were all present near the gate of the school where the nomination papers were to be filed. Both the trial Court and High Court have on analyses of the evidence come to hold that all the accused persons had formed an unlawful assembly armed with weapons which were likely to cause death and, therefore, conviction under Sec. 148 IPC and application of Sec. 149, IPC does not suffer from any infirmity. *Siri Kishan vs. State of Haryana*, 2009 (12) SCC 757 : 2009 (8) JT 305 : 2009 (6) SCR 1184 : 2009 (6) Scale 438.

In a case in a scuffle between accused and deceased over parking of three wheeler scooter, accused took out his pistol and fired at the deceased. The bullet missed deceased and instead hit thigh of a prosecution witness. Accused fired again and bullet hit the deceased killing him there only. Held, defence plea of trigger being pressed intentionally second time during course of scuffle was unacceptable. The accused was guilty of offence under Section 304-II and not under Section 302, IPC. Exception I to Section 300 IPC applied. *Sukhdev Singh* v. *Delhi State (Govt. of NCT of Delhi)*, 2003 Cr LJ 4315 : 2003 SCC (Cri) 1714 : 2003(7) SCC 441 : 2003(7) Scale 102 : 2003(5) SLT 134.

In an Orissa case during the fight accused went to his house, brought a knife and stabbed the deceased to death. He knew that the injury caused him may cause the death but he had no intention to do this. The accused was convicted under Section 304, Part-II. *Purandar Mirdha* v. *State*, 2003 Cr LJ (NOC) 210 (Orissa).

In a Gauhati case, the incident had taken place due to quarrel between two ladies and other witnesses had intervened in the matter in order to stop the fighting. The accused had given a single injury on head of the deceased. It was held that the accused had committed an offence under Section 304, Part-II. *Manik Das* v. *State*, 2003 Cr LJ (NOC) 225 (Gau) : 2003(3) Gauhati GAU LR 526.

The assault was made with spear on the abdomen and chest and victim died a week after the incident due to Septicaemia. The accused wanted to cause only grievous hurt as he was in position to cause instantaneous death but had left the place after being persuaded by his wife. It was held that accused was liable to be convicted under Section 304. *Shanmugam* v. *State of Tamil Nadu*, 2003 Cr LJ 418 (SC) : AIR 2003 (SC) 209 : 2002(10) SCC 4 : 2003(1) Crimes 123 (SC) : 2003 SCC (Cr) 1501 : 2002(8) Supreme 243. The accused assaulted the deceased when he refused to do plantation of paddy seeding in his field. Here none of injuries were aimed at vital part of body as there was no intention to cause the death but cumulative injuries were sufficient to cause death. *Shiv Murit Upadhyaya* v. *State*, 2003 Cr LJ 1109 (All) : 2003(46) ACC 123 (All) : 2003 All LJ 172 : 2003(46) All Cri C 123 : 2002(3) All Cri R 2987.

Accused a constable allegedly assaulted informant with fists, slaps and danda when he refused to pay for his drinks. Accused fired from his rifle when the neighbouring shop-keeping and passers be assembled and protested for his high handed behaviour. As a result the fire from his rifle hit a woman who died in course of treatment. Medical evidence corroborated prosecution version. Statement of eye-witnesses were reliable though there were minor contradiction in their statements. Prosecution case was proved beyond doubt. Conviction of accused under Section 304-II was held proper. *Radha Kumar* v. *State of Bihar*, 2004 Cr LJ 4925 : AIR 2004 Jhar HCR 991 : 2004(1) East Cri C 358 : 2003(3) JLJR 285.

Where death results from a violent attack the accused should be convicted to the Court of Session on a charge of culpable homicide not amounting to murder. 1 CLR 141. When a Judge convicts on a charge of culpable homicide not amounting to murder, he should state under which of the Exception of Section 300, Penal Code, the case falls. I Agra Cr 3. The Judge in this case did not find that the accused intended to cause death nor was it found that the act was done with the intention of causing any particular bodily injury as the offender knew to be likely to cause death, nor that the offender knew that it must in all probability cause death or such bodily injury as was likely to cause death. In view of the facts above stated the offence was held to fall unde Section 304, I.P. Code. UBR (1892-1896) Vol. 1. 215 ; *see* also UBR (1892-1896) Vol. 1 211 ; 6 PLR 1903 : 30 PR 1932 Cr ; AWN 1898, 163 ; 27 PR 1883 Cr ; 1 Weir 299. The accused rushed wildly into a house and without considering the consequences attacked his mother-in-law, a woman of fifty-five with a *dah* and by mistake cut another woman of sixty-one on the arm, and died of the shock by the cut. The wound was not such as would ordinarily cause the death of a woman of that age. *Held*, that he committed only culpable homicide not amounting to murder. 4 LBR 257 : 9 Cr LJ 364. The deceased having enticed away a married woman, the father and the husband of the woman armed with stick waited for him on the road by which he was expected to pass, and gave him blows on the chest and back, but refrained from hitting him above the head held, that the accused were liable to be convicted under Section 304 (2). 10 PR 1890 Cr. Where a person snatches up a log of heavy wood, and strikes another with it on a vital part with so much force and vindictiveness as to cause that person's death almost on the spot, that act must be held to have been done with the knowledge that it was likely to cause death; but if the act is done without forethought, in the heat of passion and on a sudden quarrel, offence committed is culpable homicide not amounting to murder. 7 WR Cr 70. The question for solution in cases where death is caused by a single blow given in anger, on the impulse of the moment, with a weapon not deadly in its nature, is always one of fact, not of law, as to the intention of knowledge with which the striker acted. 5 PR 1893 Cr ; 1924 Lah 492. Where the right of private defence has been exceeded the accused is guilty of culpable homicide not amounting to murder. AIR 1932 Lah 344 : 138 Ind Cas 418 : 33 Cr LJ 587 : 33 PLR 282 : 1932 Cr C 425 ; *see* also AIR 1933 Lah 227 : 1933 Cr C 347 : 146 Ind Cas 34 ; AIR 1934 Lah 108 ; AIR 1933 Rang 340 : 1933 Cr LJ 1150. Where the common intention of the assailant was only to cause grievous hurt and there was only one serious blow on the head and the other blows on the head and the other parts of the body were of a comparatively slight nature ; *Held*, that it cannot be held that the assailants intended to cause the death of their victim or to cause such bodily injury as was likely to cause death. The case therefore fell within the purview of the second part of Section 304 and not under the first part. AIR 1935 Lah 80. In an unpremeditated joint attack, when each individual beats with a stick, anything more than knowledge that their joint act in its cumulative effect is likely to cause death cannot be imputed to them collectively. 162 Ind Cas 430 : 31 NLR Supp 215 : 37 Cr LJ 607 : 1936 Cr C 605 : AIR 1935 Nag 103. Where the language used by the deceased was highly provocative and murder was in no way premeditated, the accused is guilty only of culpable homicide not amounting to murder. 38 PLR 43. Where in a course of sudden quarrel between the accused, the deceased expressed his intention of attacking and kicking the accused and went towards him and on a sudden fight that ensued between them the accused used a clasp knife and inflicted a wound in the chest of the deceased causing his death. *Held*, that as there was grave and sudden provocation from the deceased when he proceeded towards the accused with the intention of kicking him and as the accused used a clasp knife when he had so far lost his self-control during the struggle that he did not inflict the injury with the intention of causing such bodily injury as was likely to cause the death, he could therefore be convicted under Section 304 and not under Section 302. AIR 1938 Rang 15 ; *see* also AIR Mad 723. The accused after an alternation smote the deceased on the leg above the ankle with his *dah* with such force that he cut through the bones and the articles and the man died in consequence after four days. *Held*, that the accused should be convicted under Section 304, Part I and not under Section 302. AIR 1938 Rang. 71 : 1937 RLR 393. Even when death is caused the accused should be convicted under Section 323 or Section 325 in the absence of intention or knowledge to cause death. AIR 1941 Mad 560 : 42 Cr LJ 707 ; AIR 1941 Rang 141 : 42 Cr LJ 591 ; AIR 1938 Lah 714 : 40 Cr LJ 261 ; 40 PLR 562 ; AIR 1936 Lah 833 : 37 Cr LJ 1079 ; AIR 1941 Mad 746 : 42 Cr LJ 638 : AIR 1942 All 400 : 44 Cr LJ 110 ; AIR 1942 Mad 415 : 43 Cr LJ 671 ; AIR 1935 Oudh 446 : 36 Cr LJ 1262 ; 36 Cr LJ 573 : AIR 1935 Oudh 381 : AIR 1950 Kutch 2.

In the instant case, the accused nurtured grudge due to partition of property. The accused armed with shoe, stick and log entered the field and assaulted the deceased. The testimony of eye-witnesses was trustworthy and reliable and conviction of accused was upheld. Two co-accused were acquitted by giving them benefit of doubt and other two were given the benefit of probation and no appeal challenging it was filed. The conviction of remaining accused was held proper and not entitled to benefit granted to accused, when he was the main brain behind the crime. *Chaudhari Ramjibhai Narasanghbhai* v. *State of Gujarat*, 2004 Cr LJ 280 (SC) : AIR 2004 (SC) 313 : 2004 SCC (Cri) 269 : 2003(4) Crimes 471 SC : 2003(8) Supreme 67.

The accused tried to cause injury with the help of a knife but was prevented from doing it. No case under Section 326 could be made out. Therefore, he was convicted under Section 304/34 for sharing common intention with the accused. *Harjeet Singh* v. *State*, 2003 Cr LJ 2151 (Delhi) : 2003(3) All Cri LR 982 : 2003(103) DLT 217 : 2003(67) DRJ 46.

The act of accused was without any premeditation where one of the accused had fired from his gun which has hit the chest of deceased. The conviction of accused was altered to one under Section 304 Part-II. *Laldhari Rai* v. *State*, 2003 Cr LJ 1951 (Pat) : 2003(1) East Cri C 118 : 2003(1) BLJ 521 (Pat).

The wife poured kerosene on her body and threatened the husband that she was going to commit suicide. The husband threw a live match stick and burnt her to death. It was held that there was no intention to cause the death as he was in a drunken state. The sentence was reduced to three years. *R.I. Bappala Siddappa* v. *State*, 2003 Cr LJ (NOC) 242 (AP) : 2002(1) ALD (CRL) 378 : 2002(1) Andh LT (Cri) AP 167.

The accused stabbed wife with penknife as a result of heat of passion and due to apprehension that he would be arrested if he appeared before police as advised by deceased wife. The conviction under Section 304 was held proper. *Ekambaram* v. *The State*, 2003 Cr LJ (NOC) 278 (Mad) : (2003) 1 Mad LW (Cri) 282.

Where the accused having failed to passify his 9 years old child pressed the mouth of the child who was crying and the child die to suffocation. It was held that the accused was guilty of offence of culpable homicide not amounting to murder. *Lakhan* v. *Raju Balian Yadava*, 2003 Cr LJ 4424 (Bom) : 2003 All MR (CRI) 1741.

The accused was alleged to have assaulted deceased with hockey and gave him kick blows. The evidence of witnesses and medical evidence proved prosecution case beyond shadow of doubt. However, intention to cause fatal injury to deceased was not proved. Fight took place on spur of moment. Conviction of accused under Section 304-II and 34 was held proper. Having regard to the circumstances of case, including nature of offence and character of offenders. The Hon'ble High Court issued directions to release them on probation of good conduct. *Sanjay* v. *State*, 2004 Cr LJ 4761 (Delhi) : 2005(1) Cur Cri R 162 : 2004(114) DLT 132 : 2004(4) Rec Cri R 635.

Where the accused, a police constable caused the deceased's death by violently beating him in the course of police enquiry into a theft case, *held*, that the accused was not liable to be convicted for culpable homicide, but was guilty of an offence under Section 300, Penal Code 86 PR 188. Where in arresting the deceased who with others, was attempting to commit theft, the accused struck a blow on the deceased with a stick, *held*, that the accused had not used excessive violence and were not therefore, guilty of culpable homicide. 26 PR 1872 Cr. In a quarrel between himself and the deceased, the accused gave her a blow on the side of the head with a heavy hammer, which he picked up on the spur of the moment, and caused thereby her death ; *held*, that the accused were merely guilty of culpable homicide not amounting to murder 30 PR 1902 Cr : 6 PLR 1903 ; *see* also 24 WR 48 ; AWN 1881. 156 ; Rat Un Cr C 6. The Chief Court reduced the sentence to one of two or three years imprisonment, in a case where death was caused or provocation in a sudden fight the accused not taking any unfair advantage over the deceased. 12 PR 1886 Cr ; 13 PR 1866 Cr ; *see* also 9 Cr LJ 245 : 1 SLR 1 Cr. A prisoner, who struck the deceased a hasty but a fatal blow with a stick in his hand at the time for abusing his mother, was held guilty of culpable homicide not amounting to murder. 1 WR Cr 23. The finding by a man of his wife in actual intercourse with another is a provocation grave and sudden enough to reduce the offence of murder, to culpable homicide not amounting to murder and such an offence must be visited with a light sentence. Rat U Cr C 932 : Cr Reg 42 of 1897 ; *see* also AIR 1930 Lah 172 ; 10 Lah LJ 508 : 115 Ind Cas 476 : 30 Cr LJ 481 ; AIR 1950 Lah 131. Two persons stated that having caught the deceased in the act of having sexual intercourse with the wife of one of them they killed him on the spot. *Held*, that the grave provocation given reduced the crime from murder to culpable homicide not amounting to murder. 1 WR Cr 17 ; *see* also AWN 1885, 197 ; 3 BLR A Cr 33 ; 27 PR 1900 Cr ; 89 PR 1899 Cr ; 87 PR 1866 Cr ; 1 Weir 307 ; 8 PR 1890 Cr ; 8 WR Cr 38 ; 4 WR Cr 38 ; 6 WR Cr 42 ; 4 PR 1904 Cr. Where the accused when in a state of intoxication, produced by his own act struck the deceased with a bamboo, thereby causing fracture of the skull, which resulted in death, *held*, that the accused should be charged with culpable homicide not amounting to murder. 1 Weir 301 ; *see* also 2 LBR 204. Accused were hillmen and three of them were devil dancers who attempted at C's request or at any rate with his consent, to dispossess C's wife of devil by applying a hot ladle to her mouth and throat and to various parts of her body, with the result that she died. *Held*, that the accused were guilty under Section 326 and not under Section 304-A. AIR 1935 All 282. Where the crime is unpremeditated this section applies. AIR 1935 Lah 149. Where two accused had the common intention of beating the party of which the deceased was a member and the deceased died as a consequence of a blow struck in the beating, *held*, that both the accused were responsible under Sections 304 and 34, I.P. Code. AIR 1933 All 504.

In a Bombay case, the accused allegedly killed his wife by using sickle. Evidence though circumstantial was found impeachable. As per report of chemical examiner the sickle contained blood-stain of deceased. Accused made extra-judicial confession before his son. Prosecution failed to prove intention of accused in killing his wife. The accused after assaulting his wife tried to commit suicide. It was held that likelihood of knowledge that such injury might cause death could be attributed to the accused and, therefore, the accused was liable to be convicted for offence of culpable homicide not amounting to murder. *Ghansham Dashrath Waghmore* v. *State of Maharashtra*, 2004 Cr LJ 4889 (Bom) : 2004 (4) Crimes 188 : 2004 (2) Bom CR (Cr) 837 : 2004 (7) All MR (Cri) 1847.

In a Bombay case, the accused allegedly killed deceased by a knife-blow during the sudden quarrel. There was neither intention to commit murder nor motive for the commission of offence. There was no ocular evidence to connect accused with the crime except dying declaration wherein deceased implicated the accused. Medical evidence supported the case of single knife blow, conviction of accused under Section 302 was altered to one under Section 304, Part-II. *Bajirao Maruti Dale* v. *State of Maharashtra*, 2004 Cr LJ 1638 (Bom).

In a Bombay case, the deceased in a fit of anger poured Kerosene on herself and accused husband hit her. The dying declaration was fully corroborated by the circumstantial evidence. The accused tried to douse fire and took deceased to hospital. It was held that it was a case of sudden flair of emotions resulting from domestic quarrels and it could not be said that the accused had intention to kill wife but at the same time it could not be said that he had no knowledge that if he put wife on fire, she was likely to be dead. The accused, was therefore convicted for offence of culpable homicide not amounting to murder. *Sambhaji Mukund Suryawanshi* v. *State of Maharashtra*, 2004 Cr LJ 5067 (Bom).

In Jharkhand case, the accused assaulted deceased with hard blunt weapon. According to doctor, who conducted post-mortem on dead body, all the injuries except one were simple and superficial and had there been first aid given to deceased, he would have survived. Thus, there was no intention on the part of accused to kill the deceased. Conviction of accused for murder was set aside and he was convicted for offence of culpable homicide not amounting to murder. *Kaleshwar Ahir* v. *State of Bihar (Now Jharkhand)*, 2004 Cr LJ (NOC) 12 : AIR 2004 Jhar HCR 170 : 2003(4) JCR JHA 85 : 2003(4) JLJR 567.

In a Madras case, the accused allegedly killed deceased by a sharp-edged weapon. Motive for offence was proved. The evidence of the eye-witness, wife of deceased, whose presence at the place of occurrence was natural as the offence was committed in Court yard of the house, was corroborated by evidence of other witnesses. Dying declaration was reliable even in absence of endorsement as to fit condition of deceased in view of eye-witness's account. Weapon of offence was recovered at the instance of accused. The intention to kill the deceased was clear from the fact that the accused had made several attacks to cause injuries likely to cause death. The Court held that in view of the fact that the accused were enraged after coming to know that the deceased had hit their mother. Conviction under Section 304, Part-I was held proper. *Damodharan* v. *State*, 2004 Cr LJ 279 (Mad).

In a case where the plea of insanity was raised, the prosecution case was doubtful as regards injury inflicted on deceased in view of medical evidence and testimony of sole eye-witness. Evidence of witnesses showed that the accused was mentally unsound at the time of commission of offence. It was held that non-consideration of factual position of mental health of accused by trial Court in terms of Section 329, Cr PC vitiated trial and, therefore, the conviction of accused was not proper. *Nandiswar Das* v. *State of Assam*, 2004 Cr LJ 4723 (Gau) : 2004(24) All Ind Cas 105 : 2004(3) Gau LT 117.

In a Supreme Court case, the incident took place in a sudden fight in heat of passion. Keeping the fact that both the accused and the deceased had consumed considerable amount of alcohol which is established by the evidence of doctor and the service revolver being next to the place the fight took place, it could altogether be ruled out that the shots were fired not with an intention of taking undue advantage by the accused. The accused could only be found guilty of an offence punishable under Section 304, Part II. *Manke Ram* v. *State of Haryana*, 2003 Cr LJ 2328 (P&H).

Where the accused gave a single lathi blow causing fatal head injury to deceased and the evidence of which was corroborated by medical evidence was found reliable. It was held that since lathi blow was inflicted without intention to cause death, conviction under Section 304, Part II was proper. *Ghanshyam* v. *State of Rajasthan*, 2003 Cr LJ 1663 (Raj).

The accused conducted surgery keeping the patient in a store room which was ill equipped for such a major surgery. He was operated for severe, stomach pain but died. It was pleaded on behalf of defence that it was a case of medical negligence for which only civil liability could be contemplated. The defence counsel also cited, *Augustine Saldanhe* v. *State of Karnataka*, 2003 Cr LJ 4458 : (2003) 10 SCC 472, wherein only compensation was awarded to victim who even after undergoing the tubectomy operation conceived and delivered a child. It was held that the situations of the Apex Courts case and the instant case were different and framing of charges in the case on hand for offence of culpable homicide not amounting to murder was justified. *Ajith (Dr.)* v. State, 2003 Cr LJ 4458 (SC) : AIR 2003 (SC) 3843 : 2003(10) SCC 472 : 2003(4) Crimes 89 (SC) : 2003(6) Supreme 677.

Causing death by beating a thief without the knowledge that the act was so imminently dangerous that it would in all probability cause his death, or such bodily injury as was likely to cause death, is culpable homicide not amounting to murder under Section 304, 7 WR Cr 54. When a man of full age (*i.e.*, above 18 years) admits himself to an emasculation, preformed neither by skilful hand nor in the least dangerous way and death ensues in consequence, the persons concerned in the act are guilty of culpable homicide not amounting to murder. 5 WR Cr C 7. Where the accused on being attacked by the deceased armed with a large club, fired at him, without any particular aim, but lowering the muzzle of his gun, so as to hit a vital part, and death ultimately resulted from the wound inflicted, *held*, that the accused had not exercised a legal right of private defence, as he could have escaped by standing back, and that he was therefore, guilty of culpable homicide not amounting to murder. 13 PR 1868 Cr ; but *see* AWN 1882, 172. It is a doubtful question whether a person, constructively guilty of murder under Section 304 of the Penal Code, can be said to have committed the offence of murder within the meaning of Section 149, of the Code, so as to make others by a double construction guilty of murder. 8 Cal 739 : 12 CLR 233. Section 304 coupled with Section 149, applies only to such persons who, though not taking an active part in unlawful assembly, are liable to be punished by reason of their being members of the unlawful assembly, and a person being killed in prosecution of the common object. 6 CWN 98. Where a person, on the spur of the moment in the heat of passion, and without any premeditation and motive for causing death, seized a *chhavi* the first weapon which came to his hands, and inflicts with it a blow on the head of another which results in the death of the latter. The former's act fails within the 2nd part of Section 304, Penal Code. But in such a case the culprit deserves the maximum sentence of imprisonment provided for that offence. 4 PWR 1934 Cr : 3 PLR 1914 : 14 Cr LJ 178 : 22 Ind Cas 754. When the only inmates of the house were the husband and his two wives and the deceased's elder wife was habitually ill-treated and half-starved by her husband, and at last she was found suffering from a serious injury to head, from the effect of which she died three days after she was admitted to hospital where she was too ill to make any statement and there was no indication, that the injury was accidental or self-inflicted, and the explanation given by the husband as to the injury was unsatisfactory and highly improbable, the presumption is that the injury was caused by her husband. *Held*, also that to inflict such an injury on the head of a woman already reduced by ill-treatment to such a poor condition, was an act which warrants the finding that the culprit must have known that it was likely that death would be the result, and was sufficient to bring him under Section 304, Part 2, I.P.C. 3 PWR 1913 Cr : 150 PLR 1913 : 19 Ind Cas 715 : 14 Cr LJ 283.

In a sudden fight only two incised wounds were found on head of deceased. Though accused had knowledge but no intention to cause death. The conviction was converted from under Section 302 to one under Section 304-II. *Ranglal* v. *State*, 2004 Cr LJ 316 (Raj) : 2004(1) Raj Cri'c 125 : 2003(3) Raj LR 7990 : 2004(1) WLC 68.

The accused persons caused serious head injury to the deceased but evidence showed that although they knew that death was likely to be caused but they did not intend to do so. The conviction of accused was ordered under Section 304 as incident had taken place suddenly out of trivial matter and accused had not repeated the blow with a stone. The third accused was acquitted as he had not participated in attack. *Gudev Singh* v. *State*, 2003 Cr LJ 552 (Raj) : 2002(1) Raj LR 724 : 2003(1) Raj LW 146 : 2002(2) WLC 710.

The accused caused the death of deceased by giving a dagger blow on chest of deceased consequent to a quarrel over a trifle matter. Evidence on record showed that accused appellant independently committed said offence and as the appellant was knowing the charge and tried to meet the same, there was no question of any prejudice being caused to him. It was held that in number of cases Court has held that when accused fully knew the charge against him no prejudice will be caused to him for non-framing of charge under Section 302, IPC and the conviction of accused under Section 304 was proper. *Md. Nur Islam* v. *State of Assam*, 2003 Cr LJ 4370 (Gau).

Where grave discrepancies between the statement of the deceased contained in the first report and the evidence of his witness as to the persons attacking him and giving him fatal injuries, throw a great doubt on the whole case, the benefit of which must be given to the accused. 23 PWR 1914 Cr : -172 PLR 1914 : 15 Cr LJ 530 : 24 Ind Cas 842. *B* went to a police station and made report of an assault against *F* and others. The police declined to take action and he referred to a Magistrate. The accused *F* with his companions went to the house of *B*, evidently with the intention of taunting her with her failure to obtain any satisfaction from the police. A tenant of *B*, who was in B's house at the time, picked up a stick and came out abusing and threatening the intruders. *F* struck the tenant one severe blow with a *chhavi* at his head from which he died. *F* was convicted of an offence under Section 304, Penal Code, and his companions of the offence under Section 149 read with Section 334, I.P. Code. *Held*, that *F* was rightly convicted of the offence, under the first part of Section 304. But his companions must be acquitted, for none of them took any part in any assault at B' house. 55 PLR 1911 : 10 PWR 1911 : 12 Cr LJ 187 : 10 Ind Cas 643. Where a prisoner admits having thrown a girl into a canal, but the body cannot be found, it is expedient to convict him of murder; his act would properly be met by a conviction of attempt to murder. Rat Un Cr C 687 : Cr Reg 7 of 1894. Where the common intention of a number of assailants is to cause grievous hurt, and death is caused by one of the assailants cannot be convicted under Section 304, 29 All 282 AWN 1907, 51 : 4 ALJ 207 : 5 Cr LJ 130 ; *see* also 109 PLR 1916 : 17 Cr LJ 451 : 36 Ind Cas 1311 ; 40 All 133 : 6 ALJ 11 : 43 Ind Cas 438 : 19 Cr LJ 150 : 5 Lah LJ 121 ; 1924 Lah 61 : 7 Lah LJ 46 : 86 Ind Cas 341 : 26 Cr LJ 757 : AIR 1925 Lah 318 ; 30 Cr LJ 903 : AIR 1929 All 575 : 118 Ind Cas 369 ; 34 CWN 1127 : 30 Cr LJ 187 ; 1933 Cr C 1389 : AIR 1933 Lah 930. Where the accused with the object of punishing the deceased for abusing one of the dignitaries in the village, ran, caught and held the deceased permitting the principal offender to stab the victim twice with a dagger, the accused are guilty of abetment of culpable homicide under Section 304, 109 AIR 1950 Kutch 5. Where there was no intention to kill and there was only intention to commit theft and murder was committed in carrying out the former intention, 2 years' imprisonment under 2nd part is proper. AIR 1947 All 67 : 48 Cr LJ 181.

Where in committing dacoity, the accused stuffed a cloth into the deceased's mouth in order to silence him and not with any idea of killing him, held, they must be convicted under Sections 304 and 395 I.P. Code. and not under Section 302 and 396, I.P. Code, 18 MLT 103 : 1915 MWN 621 : 16 Cr LJ 614 : 30 Ind Cas 438. An offence under this section has been committed when severe beating is given to a woman to cast out evil spirit with party's consent resulting in death. 1 UBR (1902-1903). Penal Code 1.

If the immediate cause of death be the improper administration of dangerous drugs, then the persons who administered such drugs without any excuse are the persons "who caused the death". LBR (1872-1892), 179. Where death was caused by a blow with a stick, but it appeared that death would not have been caused by the violence apparently used, had the deceased's spleen been in a healthy condition and that the accused did not prove that the deceased's spleen was diseased, *held*, that the accused was merely guilty of voluntarily causing hurt by a dangerous weapon, but not of culpable homicide not amounting to murder. AWN 1881, 112. Where the husband, a fully developed adult man had several intercourses with his child wife who was an immature girl and he did it with such a violence as to rupture the vagina and destroy the partition between the vagina and the rectum and the wife died in consequence he commits an offence under Section 304 of the Penal Code as he did a dangerous act with a wanton disregard as to the consequence in having intercourse with his wife thus causing her death. 11 SLR 76. Where the accused were convicted under Section 304, Part 2, Penal Code, for causing the death of the deceased by violence, and the medical evidence showed that the cause of death was either concussion of brain due to head injuries or possibly opium poisoning, and the body bore no signs of injuries except four slight superficial lacerations but no fracture of any bone, while on the other hand opium was found in the stomach and the first report did make mention of the fact that the deceased had admitted having taken opium. *Held*, that the prosecution had failed to prove that the death was caused by any act of the accused, and they were therefore, entitled to an acquittal. 16 FWR 1916 Cr : Cr LJ 147 : 33 Ind Cas 627. Where the accused proved to have driven his motor car in a rash manner during night while he was in a drunken condition and he ran his car against four person a carrying a bier and injured two of them so severely that they died subsequently. *Held*, that the accused should be convicted under Sections 337 and 394. I.P. Code and sentenced to 18 months' rigorous imprisonment. 1929 MWN 395. Where a person was attacked by five men all armed with *lathis* and where therefore in defending himself he hit them back inflicting injuries which in the case of two of the assailants resulted in their death and where the person was charged with having exceeded the limits of private defence, *held* that in such situation, it was not possible for one to restrict himself to exactly the necessary numbers and force of blows and that therefore the accused should be acquitted. 117 Ind Cas 937 : 1929 Cr C 38 : 30 Cr LJ 863 : A1R 1929 Lah 494, where the accused committed murder exceeding the right of private defence, an offence under this section is committed. AIR 1944 Lah 97 : 45 Cr LJ 634.

The accused inflicted the injury by which death was caused with his *dang* in a fit of provocation. Two blows were struck on the head causing fracture and the third blow fell on the chest of the deceased. *Held*, that the conviction should be under Section 304, Part 2, and not under Section 304 Part I, I.P. Code. 11 Lah LJ 52 : AIR 1929 Lah 180. Where in a scuffle the accused struck three *lathi* blows which fractured his bones and caused gangrene resulting in death but it was found that the accused did not intend to cause death—*Held*, that the accused was not guilty of murder but was guilty of manslaughter. 42 All 302 : 18 ALJ 224 : 58 Ind Cas 463 : 21 Cr LJ 783. Two parties armed with *lathis* indulged in a fight, and one of the contesting parties received injuries from the effects of which he died. It was uncertain which of the several persons composing the opposite side struck the fatal blow. *Held*, that these persons are guilty of an offence under Section 304. I.P. Code, 58 Ind Cas 242 : *see* also 60 Ind Cas 676 : 22 Cr LJ 276 : 3 UPLR Lah 34. Where the accused possessed by a superstitious belief made an offering of his child to a crocodile in a certain tank with a pure heart believing that though the crocodile would doubtless take the child away, it would return the child unimpaired and the child would thereafter have charmed life and attain to a good old age. *Held*, that as the accused had no intention of causing death to the child, he was guilty of an offence under the last clause of Section 304, I.P. Code, as what he did was with the knowledge that his act would result in the death of the child. 33 Cr LJ 179 : 25 CWN 676 : 62 Ind Cas 414 : 22 Cr LJ 526. If two or more people are found to have had a common intention of causing such bodily injury as is likely to cause death and that result ensue, all are guilty of the offence of culpable homicide not amounting to murder. quite irrespective; of who caused the particular injury leading to death. 9 O & AIR 1024 ; 1923 Lah 336 ; 72 Ind Cas 532 : 24 Cr LJ 421 ; 83 Ind Cas 76 AIR 1925 Oudh 284. When the accused killed another whom he saw occupying the same bed with the wife of his cousin and there was no motive for the crime, he must have acted under sudden and grave provocation and the conviction can only be under Section 304, I.P. Code. 1923 Lah 312. Even when there is no evidence as to previous existence of any serious enmity and the affairs arose out of a petty quarrel of the moment, this is hardly an extenuating circumstance in favour of accused using a weapon like a *chavi* on slight provocation which shows a callous disregard of human life for which he must suffer the consequence. 73 Ind Cas 932 : 24 Cr LJ 708 : 1928 Lah 326.

When the Court finds that the accused must have known he was likely to cause death and concluded from that an offence under Section 300(4). I.P. Code, the conviction must be changed into one under Section 304, I.P. Code. 2 Bur LJ 99. Where the charge is one of murder under Section 302 and there is no question of the first exception to Section 300 being admitted by the prosecution and a Magistrate specially empowered under Section 30, Cr. Pr Code, heard the case and convicted under Section 304, I.P. Code, the proceedings were quashed and the accused committed of the Sessions. 69 Ind Cas 459 : 23 Cr LJ 731. During a sudden and unpremeditated affray a person was killed. The evidence showed that even after he fell down incapacited, the accused continued striking him. *Held*, a plea of self-defence was not sustainable and they were guilty under Section 304, 6 Lah LJ 483. Where the accused, a youth of about 18 years forcibly committed rape on a girl of 12 and the girl's vagina was ruptured and as a result of shock the girl died. *Held*. that the accused was not guilty under Section 304, I.P. Code of culpable homicide not amounting to murder, as death was not the natural consequence of the simple sexual offence but he was guilty of rape only 3 Pat 410 : 83 Ind Cas 651 : 1924 Pat 553. In the midst of quarrel, a man was abused by his sister-in-law and he struck her with stone. Her skull was fractured and she died. *Held*, he acted on the impulse of the moment and could be convicted only under Section 304, IP. Code. LR 5 All 175 : 25 Cr LJ 809 : 81 Ind Cas 320 : 1925 All 4. In the course of a dispute about drawing water from a tap, the accused drew a knife and stabbed the deceased piercing the chest wall and cutting the heart. *Held*, though the blow was struck in a sudden fight without premeditation, the accused must have known that striking in the chest with a dangerous weapon might prove fatal and was therefore guilty under Section 304(2). 25 Cr LJ 1289 : 82 Ind Cas 361 : 1925 Lah 148 : *see* also AIR 1931 Lah 189. Where three men armed with *dangs* attacked another and caused two grievous hurts, it can be presumed that they all intended to cause or knew that they were likely to cause grievous hurt. Where only one blow was struck on the head which resulted in death and there was no evidence to show which of the three accused struck that blow, none of them can be convicted of culpable homicide. 6 Lah LJ 268 : 1924 Lab 555. Where the skull of the deceased was fractured as the result of a blow on the head in an attack upon one man by four persons who beat him with *lathis* but there was no other grievous hurt and it was not known which of the accused struck the blow which fractured the skull and resulted in his death. *Held*, the accused did not know that death was likely to be caused but they must have known that grievous hurt was likely to be caused, and that they committed therefore the offence of causing grievous hurt. 6 Lah LJ 317 : 1924 Lah 654.

Where a person hits another on the temple with a *lathi* he must be taken to have intended to cause such hurt as would in the ordinary course of nature cause death. Where death ensues, he is guilty under Section 304, I.P. Code. 26 Cr LJ 1160 : AIR 1925 Oudh 482 : 88 Ind Cas 520. A person can be convicted under Section 304(1) I.P. Code, in a murder trial, only if one of the exceptions to Section 300, is proved. 86 Ind Cas 826 : 26 Cr LJ 890 : AIR 1925 Lah 549. Where death was due to single blow by only one out of five people but the assailant could not be spotted out, all cannot be convicted under Section 309 read with Section 34, but only under Section 325. 86 Ind Cas 337 : 26 Cr LJ 753 : AIR 1924 Pat 553. The accused struck the deceased, who was sitting with certain enemies of the accused watching an entertainment, on the head with *lathi* which resulted in his death. *Held* that the accused must have known that he was likely to cause death and was guilty under Section 304(2) and five years' rigorous imprisonment was appropriate sentence. AIR 1925 Lah 111. Where the wounds inflicted on the deceased were not serious but such as would not individually amount to more than simple hurt and no motive for murder was established. *Held*, that the offence was only culpable homicide not amounting to murder. 26 PLR 702 : 7 Lah LJ 524 : AIR 1925 Lah 621. In order to remove a culpable homicide from the category of murder the provocation must not only be grave but also sudden and must have by its gravity and suddenness deprived the accused of the power of self-control. 83 Ind Cas 712 : 26 Cr LJ 152 : AIR 1923 Lah 493. Section 34 which is based on common intention cannot possibly be used with the second part of Section 304 which expressly exclude intention. 26 Cr LJ 827 : 85 Ind Cas 475 : AIR 1925 Cal 913. Where the death is caused by knife-stab in sudden fight, the offence falls under this section, AIR 1925 Lah 148. Mere apprehension of hurt will not entitle a person to plead "private defence" to a conviction under Section 304 of the Indian Penal Code. 27 PLR 430 : 95 Ind Cas 276 : 27 Cr LJ 756 : 8 Lah LJ 455 ; (1957) 1 Andh WR 181 (reasonable apprehension of death or grievous hurt—Exceeding right of private defence) 1962 Ker LT 868 : (1962) 2 Ker LR 466. Burden of proving the right of private defence, *vide* ILR (1955) 7 Assam 392. The High Court set aside the conviction for an offence under Section 304 (2) on the ground that the prosecution witnesses were partial and their testimony was palpably false 27 PLR 22 : 95 Ind Cas 597 : 27 Cr LJ 821 : 8 LLJ 182. The Judge did not explain circumstances when an act, if it does not amount to murder, whether it amounts to culpable homicide not amounting to murder. The charge was held to be amounting to misdirection. ILR (1955) 7 Assam 392.

Presumably every body knows that the abdomen is a most delicate and vulnerable part of the human body, and if a man with that knowledge kicks the abdomen with such violence as to cause fracture of two ribs and rupture of the spleen which was normal he should be presumed to have done so with the knowledge that he, by so kicking, was likely to cause death, 96 Ind Cas 641 : 27 Cr LJ 977 : AIR 1926 Lah 313. A *lathi* is a lethal weapon and, if a person chooses to lay about with a lethal weapon with all the force at his command, it must be presumed that he knew he was likely to cause death. 94 Ind Cas 137 : 37 Cr LJ 569 : AIR 1926 Lah 426. Where the injuries inflicted by the accused result in death, the question in such cases is not concluded by the amount of reasoning from the mere fact that the injury caused did in fact result in death. What has to be seen is first, what degree of injury did the man intend ; and secondly, what did he know as to the consequence of such injury. AIR 1931 Cat 261 (SB) : 34 CWN 1127 : 32 Cr LJ 187. The mere fact that a member of one unlawful assembly which assailed its victim was a *Sikh* wearing *Kripan* unsheathing with which he dealt blow to the victim is not sufficient to hold the other members of the assembly constructively liable for causing of death simply because he was wearing a *Kripan Gian v. Emperor*. AIR 1930 Lah 532 : 122 Ind Cas 721 : 31 Cr LJ 448. Seizure of the person and dragging a debtor to his creditor by the peons of the creditor against his will, constitutes an offence of abduction within the meaning of Section 362 thereby giving the person so dragged the right of private defence of his body even to the causing of death subject to restrictions mentioned in Section 99. If while defending himself such person strikes the person against whom he was defending on a sudden irritable impulse thereby exceeding the power given to him under the statute and caused death of other person, the offence comes not under Section 302 but under Section 304. *Daroga* v.

Emperor, AIR 1930 Pat 347. It is not improper to inflict lesser sentence, where the circumstances demanding exercise of discretion, *e.g.*, absence of strong motive coupled with possibility of murder having been committed without premeditation and under temporary derangement of mind due to fear of being prosecuted and convicted of criminal offence. AIR 1930 Sind 224. Person inflicting wounds in defending himself is not guilty. AIR 1930 Lah 93.

Where death is the result of sudden quarrel between parties, there is no intention of pre-determination to cause death. The offence in such cases will always be punishable under Section 304, Part II. *State of MP* v. *Reshiraj*, 2004 Cr LJ 1445 (SC).

Where there was a sudden quarrel and a fight in the course of which the deceased was stabbed by the accused and the accused himself received an injury from some weapon such as a knife, *held*, that the accused cannot be said to have taken undue advantage of the deceased since he himseif was attacked and wounded also by a knife, and more appropriate section under which the accused should have been convicted is Section 304. 97 Ind Cas 952 : 27 Cr LJ 1192 ; *see* also 106 Ind Cas 449 : 29 Cr LJ 33 : 27 ALJ 508 : AIR 1929 All 535. Where the accused went along with two persons who were armed and at the scence of occurrence he gave the order to beat but the others assaulted the deceased so severely that he subsequently died, *held*, that the reasonable inference is that the accused intended all the results that followed and that he was rightly convicted under Sections 304 and 109, 6 Pat 627. Where a man receives three injuries on his head, it is most improbable that he was attacked by more than two persons. 103 Ind Cas 58 : 28 Cr LJ 634 : 1 Luck C 197 : 8 AI Cr R 314. Where it is found that the aggressor was not the accused but the deceased, the Court should not pass a severe sentence. 99 Ind Cas 58 : 28 Cr LJ 24. Six persons one of whom was armed with an iron *lathi* went to take possession of a *taur*. The deceased person resisted them and the man who was armed with *lathi* inflicted a fatal injury on the head of the deceased which fractured his skull and killed him. *Held*, that under the circumstances, the armed person was guilty of offence under Section 304 (2), I.P. Code and the others of an offence under Section 325. 9 Lah LJ 529. Where the wife of the accused and the deceased woman were quarrelling and the accused being provoked by the abuses given to his wife, in sudden anger, struck the deceased a heavy blow on the head with a heavy *lathi* and fractured her skull and caused her death. *Held*, that the circumstances of the case do not lead to the inference of an intention to kill and it cannot be inferred on the evidence that the accused had the knowledge that the act was so imminently dangerous that it must in all probability cause death. 8 Pat LT 594 : 102 Ind Cas 349 : 28 Cr LJ 541 : 8 AI Cr 189. In case of sudden fight between young boys, accused stabbing deceased without premeditation, the offence committed by him was that punishable under Section 304, Part I and not under Part II thereof. AIR 1956 Bom 267 : 1956 Cr LJ 503 ; *see* also 1956 MBLJ 472 : Madh BLR 1956 Cr 56 ; where in a trial the injuries are proved to be only likely to cause death and the offence committed by the unlawful assembly against the deceased would be punishable under Section 304 only. ILR 1962 AP 313 : 1963 (2) Cr LJ 70. Where the accused inflicted many blows on the body of the deceased, and also used kicks in order to drive away an evil spirit, and thereby caused the death, the accused is guilty under Section 304 (2), Penal Code. AIR 1928 Lah 917.

Where the husband and wife were not on very good terms and on one occasion the husband asked for *pan* and the wife refused *pan* and threw dirty rice water in his face whereupon the husband beat her with stone and killed her. *Held*, that the refusal of his wife to give him *pan* was liable to make him angry but the throwing of dirty water in the face was an act which would cause a husband to lose control of himself and would be a grave and sudden provocation and therefore the offence was not one of murder but culpable homicide not amounting to murder... 117. Ind Cas 164 : 30 Cr LJ 720 : AIR 1930 Pat 201. If a man joins with another to assault a third even though the original intention may be merely to inflict relatively harmless injuries, and he sees his companion in a course of action which may reasonably be expected to bring about the death of the deceased and takes no steps to interfere with that action or to assist the deceased such an act is an act or omission which renders him liable to be convicted under Section 304 read with Section 32 and 34, I.P. Code. It must be apparent to every person that to hold an elderly man's head under water for any longer than is required to inflict a mere ducking is liable to bring about the death of the person, 9 Pat LT 826 : 114 Ind Cas 222 : 36 Cr LJ 276 : AIR 1929 Pat 65.

In case of an exorcism of curing the woman of evil spirits, death is caused by suffocation by smoke, the accused is to be convicted under Section 304, Part II as the act is done with the knowledge that it is likely to cause death. AIR 1964 Mad 410 : 1964 (2) Ind Cas 557 : 1964 Mad LJ (Cr) 157. The question whether the accused had the knowledge that his act was likely to cause death is, as in the case of intention, is a question of fact depending upon the circumstances of the particular case. the weapon used, the part of the body on which the injury was inflicted, the nature of injuries caused, the deliberateness of the act etc. AIR 1979 SC 1532 : 1979 Ind Cas 1135 ; AIR 1984 SC 735 : 1984 Cr LJ 478 ; AIR 1985 SC 336 ; AIR 1983 SC 529 : 1983 Cr LJ 1135 ; AIR 1982 SC 1406 : 1982 Cr LJ 1946 : AIR 1982 SC 52 : 1982 Cr LJ 195.

In a case deceased was hit by accused with a milk can with such force as to cause fracture of the skull of the deceased resulting in his death, he (accused) should be convicted under Section 304, Part II considering the fact that he was provoked into hitting the deceased. 1988 (1) Crimes 251 (Del).

Death of the husband caused under grave provocation being a man of bad habits which caused the accused amounting to mental and physical cruelty. The accused was beaten on the day of incident and received several injuries from a blunt weapon. *Held*, the appellant could not have been convicted for any offence when her act was in exercise of right of private defence. (1986) 1 Crimes 82 (Guj).

The serious charge against the accused was that he poured Kerosene Oil over his wife and set her on fire. It is urged that the accused is a young man with 2 children. *Held*, it cannot be a ground for limiting his sentence down to the sentence already undergone. 1986 Cr LJ 739 (Bom).

The accused and his wife had a domestic quarrel on 25.6.1982. When she was slapped twice or thrice causing her to fall down every time which resulting in injuries to her head. Inmates of the house including the accused did not inform either the police or neighbours nor was any medical aid provided. The accused pleaded in his defence that she fell down from the ladder but the nature of injuries did not answer its tests. The judicial confession made earlier on the question of quarrel was retracted by the accused at the Sessions trial. *Held*, judicial confession in the circumstances should be relied upon. (1986) 2 Crimes 441 (Cal).

Death of deceased under suspicious circumstances. Charge of abetment of suicide and cruelty. Conviction under Section 304-B, I.P.C. Revision petition was filed. Since there was no evidence of murder as there was no injury on deceased. Presumption as to abetment of suicide. Accused-appellants held guilty of offence under Section 306, I.P.C. in place of Sec. 304-B, IPC. *Hiralal* v. *State of Madhya Pradesh*, 1995) 3 CCR 434 (MP).

Injuries were made on non-vital part—Neither there was fracture nor-damage to internal organ—Offence made out only under Section 304, Part II/149. I.P.C. not under Sections 302/149, I.P.C. *Kirti Mahto* v. *State of Bihar*, 1-994 SCC (Cri) 1493 : 1994 Supp(2) SCC 569.

The record suggested that after grappling and exchange of abuses between accused and the injured P.W. for few minutes, the accused took out his *kirpan* and caused injuries to deceased and the P.W. Out of 3 injuries only one proved fatal. His acts falls within purview of Section 304, Part I for causing death of the victim and under Section 308 for causing injuries to P.W. *Sukhwinder Singh* v. *State of Punjab*, (1995) 1 CC Cases 304 (P & H).

Causing of death by knife injury. Prosecution unable to explain appellant's injury inflicted on vital parts of his body. There were interested eye-witnesses—No ocular evidence reliable and safe. Hence conviction and sentence of accused person cannot be sustained. *Gopal Anjayya* v. *State of Maharashtra*, (1995) 2 Mah LR 265 (Bom).

Where testimony of witness, son of deceased was reliable, trustworthy and corroborated by medical evidence and with evidence of other eye-witnesses then defence plea as to place of incident not comes in way to convicting accused. *Ch. Ramjibhai Narasangbhai* v. *State of Gujarat*, 2004 Cr LJ 280 (SC) : AIR 2004 (SC) 313 : 2004(1) SCC 184 : 2003(9) JT 96 : 2003(4) Crimes 471 (SC) : 2003(8) Supreme 67.

Where evidence of eye-witness as to incident cogent and reliable as death of deceased by gun shot injury admitted by defence, establishing motive behind crime, place of incident, time and manner therefore conviction of accused warrants no interference. *Medni Singh* v. *State of Bihar*, 2005 (3) East Cr C 164 (Pat) : AIR 2004 (SC) 313 : 2004(1) SCC 184 : 2003(9) JT 96 : 2003(4) Crimes 471 (SC) : 2003(8) Supreme 67.

Where involvement of accused in commission of offence was established then accused cannot take advantage of benefit of probation extended to two co-accused person. *Ch. Ramjibhai Narasangbhai* v. *State of Gujarat*, 2004 Cr LJ 280 (SC).

In a Supreme Court case, the accused allegedly killed deceased by thrusting spear in his abdomen. The evidence of eye-witnesses showed that the accused caused injuries to deceased. One of the eye-witnesses was also injured during the occurrence. The presence of eye-witnesses was not doubtful. The conviction of accused under Section 304, IPC was held proper. *Naval Kishore Singh* v. *State of Bihar*, 2004 Cr LJ 4252 : AIR 2004 SC 4421 : 2004(6) Supreme 445 : 2004(3) Crimes 373 : 2004 SCC (Cri) 1967.

Where in a joint attack during sudden quarrel between parties resulting in death of victim and causing injuries to others, accused persons were held liable to be convicted under Section 304, Part-II. *State of MP* v. *Deshraj*, 2004 Cr LJ 1415 : AIR 2004 SC 2764 : 2004(1) Crimes 375 (SC) : 2004(1) Supreme 745 : 2004(2) JT 146 : 2004(1) JCC 367.

During altercation with the deceased, the accused took out a knife and stabbed deceased in abdomen who died after running a short distance. Testimony of witnesses who witnessed the incident was corroborated by medical evidence. The incident had accused without pre-meditation or planning and had taken place all of a sudden. It was a case of single injury. It was held that the conviction of accused for the offence of culpable homicide not amounting to murder could not be interfered with. *State of UP* v. *Qamar*, 2004 Cr LJ 2390 (All) : 2004 All LJ 1290.

The act of stabbing of his wife by husband was witnessed by their children in torch-light. Their ocular evidence and dying declaration were found trustworthy, truthful and reliable. The injury was caused on vital part *i.e.* abdomen. It was held that intention could be resumed regarding causing such injury as was likely to cause death and that the accrued was liable to be convicted for offence under Section 304-I. *Sebvalam Suranna Dora* v. *State*, 2004 Cr LJ 427 (AP) : 2003(2) ALD (CRL) 742.

The circumstances showed that the accused had seen some incident of victim with "S" which prompted him to rush to Kitchen with instrument by which he was cutting firewood and assaulted victim on his head with same and also by knife. Weapons of offence were seized with blood-stain from place of occurrence. It was held that the circumstances were sufficient to indicate that the injuries caused to victim could not be contemplated without any heat or passion and the conviction of accused under Section 302 was altered to one under Section 304 Part II. *Jerka Munda* v. *State*, 2004 Cr LJ 4764 (Cal).

In a case, the accused threw lighted lamp in a fit anger. Circle Inspector laid charge-sheet for offence under Section 302/34 when FIR was registered under Section 304-II. It was held that the offence fell under Section 304-II and that the non-examination of the Circle Inspector which did not cause was immaterial. 2004 Cr LJ 78 (AP).

Accused allegedly caused injuries on the head of deceased mother by throwing stones resulting into her death. The presence of solitary eye-witness, husband of deceased at the place of incident was not doubtful, as he was an injured witness. His testimony was reliable and corroborated by medical evidence. There was no unreasonable delay in lodging FIR. It was held that the testimony of the such eye-witness could not be discarded on the sole ground of interestedness and that the conviction of accused under Section 304, Part-II was proper. *Shankar* v. *State of Rajasthan*, 2004 Cr LJ 1608 (Raj).

In a Gauhati case, the accused allegedly stabbed his brother-in-law with fishing spear after quarrel. Three prosecution witnesses who were members of the same family turned hostile because they did not want to lose another family member. Confession by accused was voluntarily made and was true. Detailed nature of confession ruled out the possibility of any tutoring by police. The confession was corroborated by other evidence. There was no animus or intention on the part of accused to cause death of deceased. His conviction under Sec. 302 was modified to one under Sec. 304, Part-II. *Rajen Boro* v. *State of Assam*, 2004 Cr LJ (NOC) 42 : 2003(3) Cur Cri R 470 : 2003(2) Gau LT 632.

The accused allegedly assaulted informant and his father with lathi and sabbal, when asked to plough in their share of land. Father of the informant died. Informants' wife; who came to the site of occurrence on an alarm being raised, was also assaulted by accused persons. Consistent statement of maternal witnesses, that accused took active part in assaulting the victims. The testimony of material witnesses was supported by injuries found on persons of victims, conviction of accused under Section 304, Part-

It was held proper. *Raska Hansda* v. *State of Bihar*, 2004 Cr LJ (NOC) 115 (Jhar) : AIR 2004 Jhar HCR 883 : 2003(3) East Cri C 116.

In an Orissa case, the accused on coming to know that the deceased, an old man, had sexually assaulted his minor daughter, got enraged and in heat of temper assaulted deceased causing his death. Accused after assault took injured to hospital for treatment. It was held that the act of accused in taking the deceased to hospital for treatment indicated that he had no intention to murder deceased and, therefore, conviction was altered from Section 302 to one under Section 304, Part-II. *Sibai Hemram* v. *State of Orrisa*, 2004 Cr LJ (NOC) 233 (Orissa).

In another Orissa case, the accused persons felt insulted when the deceased being Headmam sent them to appear before the Punch on an allegation of theft of cock. The accused were not enmicals but they were illiterate tribals with volatile temperament. They had no intention to kill the deceased. The conviction of accused persons was altered from 302 to one under Section 304, Part-II. *Madkami Irma* v. *State of Orissa*, 2004 Cr LJ (NOC) 225 (Orissa) : AIR 2004 Jhar HCR 2295 : 2003(3) BLJR 2190 : 2003(3) East Cri C 511.

The evidence showed that accused had assaulted complainant, his father who died and his wife. Testimony was supported by injuries found on persons of victims. Conviction under Section 304 part-II was held proper. *Raska Hans da* v. *State*, 2004 Cr LJ (NOC) 115 (Jhar). Husband set his wife to fire and she died in spite of treatment in best hospital. Accused husband was convicted under Section 304 I and not under Section 304, Part-II. *Paraman* v. *State*, 2004 Cr LJ 3379 (Ker) : 2004(2) DMC 535 : 2004(1) KER LJ 697.

In a case where the deceased was assaulted the deceased with lathi on spur of moment and there was premeditation or any intention of accused persons commit his murder. It was held that the accused persons could be said to have knowledge that their act would result into death of the deceased although they had no intention to kill them and thus the offence of culpable homicide not amounting to murder was made out. *Ramadhar Sharma* v. *State of Bihar*, 2005 CrLJ 3874 (Pat) : 2005 (2) EastCriC 84.

In the present case, appellant was not armed with any deadly weapon. From the statements of the witnesses what appears is that the appellant and deceased were grappling and fighting and in that sequence when the deceased jumped down in another field the appellant threw a stone which hit the deceased on his head. It is settled principle of law that Section 304, Part II gets attracted when it is proved that even if the accused had no intention to cause such bodily injury as was likely to cause death but had the knowledge that the injury was likely to cause the death. *Baraf Singh* v. *State of Uttaranchal*, 2005 Cr LJ 3212 (Uttar) : 2005(3) UC 1539 UTR.

Where accused inflicted cart-peg injury on head of deceased without any premeditation during altercation between them when both were going to *sarpanch* to settle dispute between them therefore accused liable to be convicted under Section 324, IPC and not under Section 304-II, IPC. *Bhukya Babilal* v. *State of AP*, 2005 Cr LJ 1315 (AP) : 2004(2) ALD (CRL) 689.

Where victim died after about 20 days from the date of incident in which accused poured edible oil mixed with castor oil on him without intention to kill him therefore while evaluating requisite *mens rea* and nexus between *mens rea* and offence, status of parties involved in offence have to be taken into consideration hence offence of accused fell under Section 324, IPC and sentence of one year imprisonment awarded. *Yerra Veera Lakshmi* v. *State of A.P.*, 2005 (2) Crimes 482 (AP).

11. Abetment of suicide.—The prosecution story, if believed, shows that the quarrel between the deceased and the appellant had taken place on 25th July, 1998 and if the deceased came back to the house again on 26th July, 1998, it cannot be said that the suicide by the deceased was the direct result of the quarrel that had taken place on 25th July 1998. Viewed from the aforesaid circumstances independently, the ingredients of 'abetment' are totally absent in the instant case for an offence under Section 306, I.P.C. It is in the statement of the wife that the deceased always remained in a drunken condition. It is common knowledge that excessive drinking leads one to debauchery. It clearly appeared, therefore, that the deceased was a victim of his own conduct unconnected with the quarrel that had ensued on 25th July, 1998 where the appellant is stated to have used abusive language. *Sanju alias Saujoy Singh Sengar v State of Madhya Pradesh*, 2002 Cri LJ 2796 (SC) : AIR 2002 (SC) 1998 : AIR 2002 SCW 2035 : 2002(4) Scale 270 : 2002(3) Supreme 650.

12. Section 304, Second part of Section 299.—Section 304 divides offence of culpable homicide into two degrees of guilt, the graver of which depend on the intention proved or to be inferred from all circumstances and the less serious of which does not depend on the intention at all. But though the absence or presence of intention is the criterion to be adopted in deciding on which side of the line an offence under Section 304 falls there are cases in which there is an intention which makes the offence the graver offence of culpable homicide but which would yet fall short of the intention requisite to satisfy Section 300. Cases coming under the last para of Section 299 are either cases under Section 300. In that class of cases, recourse cannot be had directly to the first part of Section 304 unless it is a *prima facie* case of murder to which some exception applies. AIR I960 Andh Pra 41 : (1960) 1 An WR 313 : 1960 Cr LJ 303.

13. Sections 304 and 300.—In this country if a person were to beat another with a shoe, that is considered to be the height of shame and particularly in the midst of a number of villagers present in the street. *Held*, there was grave and sudden provocation and the offence was not one of murder under Section 300 but only under Section 304 Part I. AIR 1953 Mad 579 : 1953 Cr LJ 1109 : (1953) 1 Mad LJ 180.

In a case the acid was poured on body of deceased as per evidence of doctor and dying declaration but death had occurred after 37 days and injuries themselves were not sufficient in the ordinary course of nature to cause the death, the conviction of accused was altered from under Section 302 to one under Section 304. *Sukumaran* v. *State*, 2004 Cr LJ 1462 (Ker). The accused, not a license holder fired the gun at the close range of 4-5 feet aiming at the deceaseds' chest. It was considered negligence and conviction was done under Section 304, as it was not a negligence cause. *Shankar Narayan* v. *State of Maharashtra*, 1778 (Ker). The accused killed deceased by shouting her on temple but direct evidence in the matter could not be produced. The accused held guilty under section 304. *Thamilarasan* v. *State*, 2004 Cr LJ 1639 (Mad) : 2004(4) All Cri LR 405 : 2004(1) Mad LW (Cri) 401.

Deceased gave birth to three girls so mother-in-law/accused was unhappy and threw burning-wick on clothes of deceased and thereby set them on fire. The post-mortem report of the deceased was placed on record during the trial and doctor, who conducted the post-mortem examination was also examined as a witness in the trial. The said documentary and oral evidence of the doctor, as adduced, that he also treated the patient and conducted the post-mortem examination made it crystal clear that the deceased remained under treatment in hospital for 8 days and died after 8 days of the incident in question. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Sec. 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Sec. 304 Part II of IPC.

We find that the view taken by the trial Court was a cogent and plausible view and, therefore, we hold that the conviction and sentence imposed by the trial Court is justified. Considering the totality of the circumstances and the fact that the appellant is of 85 years of age and had undergone the sentence imposed by the trial Court under the provisions of Sec. 304, Part II of IPC, we set aside the conviction and sentence of the appellant imposed by the High Court of Gujarat and restore the judgment and order passed by the trial Court. *Maniben vs State of Gujarat*, 2010 AIR SCW 570 : AIR 2010 SC 1261

In the scheme of the IPC culpale homicide is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Sec. 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Sec. 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishment provided for the three grades. Culpable homicide of this degree is punishable under the second part of Sec. 304.

In the instant case, the culpable homicide of his second wife by accused husband, who was suspecting illicit relationship of deceased with the guest who had witnessed accused sitting on chest of deceased and assaulting her with hands, held, was liable to be punished u/Sec. 304 Part II and not for murder u/Sec. 300 and custodial sentence of ten years was held sufficient to meet the ends of justice. *Budhi Lal vs State of Uttarakhand*, AIR 2009 SC 87 : 2009 CriLJ 360 (SC)

Both parties very closely related to each other and they have dispute with regard to land. Accused came to place of incident fully armed. Object was to sort things out with deceased as he was creating problems for them and their lather over land in question, and to remove him from scene once and for all. Plea of right of defence found rightly rejected. It has also been contended that no case under Sec. 302 of the IPC had been made out and if at all the accused were liable to be convicted under Sec. 304 Part-II of the IPC. We find no merit in this plea. It is clear from the record that the accused had come to the place of incident fully armed with the object to sort things out with the deceased as he was creating problems for them and their father over the land in question and to remove him from the scene once and for all. Furthermore, in the light of the serious injuries caused to the deceased and to prosecution witness the matter does not fall within the ambit of Sec. 304 Part II of the IPC. *Chandrappa and Ors. v. State of Karnataka*, AIR 2008 SC 2323 : 2008 (11) SCC 328 : 2008 (5) JT 540 (SC) : 2008 (6) Scale 454 (SC) : 2008 (4) SLT 278 (SC) : 2008 (6) SRJ 25 (SC).

In a fight over possession of certain land both parties attacked each other and if two views which emerged out of whole discussion were entitled to the benefits of doubt but in any case they had exceed the right of private defence. The conviction under Section 302 was altered to one under Section 304 and conviction under Section 307 was altered to one under Section 304. *Mahendra Paras Yadav* v. *State*, 2004 Cr LJ 1492 (Jhar) : AIR 2004 Jhar HCR 553 : 2004(1) JCJR 142.

The accused came home in a drunken State started quarreling with his wife. His son attempted to interfere to save his mother. The accused picked up a chaffer and inflicted a cut injury on his son on the back of his left leg below the knee. The son died due to excessive bleeding. It was held that the offence committed was not an offence punishable under Section 302, IPC, but the offence was one which was punishable under Section 304, Part-II, IPC. *Thankachan* v. *State of Kerala*, 2005 Cr LJ 4130 (SC) : AIR 2005 (SC) 3819 : AIR 2005 SCW 4577 : 2005(3) Crimes 255 : 2005(6) Supreme 14.

The case of the prosecution was that the respondent who was armed with a knife had caused injuries on the person of the deceased. The High Court found that the medical evidence on record did not make out a case of murder. The medical evidence on record discloses that the injuries found on the person of the deceased were simple injuries and none of them was described as grievous. There was no evidence to prove that the injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death. There was a bruise on the front of the neck of the deceased and the medical evidence disclosed that there was bleeding of the trachea as a result of that injury, and the bleeding resulted in clotting of the blood in the trachea leading to Asphyxia. This injury was not attributed to the respondent, and there was nothing to establish that the injury which ultimately resulted in the death of the deceased was intended by any one. In the circumstances, the offence under Section 302, IPC was not made out and the offence made out was punishable under Section 304, Part-II, IPC. *State of Rajasthan* v. *Jora Ram*, 2005 Cr LJ 2578 (SC) : AIR 2005 (SC) 2440 : AIR 2005 SCW 2393 : 2005(4) Scale 461 : 2005(3) Supreme 568.

14. Sections 304 and 326.—The charge against the appellants under Section 304 read with Section 149 of the Penal Code but the jury returned a verdict of not guilty in respect of that charge. They however returned an unanimous verdict of guilty under Section 304 Part II. No charge was framed under this section. They can be held guilty under Section 326 and no prejudice would be caused to the accused thereby. AIR 1958 Assam 44 : ILR (1956) 8 Assam 191 : 1958 Cr LJ 742 ; ILR (1963) 15 Assam 552.

Accused as a member of unlawful assembly allegedly inflicted fatal injury by spear on deceased. There was no motive for accused to cause the injury. The injury was caused during a melee in which six persons took part. It was held that the act of accused wouid amount to causing grievous hurt with deadly weapon under Section 326 and not one under Section 304. *Ramu* v. *State of UP*, AIR 2004 SC 1605 : 2004 Cr LJ 1407 : 2004(1) Crimes 325 (S)C 2004(1) Supreme 828 : 2004(2) JT 289.

Court acted in hot case and no proper opportunity given to prosecution to lead evidence. When Court issued summons to witnesses, they should be examined—In case there do not appear coercive method to be used for securing presence of these witnesses—It should not be left on choice of prosecution to examine or not examine witnesses—F.I.R, was lodged and seven injuries found by doctor on person of injured, revision allowed as injustice has crept in and fair trial not done. Case remanded for re-trial. *Azaz Hussain* v. *J.J. Jan and State of M.P.*, 1994 Cr LR 231 (MP).

Only one injury by *kulhari* blow was given on the left leg of victim and blow was repeated. Accused did not come armed but picked up *kulhari* from the spot. Hence accused cannot be said to have remote knowledge that such an injury would result in death. Hence liable to be convicted under Section 326. I.P.C. *Sahwarg Singh* v. *State of Punjab.*, (1994) 2 Crimes 621 (P & H).

Sentence of fine imposed was also not changed. The death of accused was caused due to injured spleen of deceased but there was no proof to show that accused had caused injuries on spleen. However their involvement in causing head injuries was proved by eye witness's statement. Accused were convicted under Section 326/34. *Ganga Paller* v. *State*, 2003 Cr LJ 4339 : AIR 2003 (SC) 3191 : AIR 2003 SCW 4547 : 2003(7) Scale 387 : 2003(6) Supreme 649.

Conviction was held under Section 304, Part I appellant inflicted simple injury with axe—Other accused acquitted. Injury by appellant not sufficient to cause death in ordinary courses. Accused appellant could be convicted for his individual act. Hence appellant's conviction altered to one under Section 326. *Moti Lal* v. *State of M.P.*, 1994 Cr LJ 1633 (SC) : (1994) 3 Recent CR 77 : (1994) 2 East Cr C 353 : AIR 1994 SC 1544.

Accused husband and mother in law allegedly demanded money from deceased, beat her and caused her death by strangulating her. There was no evidence to show that the deceased was harassed or money was demanded by accused. The statements of witnesses about harassment caused to deceased recorded by the Mandal Revenue officer were not produced before the Court. Even the copies thereof were supplied to the accused. It was held that the charges u/Secs. 304, 398A & 201, IPC against accused were not proved and hence the conviction was set aside. *Mohd. Dowlath* v. *State of AP*, 2004 CrLJ 760 (AP) : 2004(1) ALD (CRL) 822 : 2004(1) DMC 447 : 2004 Mat LR 261.

15. Jury.—As this section deals with two kinds of culpable homicide, the jury ought to be asked to say under which part they find the accused guilty. 19 Bom 71 : ILR (1937) 2 Cal 250 : 41 CWN 570 ; 41 CWN 575.

16. Sentence.—In a case of culpable homicide, a sentence of two years' rigorous imprisonment is grossly inadequate. AIR 1950 lah 159. A case of murder which owing to the application of one of the exceptions to Section 300 is reduced to culpable homicide not amounting to murder is punishable, so far as imprisonment is concerned. with a maximum term of ten years, if no intention imputable to the accused under Sec. 299 but only the knowledge therein mentioned. AIR 1939 Rang 225 : 40 Cr LJ 725.

Conviction is nothing but proof of offence committed by a person or otherwise the proof of guilt and sentence is the punishment. According to this Court, so far conviction is concerned the Court should not compromise with that but regarding sentence, Court has to consider many aspects at the time of exercising its discretion that it has to protect society and stamp out criminal proclivity as the same is the object of law at the time of imposing the sentence. The Court has also to keep in mind that in what circumstances the accused committed the offence, what was his age at the time of offence and what is his age ultimately when he is going to suffer the sentence and social background of this family i.e. whether anybody is dependent on him or not and whether the crime committed by him was planned one or occurred due to certain situation that arose at that moment. In the instant case, at the time of commission of offence under S. 304 Part II, the accused was at senile age of late sixty's. But by this time another seven years have already been passed and he is stepping to the age of seventy's. Therefore, the prayer for reduction of sentence was considered with some human touch by this Court. Sentence of 5 years RI reduced to already undergone and with fine. *Md. Isub Ali v. State of Tripura*, 2008 CriLJ 100 (Gau).

Lenient sentence should be given when the accused committed an offence under grave and sudden provocation or exceeded his right of private defence. 34 Cr LJ 1170 ; 34 Cr LJ 1161 : 35 Cr LJ 461 : 35 Cr LJ 1163 : 35 Cr LJ 1445 ; 42 Cr LJ 755 ; 39 Cr LJ 927 ; 39 Cr LJ 137 ; 37 Cr LJ 931. Considering the youth of the accused a lenient view was taken and the accused was sentenced to six month's R.I. in a charge of hitting his father in rage possibly on account of his refusal to pay him money. The offence was held to be under Section 324 and not under Section 304. 1957 All WR (Sup.) 117 : AIR 1958 Mys 48 : AIR 1957 Mys 159 : 1958 Cr LJ 529 : AIR 1985 SC 236.

Reduction of life imprisonment—Scope.—Santosh Dorjee along with his cousin brother went to an eatery situated for taking food. They placed order and were waiting there. All of a sudden one Bikram Dorjee came there and assaulted Santosh Dorjee by a knife in his belly. Seeing the same assault Sankar panicked and rushed away from the place of occurrence thinking that Bikram Dorjee might assault him. He informed the matter to the parents of Santosh who was by then taken to Birpara hospital. Sankar accompanied father of Santosh from Santosh was later on transferred to Silliguri medical college where he died the next day. Prosecution case the Birpara P.S. was started against the accused Bikram Dorjee under Sec. 304 IPC. After investigation charge sheet was filed. Since the accused pleaded innocence trial was held.

The trial Court found the appellant guilty and convicted him in terms of Sec. 304 Part I IPC. The appeal filed by the appellant was dismissed by the High Court. The only point in support of the appeal is relating to quantum of sentence.

On the peculiar facts of the case, we are of the view that 10 years custodial sentence would meet the ends of justice. The appeal is allowed to the aforesaid extent. The appellant be set at liberty if he has served the sentence imposed. *Bikram Dorjee vs. State of West Bengal*, AIR 2009 SC 2539 : 2009 (2) Crimes 354 (SC) : 2009 (7) JT 325 : 2009 (6) Scale 325 : 2009 (6) SCR 884 : 2009 (3) Supreme 772.

The witnesses have not only named the appellant, but also enumerated the specific role of hitting the deceased by bricks. On analysis of the entire evidence on record, it is abundantly clear that the conviction of the appellant cannot be sustained under Secs. 302/149 IPC. However, we do not agree with the second submission that the appellant also cannot be convicted under Sec. 304 Part II/149 IPC. In our considered view, when the bricks were thrown on the vital parts of the body of the deceased who was an old man of 78 years, in that event, knowledge to commit murder can definitely be attributed to the appellant. In this case, the deceased died instantaneously after receiving the brick injuries. On consideration of the totality of the facts and circumstances of the case, the ends of justice would be met if the conviction of the appellant under Secs. 302/149 IPC is set aside and the appellant is convicted under Secs. 304 Part-II/149 IPC and sentenced to five years imprisonment. *Naimuddin vs State of West Bengal*, 2010 CrLJ 392 (SC) : AIR 2010 SC 505

The accused was found to have committed offence relatable to Section 304 Part-I and not under Section 302. The plea of accused that incident occurred two decades back was held not tenable as custodial sentence of 6 years even on a liberal approach was to serve the ends of justice. Sentence of fine imposed was also not changed. *State of MP* v. *Ghanshyam Singh*, 2003 Cr LJ 4339 (SC) : AIR 2003 (SC) 3191 : 2003(8) SCC 13 : 2003(6) Supreme 649 : 2003(41) Crimes 6 (SC).

Altering of conviction—From 304-I to Sec. 304-II. The offence of Sec. 304 Part I IPC is of a higher degree than that of the offence under Sec. 304 Part II IPC, as also held in *Ruli Ram vs. State of Haryana*, [2002 (7) SCC 691, Para 8.] The learned Single Judge, therefore, was not justified in converting the order of conviction and altering the same from Sec. 304 Part II IPC to Sec. 304 Part I IPC, particularly when the prosecution did not file any appeal. By virtue of the order passed by the learned Single Judge the appellant stood convicted of a higher degree of offence than that of Sec. 304 Part II IPC, although the learned Single Judge altered the sentence from eight years to five years. *Jarnail Singh vs. State of Punjab*, 2009 CrLJ 1141 : 2009 (3) SCC 391 : 2009 (1) JT 644 : 2009 (1) Scale 610 : 2009 (1) SCR 311 : 2009 (1) Supreme 224 : 2009 (1) SLT 679.

Alteration of conviction—Scope. Clause (b) of Sec. 299 corresponds with Clauses (2) and (3) of Sec. 300. The distinguishing feature of the *mens rea* requisite under Clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of Clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of Clause (2) is borne out by illustration (b) appended to Sec. 300.

Clause (b) of Sec. 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under Clause (2) of Sec. 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In Clause (3) of Sec. 300, instead of the words 'likely to cause death' occurring in the corresponding Clause (b) of Sec. 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice.

The above are only broad guidelines and not cast iron imperatives. In most cases, their observance will facilitate the task of the Court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

Considering the factual scenario and the facts that one arrow was shot the offence is covered by Sec. 304 Part I IPC and not Sec. 302 IPC. Though it cannot be laid down that whenever one arrow is shot Sec. 302 IPC will not apply, on the facts of the present case it appears to be so. Therefore, conviction is altered from Sec. 302 IPC to Sec. 304 Part I IPC. Custodial sentence of eight years would meet the ends of justice. *Laxminath vs. State of Chhattisgarh*, AIR 2009 SC 1383 : 2009 (3) SCC 519 : 2009 (1) JT 365 : 2009 (1) SCR 348 : 2009 (1) Scale 459 : 2009 (2) SLT 754.

Alteration of conviction—Scope. Clause (b) of Sec. 299 corresponds with Clauses (2) and (3) of Sec. 300. The distinguishing feature of the *mens rea* requisite under Clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of Clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of Clause (2) is borne out by illustration (b) appended to Sec. 300.

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In a Karnataka case, the evidence of injured witness was found reliable and the accused causing fatal injuries were convicted under Section 304/34 but those who had inflicted injuries to a witness was convicted under Section 326. Since the case was pending for the last 13 years, the sentence was reduced to the period already undergone. *State* v. *Salim Khan*, 2004 Cr LJ 552 (Raj).

In a case the sentence was reduced in view of the long duration and trifling nature of case in which single injury was caused. *Md. Nur Islam* v. *State*, 2003 CrLJ 4370 (Gau).

Reduction of compensation and custodial sentence both—Scope. We find that in a case of this nature where the High Court has altered conviction from Sec. 304 Part I to 304 Part II IPC and has considerably reduced the period of custodial sentence, there was no basis for reducing the compensation as awarded, *i.e.* Rs. 5 lakhs to Rs. 3 lakhs. No reason has been indicated to justify the reduction. Accordingly, we enhance the quantum of compensation to Rs. 5 lakhs. The balance of amount, if any, required to be deposited shall be so done within a period of four weeks from today. *Kaliben Rabari vs. State of Gujarat*, 2009 CrLJ 2843 : 2009 (11) SCC 797 : 2009 (7) JT 360 : 2009 (5) Scale 26 : 2009 (5) SCR 331 : 2009 (4) Supreme 392.

In a case where the accused was convicted after setting aside acquittal, sentence of 10 years was reduced to 5 years, as several years, had elapsed after acquittal of accused. *State of Rajasthan* v. *Maharaj Singh*, 2004 Cr LJ 4195 : AIR 2004 (SC) 4205 : 2004(3) Crimes 395 (SC) : 2004(6) Supreme 476 : 2004(7) JT 506.

Where accused persons convicted under Section 304 r/w Section 34, IPC, were young men at time of incident about 13 years back having no criminal background, sentenced to period already undergone by them. *State of Karnataka* v. *Salim Khan*, 2004 Cr LJ 335 (Kant).

Since accidental death of victim was not direct result of only rash and negligent act of accused hence accused remained in custody for 7 days entitled to reduction in substantive sentence of imprisonment for two months to period already undergone. *Bharat Pandharinath More* v. *State of Maharashtra*, 2004 Cr LJ 205 (Bom) : 2004 All MR (CRI) 136 : 2004(1) Bom CRI (Cri) 958.

Where the incident took place long back and many years had passed after acquittal of accused, sentence of imprisonment was reduced from seven years to five years in facts and circumstances of the case. *State of Karnataka* v. *Bharkoo Kushali Katharkar*. 2004 Cr LJ 4229 : AIR 2004 SC 4333 : 2004(7) SCC 487 : 2004(6) Supreme 472 : 2004(3) Crimes 390 (SC) : 2004(7) JT 208.

The evidence showed that the accused caused death of young boy in a cruel and brutal manner. The accused convicted under Section 302, IPC. The appellate court converted the conviction under Section 304 without specifying whether it came under Part I or II. It was held that no interference with sentence of 7 years imprisonment was called for. *Naval Kishore Singh* v. *State of Bihar*, 2004 Cr LJ 4252 : AIR 2004 SC 4421 : 2004(6) Supreme 445 : 2004(3) Crimes 373: 2004 SCC (Cri) 1967.

In a sudden quarrel, death of the deceased was caused due to blow given by pick axe in the heat of passion. The blow was not repeated and thus there was no intention to cause death. Sentence of eight years was held to be on higher side and it was reduced to three years R.I. *Bagdi Ram* v. *State of MP*, AIR 2004 SC 387 : 2004 Cr LJ 632 : 2003(8) Supreme 579 : 2004(1) Crimes 108 (SC) : 2003(10) JT 219.

Where the case was pending for more than 23 years from the date of incident, sentence of five years R.I. was held sufficient to meet the ends of justice. *Brij Lal* v. *State*, 2003 Cr LJ 1873.

In case of culpable homicide not amounting to murder, the accused inflicted solitary knife blow on stomach of deceased. The accused was aged less than 19 years at the time of incident. It was held that the sentence of 7 years R.I. would meet the ends of justice. *Barkat-ullah* v. *State of UP*, 2004 Cr LJ 4482 (All) : 2004 All LJ 3370.

Where the accused was about 55 years at time of incident and he was now 78 years of age, it was held that R.I. for two years and fine of Rs. 20,000/- would be sufficient. *State of UP* v. *Hari Ram*, 2004 Cr LJ 1895 (All).

Where in case of culpable homicide not amounting to murder, the accused spent more than 7 years in jail, the accused was held liable to be released with immediate effect. *Bajirao Maruti Dale* v. *State of Maharashtra*, 2004 Cr LJ 1638 (Bom) : 2004(1) Bom CR (Cri) 685.

The accused persons were convicted under Section 304, Part-II read with Section 34. Incident was outcome of some violent quarrel *inter se* between the groups. It was held that since the accused were young men having no antecedents of criminal background and about 13 years have elapsed from the date of incident, the ends of justice would meet if the accused was sentenced to period already undergone by them. *State of Karnataka* v. *Salim Khan*, 2004 Cr LJ 335 : AIR 2004 Kant HCR 32 : 2003(4) All Cri LR 265 : ILR (Kant) 2003(4) KAR 3337.

In a case the accused had undergone ordeal of interacted trial for about five years. They were in custody for more than two years. Appeal was pending for about 14 years.

It was held that in the circumstances, the sentence of ten years R.I. is liable to be rendered to period already undergone. *Arjun Mehra* v. *State of Bihar*, 2005 Cr LJ 3676 (Jhar) : 2005(3) East Cri C 230 : 2005(3) JCR JHA 222 : 2005(4) JLJR 589.

Where the accused was not healthy and the whole family was dependant on him and his parents were also dependants on the accused, the sentence of 7 years R.I. was modified to a period of 4 years and however, the payment of fine as imposed by the lower court was confirmed. *Bodo Lokya* v. *State of AP*, 2005 Cr LJ 255 (AP) : 2005(1) Andh WR 116 (A.P.).

When the offence was committed, the accused was a young man of about 22-23 years. He had already undergone over 6-7 years incarceration and had not been able to avail the benefit of bail/suspension of sentence due to his mobility to furnish a surety. He had clean antecedents. There was no motive for committing the offence. The offence was committed in the heat of moment following the quarrel. It was held that in the facts of the case and circumstances, the sentence of life imprisonment, in view of the mitigating circumstances deserved to be modified to a period of 10 years with remission as admissible under rules and benefit of set off of the period undergone in custody under Section 428, Cr PC. *Subhash Kumar* v. *State of Govt. of NCT of Delhi*, 2005 Cr LJ 4399 (Delhi) : 2006(1) Crimes 26 : 2005(123) DLT 487 : 2005(4) Rec Cri R 974.

The accused gave simple blow of knife on person of deceased which fell on his throat causing his death. The fact is proved by evidence of eye-witnesses and corroborated by medical evidence. The offence committed is culpable homicide and would fall under Section 304. Part II, I.P.C, Hence conviction and sentence under Section 302 altered to one under Section 304. Part II. *Sekhar* v. *State*, 1994 Cri LJ 2479 : 1994 MLJ (Cr) 570 (Mad).

The head injury as proved by the medical report was externally protruding outside. The absence of medical opinion that injury was sufficient in ordinary course of nature to result in death would not make any difference. Hence the offence proved against him under Section 302, I.P.C. was clearly made out. *Phoolbhan Saha* v. *State of M.P.*, 1994 Cr LR (MP) 172 (N) (MP).

Sentence of young boy of 18 years old may be reduced. *Narain* v. *State*, 1994 Cr LR 75 (Raj).

Reduction of sentence under Section 304, Part II by High Court not proper particularly when accused remained on bail through out and served only 2-1/2 months in jail. *State of Punjab* v. *Mohinder Singh.*, AIR 1994 SC 113.

In criminal law inevitable decisions are given in relation to special facts of each case. Hence argument that sentence may be moulded to afford help to dependents of victim cannot be accepted. *Madhukar Chandar* v. *State of Maharashtra*, (1994) 1 Bom CR 617.

The deceased had stepped into the mango groves of the accused for dishonestly plucking mangoes in the dead of night and was beaten with a *lathi* and split bamboo under the heat of the moment. In an appeal from his conviction, sentence was reduced from 5 years R.I. to 4 years R.I. (1986) 2 Crimes 340 (Cal).

The medical evidence lends corroboration to ocular account that deceased as a result of head injury received by him at the hands of appellant with a *Tamba* on spur of moment without any premeditation. Apart from this both deceased and appellant are close relatives and the appellant has under gone agony of trial for over two years the period of sentence is reduced to rigorous imprisonment for 4 years instead of 8 years. *Bhura Singh* v. *State of Punjab*, 1994 (2) CC Cases 554 (P & H).

Conviction came under Section 304, Part II I.P.C. an old accused suffering from mental agony. Hence High Court reduced the sentence. *Balu Sendappriyar* v. *State by Inspector of Police, Patukottaim*, 1995 Cr LJ 155 (Mad).

Conviction was made under Section 304, Part II—Appeal was hence made—Appellant accused killed his wife and her paramour when found them in compromising position and trial Court rightly found occurrence as sudden and on grave provocation—Sentence of 5 years, imprisonment reduced to one year imprisonment. *BibhshanYadav Deshmukh* v. *State of Maharashtra*, (1995) 4 Crimes 157 (Bom).

Two persons from side of accused also receiving serious injuries. Both accused and complainant parties closely related, appellant giving only one blow by cricket stump appellant was below 21 years of age even on date of passing of sentence and benefit of probation should be extended which cannot be denied except in rare cases. *Bhupesh Ramchandra More* v. *State of Maharashtra*, 1994 (1) Crimes 2 : (1994) 1 ALT (Cr) 5 : (1994) 2 Bom CR 403 (Bom).

When accused was convicted under Section 304, Part II and sentenced to R.I. of 5 years with fine of Rs. 3.000/- and thereafter he realising his misdeeds tried to commit suicide, Supreme Court had reduced sentence to period already undergone and enhanced fine to Rs. 1,00,000/-. *Venkatesh* v. *State of Tamil Nadu*, 1993 Cr LJ 61 (SC) : AIR 1993 (SC) 1230 : 1993 Supp(3) SCC 301 : 1992(2) Scale 698.

Conviction for offence came under Section 304, Part II I.P.C. High Court awarded sentence for period already undergone and a fine of Rs. 4,000/- Appeal against the same was filed, there was long lapse of time. The apex court maintained the imprisonment, however, the fine enhanced to Rs. 10,000/-. *State of Punjab* v. *Mohinder Singh*, 1995 SCC (Cr) 147 (SC) : AIR 1994 (SC) 113 : 1994 Cr LJ 3903.

Passenger of bus standing on footboard fell down and expired when bus driver took sharp turn at great speed—Guilt of driver accused established beyond doubt—Occurrence took place 23 years ago, hence conviction was held proper but sentence of one year's imprisonment reduced to period already undergone. *Shivdev Singh* v. *State (Delhi Administration)*, 1995 Cr LJ 2142 (Del).

Main accused and the deceased were brothers contesting a case of land dispute of long standing. He shot at the deceased where sons were also injured. *Held*, the co-accused were not responsible for any overt act of the accused who had knowingly and intentionally shot him down. He should be convicted under Section 302. I.P.C. and Section 323, I.P.C. whereas the others should be convicted under Section 323/34. I.P.C. 1986 Cr LJ 197 (All).

An accused of 18 is a child and cannot be tried with adults accused of a dacoity. A minor should be tried by juvenile Court. His conviction was set aside and case remanded to Magistrate concerned for onward transmission to the trial Court *i.e.*, juvenile Court. 1986 Cr LJ 381 (Cal) : (1986) 1 Crimes 185.

The accused were set at liberty for want of evidence on its reappraisal in an appeal since the prosecution failed to bring the guilt to the accused. (1986) 2 Crimes 640.

Death was held in police custody—Trial of Police personnel was made. Prosecution evidence well corroborated—Conviction, was hence sustainable. *Sadasivan Mohanachandran* v. *State of Kerala*, 1994 SCC (Cri) 165 ; 1994 Cr LJ 920 : (1994) 1 CCR 1 (SC).

When accused tried for forming unlawful assembly and allegedly killing the deceased in presence of witnesses. All the eye-witnesses except one testifying that they did not witness the occurrence. Only one eye-witness testifying the killing and his testimony well corroborated by medical evidence—However, *mens rea* being absent. Hence accused cannot be convicted for murder.—Accused, *held* guilty of offences under Section 304. Part II and 149. *Pooma Ram* v. *State of Rajasthan*, 1995 Cr LJ 359 (Raj).

Acquittal because identity of the accused not established—There was filed claim-petition by deceased's L.R. W.S. by the accused stating that he was driving the truck at the relevant time. It was held that his acquittal having been recorded and proceeding terminated any statement of a person recorded subsequent to the completion of trial not to be considered for the purpose of reappraisal of evidence. Court to be slow and reluctant in interfering with the order of acquittal in revision application filed by private party. *Navinchandra Ramlal Kayastha* v. *State of Gujarat*, 1995 Cr LR 202 (Guj).

The medical evidence establishes beyond all reasonable doubt that the deceased died due to homicidal violence. The nearest kith and kin of the deceased who were present at the scene of occurrence have been cited as eye-witnesses. So far as the part played by the appellant is concerned the evidence of the eye-witnesses is consistent. The High Court however, *held* on the basis of the injuries found on the four accused persons that there was a free fight and that the prosecution had suppressed the origin of the occurrence. Having held that it was a free fight, the High Court however convicted the accused for their individual acts. So far as the appellant is concerned, the High Court relied on the evidence of P.W. 3 who deposed that it was the appellant who caused the lacerated injury on the head by throwing a stone. As a matter of fact this evidence finds corroboration from the medical evidence. Even in the F.I.R. it was mentioned that it was the appellant who threw the stone on the head of the deceased as a result of which the brain-matter came out. The High Court was given good reasons for convicting the appellant under Section 304, Part II and sentence awarded also is not excessive. Therefore the appeal is dismissed. The appellant who is on bail shall surrender and serve out the remaining period of sentence. *Kotwal* v. *State of M.P.*, 1994 SCC (Cri) 92 at p. 93 : 1994 Cr MLJ 255 : AIR 1994 SC 564 : 1993(4) Scale 517 : 1994 Cr LJ 255.

Conviction was made under Section 304, of I.P.C. Fight was between two step-brothers. One in drunken state hit the other with *Gupti* resulting in death—Accused brother 19 year's old remained in custody for 2 year's and 11 months. Conviction was maintained but sentence reduced to period already undergone. *Narain* v. *State of Rajasthan*, 1994 RCC 199 : 1994 Cr LR (Raj) 266 (Raj).

• When accused killed his wife in order to take revenge but without any provocation, sentence of 5 years R.I. not excessive and fact that accused having four children is no ground to show sympathy. *Shanmugham* v. *Inspector of Police*, 1996 Cri LJ 3702 (Mad).

When accused is below 21 years of age at time of occurrence and was not previous convict or with bad antecedents he can be released on probation of good conduct. *Sitaram* v. *State of Rajasthan*, 1996 Cr LJ 1055 (Raj).

Where the accused was about 80 years at the time of the occurrence and he was totally for bidden at the time of High Courts judgment it was held that the ends of justice would be met if his sentence is reduced to that already undergone by him. *Dev Singh* v. *State of Punjab*, 2000 Cri LJ 347 (P&H).

When the High Court held that accused had not committed offence of murder and therefore, as a logical corollary he was not liable to be sentenced to life imprisonment. It is difficult to appreciate how the same sentence of the life imprisonment could be imposed on him by enhancing his sentence under Section 304, Part I.

It is now well settled that imposing of sentence is in the realm of discretion of the Court and unless this sentence is found to be grossly inadequate the appellate Court would not be justified in interfering with the discretionary order of sentence. *Ram Sajiwan Singh* v. *State of Bihar*, 1996 Cr LJ 2528 (SC) : AIR 1996 (SC) 3265 : 1996(8) SCC 552 : 1996(4) JT 502 : 1996(4) Scale 63.

Where the accused was prompted to commit the crime on account of the fact that the deceased was moving with other persons while her husband was abroad, the sentence under Section 304 (Part–II) was reduced from seven years to five years R.I. In this case, the accused was convicted under Section 304 (Part-II) for killing his sister by implicting Danda blow- *Franco 'D' Souza* v. *State of Goa*, 2000 Cri LJ 1985 (Bom).

In the instant case, the accused who was an engineering graduate consumed arsenic poison along with his girl friend but survived. He was found guilty of offence under Section 304, Part II. He was married during pendency of case. He sufficiently suffered mentally and morally. He already remained in jail for 3 years and 10 months. He had old parents to look after. Thus having regard to his age, character, antecedents, his social background, academic background, family obligations and above all the fact that he hardly will have any academic feature, the High Court reduced his sentence to the period already undergone and a fine of Rs. 2 lakh in addition to it. *Sanjay Goel v. State of U.P.* 2002 Cri LJ 625 (All.) : 2001 All LJ 2713 : 2001(3) All Cri R 2384 : 2002(1) Rce Cri R 356.

The incident had occurred 21 years ago and most of the accused were aged between 55-60 years at the time of Judgment in appeal and with the passage of time their socio-economic conditions must have undergone radical changes during this long interval. Looking to these facts and having regard to the circumstances in which the crime was committed where the accused were unnecessarily suspected of having set fire to the fodder of Nathoo, to the kind of weapons used, the number and nature of injuries caused, the antecedents of the accused persons etc., it would not be reasonable to award severe punishment to the accused and the ends of justice would sufficiently be met if each of the accused is sentenced to three years, R.I. under section 304 Part-II read with section 149 IPC and to pay a fine of Rs. 5000/-. *Ganga Singh* v. *State of UP.* 2000 Cri LJ 1965, (All).

It is well established law that while selecting an appropriate sentence the Court should weigh the aggravating as well as mitigating and extenuating circumstances going in favour of the accused. At the time of incident, the accused was a young lady about 17 years of age. By the time after gap of more than 20 years, he must be about 37 years of age. With the passage of time the passion of both sides must have cooled down and there was nothing on record that the accused had any criminal history or that he had indulged on criminal activities during the pendency of appeal. Taking all these circumstances the life imprisonment was reduced to 5 years' R.I. *Pramod* v. *State of U.P.*, 2001 Cri LJ 925 (All).

When after altercation and fight deceased took out knife and seeing it accused assaulted deceased with bricks at spur of moment, sentence of 10 years imprisonment reduced to period already undergone. *Ghasiram Lakra* v. *State of Orissa*, 1997 Cri LJ 939 (Ori).

Where the appellant picked up a heavy stone and threw it down from the roof of his house on the deceased, it was held that it would not be proper to reduce the sentence to the period already undergone by the accused. However, keeping in view the fact that the said accused had faced the agony of trial for a period of more than a decade, the sentence of 2 years. R.I. coupled with sentence of fine awarded by the trial court would be sufficient to meet the ends of justice. *Santosh* v. *State of MP* 2000 Cri LJ 1140 (MP).

When sentence imposed is manifestly inadequate, it can be interfered with. *Surinder Kumar* v. *State of Haryana*, 1997 Cri LJ 1737 (P&H).

The injuries were four in number and those injuries resulted in internal injuries as well. In the internal examination it was found that left sided 8th and 9th ribs at midaxillary line were fractured. Left lung was also torn. Spleen was ruptured and according to the opinion of the doctor the cause of death was due to shock and haemorrhage (massive) due to rupture of inner surface of spleen. In these circumstances a sentence of fine of Rs. 3000/- was inadequate and it was enhanced to RI of 2 years and fine. *State of Madhya Pradesh* v. *Kamla Shanker*, 1999 Cri LJ 2709 (M.P.)

Where the accused inflicted *lathi* blow on the head of the deceased without any provocation on her side, sentence of seven years imprisonment imposed on him was held not excessive. *Umed Singh v. State of Rajasthan*, 2002 Cri LJ 414 (Raj).

17. Evidence and proof/Eye-witness.—A police constable and not the informant had-witnessed the occurrence as a result of which the F.I.R. was lodged. The appellant was arrested and the trial was pending against 72 years old female. *Held*, she was entitled to bail. 1986 Cr LJ 365.

Eye-witnesses. After investigation, charge-sheet was filed. As the accused persons pleaded innocence, trial was held. Twelve witnesses were examined to further the prosecution version. The trial Court placed reliance on the evidence of eye-witnesses and found the appellant guilty. Questioning the conviction, the appellant preferred an appeal before the High Court. The stand taken before the High Court that the occurrence took place in course of sudden quarrel was not accepted. The appellant has filed this appeal primarily on the ground that even if the prosecution version is accepted in its totality, case under Sec. 302, IPC is not made out. The appropriate conviction would be under Sec. 304 Part I, IPC. *Posuram Deshmukh v. State of Chhattisgarh.*, AIR 2009 SC 2482 : 2009 (5) SCR 807 (SC) : 2009 (7) JT 120 (SC) : 2009 (5) Scale 332 (SC) : 2009 (3) Supreme 745 (SC) : 2009 (2) Crimes 346 (SC) 2009 (3) JCC 1699 (SC).

Testimony of Eye witnesses—Some omissions—Effect of. The High Court found that the trial Court has over looked the evidence of the eye witnesses, more particularly, PWs. 2 to 5. It was also noted that PW-10 the father of accused Bhola accepted that

Kailasho Devi accompanied by her son and the deceased in injured condition came to his shop and on enquiry Fandi Ram and his wife informed him that he was beaten by accused Dharmu and Fundi Ram also nodded his head supporting the version of his wife. The High Court noted that the evidence clearly established that the accused persons took liquor with the deceased in the house of accused Bhola. There was election dispute. PW-10 who was Pradhan proclaimed that he did not vote for a winning party and this was the bone of contention between the accused persons and the deceased. The accused persons were also drunk. They started quarreling with the deceased and gave him a fist blow and assaulted him with some stones which was witnessed by Kailasho Devi and her son Jagdish Singh from their house. Therefore, the order of acquittal was set aside.

It is to be noted that the accused persons pleaded that the evidence of the eye witnesses cannot be accepted as there were omissions, contradictions and discrepancies in the evidence of most of the prosecution witnesses. In the effort of false implication, prosecution made introduction of PW-9, an eye witness. It is fairly settled position in law that even if there are some omissions, contradictions and discrepancies the entire evidence cannot be discarded. After exercising care and caution and shifting the evidence to separate the truth from untruth, exaggeration, embellishments and improvements the Court can come to a conclusion as to whether the residual evidence is sufficient to convict the accused.

Undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the root of the matter and shake the basic version of the prosecution witnesses. A witness cannot be accepted to possess a photographic memory and to recall the deals of an incident verbatim. Ordinarily, it so happens that a witness is overtaken by events. A witness could not have been anticipated the occurrence which very often has an element of surprise. The mental faculties cannot, therefore, be expected to be attuned to absorb all the details. Thus, minor discrepancies were bound to occur in the statement of witnesses. *Bhola vs. State of Himachal Pradesh*, AIR 2009 SC 1338 : 2009 CrLJ 1885 : 2009 (11) SCC 460 : 2009 (2) SCR 750 : 2009 (3) Scale 186;: See also *Sohrab and Anr. vs. The State of M.P.*, AIR 1972 SC 2020;: *State of U.P. vs. M.K. Anthony*, AIR 1985 SC 48.

Coming to the plea about variance between medical evidence and ocular evidence, it is to be noticed that even on an casual reading of the evidence it cannot be said that the ocular evidence was at variance with the medical evidence. The High Court has analyzed the medical evidence and the ocular evidence to conclude that the evidence of eye witnesses was cogent and trustworthy and, therefore, held that the trial Court's conclusions were unsustainable. *Sripathi vs. State of Karnataka*, AIR 2010 SC 249 : 2009 CrLJ 4646 : 2009 (11) SCC 660 : 2009 (7) JT 146 : 2009 (5) SCR 309 : 2009 (5) Scale 5 : 2009 (2) Supreme 319.

We find that the evidence of eyewitnesses clearly establishes the roles played by the Hardeep Singh and Harjinder Singh. It is also clear from the prosecution evidence that on hearing of the exhortation of the acquitted Gurcharan Singh, Jaswinder Singh and Harjinder Singh had given blows on the legs of the deceased. After he fell down, Hardeep Singh gave blow on the head. Similarly Harjinder Singh also gave blows on the head. After the deceased fell down Jaswinder Singh did not attack on any vital part of the deceased's body. He assaulted on the arm of the deceased. In the aforesaid circumstances, while appeal filed by the accused appellants Hardeep and Harjinder Singh is dismissed, the appropriate conviction of Jaswinder Singh would be under Sec. 304 Part II, IPC. *Hardeep Singh and Ors. v. State of Haryana*, AIR 2008 SC 3113 : 2008 (9) SCR 1114 (SC) : 2008 (10) JT 593 (SC) : 2008 (8) Scale 686 (SC) : 2008 (4) Supreme 501 (SC) : 2008 (8) SLT 38 (SC) : 2008 (3) Crimes 28 (SC) : 2008 (3) JCC 1818 (SC) : 2008 (4) Recent CR 125 (SC).

Testimony of Solitary eyewitness—Presence of eyewitness at the spot at that point of time was also providential and he has been examined only as a chance witness. The other alleged eye witness namely Chanan Singh, Member Panchayat of village Kasiana was not examined at all on the ground that he was won over by the accused. Manjit Singh, Sarpanch who is stated to be the last and third eye witness turned hostile. Therefore, out of the three eye witnesses' one has become hostile whereas the other was not examined at all by the prosecution and we have only one eye witness, who happens to be the brother of the deceased. If his evidence is discarded there is no other evidence on the basis of which the accused could be convicted.

The entire story sought to be put forth by the prosecution and by eyewitness particularly appears to be doubtful and full of contradictions. It will be unsafe to convict a person on the basis of such unreliable and untrustworthy evidence particularly when such statements are full of embellishment and contradictions, without corroboration in material particulars by reliable testimony, direct or circumstantial. Consequently, we set aside the order of conviction and sentence passed against the appellant and give him benefit of doubt. He stands acquitted of the charges. He shall be set free immediately, unless required in any other matter.

PW-7 is said to be the eye witness who has allegedly seen the entire occurrence including the exchange of hot words between the appellant and the deceased in a winter night and that also when it was totally dark. According to him, he could see the entire incident in the light of the headlight of the car.

The aforesaid statement of eyewitness does not appear to be trustworthy and reliable for the simple reason that even though the headlight of the car was on, it would be lighting only the front portion and not the side of the car and may not even have lighted sufficiently to enable PW. 7 to see as to what had happened inside the car. *Jarnail Singh vs. State of Punjab*, 2009 CrLJ 1141 (SC): 2009 (3) SCC 391 : 2009 (1) JT 644 : 2009 (1) Scale 610 : 2009 (1) SCR 311 : 2009 (1) Supreme 224 : 2009 (1) SLT 679.

Solitary relation witness. It is no doubt true that conviction could be based on the sole testimony of a solitary eye witness but in order to be the basis of conviction his presence at the place of occurrence has to be natural and his testimony should be strong and reliable and free from any blemish. In *Chuhar Singh vs. State of Haryana*, 1976 (1) SCC 879, this Court held that what is important is not how many witnesses have been examined by the prosecution but what is the nature and quality of evidence on which it relies. The evidence of a single witness may sustain a sentence of death whereas a host of vulnerable witnesses may fail to support a simple charge of hurt. Since the case must stand or fall by the evidence of single witness, it is necessary to examine that evidence critically.

However, when we scrutinize the evidence of PW-7, in the present case, we do not find him to be trustworthy and reliable witness for he is changing his version frequently. He had given one version in the FIR which is reiterated during the course of investigation before the police whereas he had given a totally different version at the time of his statement before the Court. He had stated in the FIR that following the altercation between the deceased and the accused the deceased first gave a knife blow. When inquest proceedings took place on the next day at 7.00 a.m. he stuck to the same version and during investigation also he confirmed the aforesaid allegation made by him whereas in the trial he stated that the accused first gave two knife blows to the deceased and then he tried to commit suicide by giving a knife blow to himself. He had also stated that on receiving those two blows the deceased came through the window and fell down on the ground. The said version also cannot be believed for the deceased after receiving the injuries could not have gone out of the window unless the door was open. The car was allegedly parked with the headlights on and if that was so, the key of the car was available in the starting/ignition switch and, therefore, there was no reason why the said car could not have been driven with the dead body of the deceased and the injured to the hospital as also to the police station by the said PW-7 and the other witnesses allegedly with him at that point of time for it has come in evidence that the other witness knew driving as he was driving the tractor. *Jarnail Singh vs. State of Punjab*, 2009 CrLJ 1141 : 2009 (3) SCC 391 : 2009 (1) JT 644 : 2009 (1) Scale 610 : 2009 (1) SCR 311 : 2009 (1) Supreme 224 : 2009 (1) SLT 679.

Solitary evidence.—The statement of said witness gets corroborated from the evidence of doctor who had conducted the post-mortem. According to learned counsel for the appellant on the basis of sole evidence conviction cannot be sustained but then law is well settled that even on the basis of a solitary evidence the Court can convict an accused provided the Court is satisfied that the evidence is trustworthy, reliable and does not suffer from any infirmity. In this case at hand on a reading of the evidence of P.W.2, who is a boy of only 14 years, it appears that he had seen the occurrence and had given vivid description as to how his father was assaulted by the accused. The said statement also gets corroborated to certain extent with regard to prior enmity with her mother-P.W.1.P.W.3 was another child witness. He was also travelling in the trolley rickshaw. He had stated that all of a sudden there was altercation between Prafulla and the accused. Of course this witness had not seen the assault part. The said statement reveals that not only he confessed about the guilt but also disclosed as to where he had kept the weapon of offence. On the basis of said statement the police recovered the weapon of offence. The Doctor who had conducted post-mortem also opined that the injuries might have been caused by such weapon. The statement leading to discovery can be accepted under Section 27 of the Evidence Act in evidence.

In view of the discussions made above this Court is satisfied that the conclusions arrived at by the learned Addl. Sessions judge does not suffer from any infirmity and the same are based on cogent and reliable evidence. This Court, therefore, is not inclined to interfere with the said finding. However, it appears, that the accused is in custody for about nine years. That apart, evidence is available to reveal that there was ill-feeling between the deceased and the accused on the allegation that the accused was having illicit extra-marital relationship with the informant. The evidence of P.Ws.2 and 3 clearly reveals that while proceeding on the road all of a sudden there was an altercation between the deceased and the accused and being enraged in the heat of passion without any premeditation took out a knife and indiscriminately stabbed

Prafulla, thereby causing his death. In view of the aforesaid facts and circumstances this Court feels that ends of justice and equity will be better served if the order of conviction under Section 302 of IPC is set aside and instead the appellant is convicted under Section 304, Part-II, IPC and sentenced to the period of imprisonment already undergone by him. Before parting it is apt to say that the endeavour made by Mr. Soumendra Patnaik who was engaged by this Court as an Amicus Curiae in assisting this Court, is very much appreciated. *Sana alias Sanatan alias Dhaneswar Samalv State of Orissa,* 2010 Cri LJ 299 (Orissa).

Suppression of genesis of evidence—Discrepancy and inconsistency. The discrepancies coming on record in the evidence of witnesses in no circumstances can be termed to be minors in nature which in our view, are vital for disbelieving and discrediting the evidence of the eye-witnesses. The High Court discarded the important pieces of evidence on the basis of surmises and conjectures. On the day and time of the incident none of the eye-witness including injured witnesses had seen the appellant travelling on Bus. It is their evidence testimony that there were some more persons present at the bus stand, who took the luggage of the appellant after the same was unloaded from the rooftop of the bus. It has come in the evidence of these witnesses that one person hit PW-Laxman Dass. The Investigating Officer has not cared to find out the identity of those persons who were accompanying the appellant on the scene of occurrence and took his luggage or out of those persons who hit PW-Laxman Dass with a stone. It appears that the prosecution has suppressed the genesis of the evidence.

It is the evidence of Fire Arm Expert, that he examined rifle No. 243 of 302 bore which was deposited with the Scientific Branch of the Forensic Science Laboratory by Constable Ram Chhabile. It is clear from the evidence of the Ballistic Expert that the rifle of, 302 bore was sent to him for scientific analysis and not rifle of 315 bore which allegedly was used by the appellant at the time of commission of the offence and which later on was handed over to H.C. Sukhram Singh, who sealed the same in the Police Station. This discrepancy and inconsistency in regard to the use and recovery of the weapon of offence from the possession of the appellant is very vital to discard the truthfulness of the prosecution case. The prosecution has failed to prove that the same weapon of offence was sent to the Ballistic Expert which allegedly was handed over by PW-Vimal Kumar Tiwari or Shambhu Dayal Chaurasia to Head Constable in the Police Station. The contentions of the learned Counsel appearing for the State that such type of minor discrepancy has to be ignored from consideration cannot be accepted.

It is the case of the prosecution that single bullet was fired by the appellant from rifle of 315 bore which caused injuries to four persons.

Witness Tiwari deposed that on the day of incident the appellant fired one single bullet shot, which first hit Prahlad Babu and then Dhanna Lal and the bullet came out of the body of Dhanna Lal and in the process hit two other persons whom he did not know. It has come in his evidence that he could not tell whether all the injured persons were standing in a queue when they received bullet shot.

A Fire Arms Expert examined rifle and he also scientifically examined three live cartridges and one missed fire round. It is his opinion that two pieces of metal could have been fired from above rifle. He placed on record copy of the test report. In cross-examination this witness stated that he could not definitely point out whether pieces of metals *i.e.* EB2 and EB3 were the pieces of same bullet which was fired from same rifle. It is his opinion that rifle was of .302 bore and not of .315 bore. He also categorically stated that one bullet could cause only one entry wound to a person. *Mahendra Pratap Singh vs. State of Uttar Pradesh*, 2009 (11) SCC 334 : 2009 (1) Crimes 424 : 2009 (3) JT 120 : 2009 (2) SCR 1033 : 2009 (3) Scale 122 : 2009 (2) Supreme 175 : 2009 (2) SLT 520 : 2009 (2) JCC 1131.

The witnesses have not only named the appellant, but also enumerated the specific role of hitting the deceased by bricks. On analysis of the entire evidence on record, it is abundantly clear that the conviction of the appellant cannot be sustained under Secs. 302/149 IPC. However, we do not agree with the second submission that the appellant also cannot be convicted under Sec. 304 Part II/149 IPC. In our considered view, when the bricks were thrown on the vital parts of the body of the deceased who was an old man of 78 years, in that event, knowledge to commit murder can definitely be attributed to the appellant. In this case, the deceased died instantaneously after receiving the brick injuries. On consideration of the totality of the facts and circumstances of the case, the ends of justice would be met if the conviction of the appellant under Secs. 302/149 IPC is set aside and the appellant is convicted under Secs. 304 Part-II/149 IPC and sentenced to five years imprisonment. *Naimuddin vs State of West Bengal*, 2010 CrLJ 392 (SC) : AIR 2010 SC 505

In a Gauhati case the accused stabbed deceased with a dagger resulting into his death. The FIR was promptly lodged mentioning name of accused as sole assailant. Testimony of eye-witness, brother of deceased was found trustworthy. Oral dying declaration made by deceased was corroborated with eye-witness. Medical evidence also supported oral dying declaration. The weapon of offence was recovered at the instance of accused. In view of the fact that injuries on the person of deceased were not on any vital part and that the occurrence took place on a petty quarrel, the Court held that the conviction of accused under Section 304, Part-I was held proper. *Damarudhar Nath* v. *State of Assam*, 2004 Cr LJ 1129 (Gau) : 2004(2) Gau LT 1.

When direct evidence is available, the minor discrepancy in the medical evidence may not play an important role. *Bada Lokya* v. *State of AP*, 2005 Cr LJ 255 (AP) : 2005(1) Andh WR 116 (AP).

There were vital contradictions in evidence of eye-witnesses. They cause two accused appellants singled out only on ground that they, used iron rod and stone. 15 out of 17 accused were acquitted and occurrence took place 21 years before. Hence conviction under Section 304, Part II 34, I.P.C. is set aside but that under Section 148, 329 and 149. I.P.C. confirmed. *Phani Bhushan Das* v. *State of West Bengal*, 1995 Cr LJ 551 (SC) : 1994(6) JT 57 : AIR 1995 (SC) 70 : 1994(4) Scale 136.

Sufficient evidence—Omissions—Contradictions—When not material. It is to be noted that the accused persons pleaded that the evidence of the eye witnesses cannot be accepted as there were omissions, contradictions and discrepancies in the evidence of most of the prosecution witnesses. In the effort of false implication, prosecution made introduction of PW-9, an eye witness. It is fairly settled position in law that even if there are some omissions, contradictions and discrepancies the entire evidence cannot be discarded. After exercising care and caution and shifting the evidence to separate the truth from untruth, exaggeration, embellishments and improvements the Court can come to a conclusion as to whether the residual evidence is sufficient to convict the accused.

Undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the root of the matter and shake the basic version of the prosecution witnesses. A witness cannot be accepted to possess a photographic memory and to recall the deals of an incident verbatim. Ordinarily, it so happens that a witness is overtaken by events. A witness could not have been anticipated the occurrence which very often has an element of surprise. The mental faculties cannot, therefore, be expected to be attuned to absorb all the details. Thus, minor discrepancies were bound to occur in the statement of witnesses.

The High Court has analysed the evidence in the aforesaid background and has rightly come to the conclusion that the guilt of the accused persons has been established. *Prithu vs. State of Himachal Pradesh*, AIR 2009 SC 2070 : 2009 (11) SCC 588 : 2009 (3) JT 440 : 2009 (2) SCR 765 : 2009 (3) Scale 192;; See also *Sohrab and Anr. vs. The State of M.P.*, AIR 1972 SC 2020;; *State of U.P. vs. M.K. Anthony*, AIR 1985 SC 48.

Substantial part of the statement disbelieved not other part of the statement of the witness may not be declared false. But that will be very good reason to closely examine the remaining part. *Bans Raj* v. *State of U.P.*, 1994 Cr R 114.

Where oral evidence of witnesses that accused caused stab injury on back shoulder of deceased was corroborated with medical evidence than even in absence of premeditation or pre-plan, finding of guilt of accused stand proved. *David* v. *State*, 2005 Cr LJ (NOC) 40 (Mad).

18. Power of High Court.—Where the accused is found not guilty and acquitted of the offence punishable under Section 302, but is found guilty under Section 304, the High Court as a Court of appeal has no power to convert the finding of acquittal into one of conviction under Section 302 and to enhance the sentence imposed on him. AIR 1950 All 380. In AIR 1944 All 137 : 42 Cr LJ 38 (SB). *Sir Iqbal Ahmed, C.J.*, said" An appellate Court is, subject to the other provisions contained in the Code, empowered under Section 423 (I)(b)(2) to alter finding of acquittal into one of conviction even though no appeal has been preferred by the Provincial Government. This power is however, subject to the condition that the Appellate Court can not enhance the sentence imposed by the trial Court. Section 439, Cr Pr. Code, empowers the High Court to enhance the sentence in exercise of its revisional powers ; but as was pointed out by Their Lordships of the Privy Council in AIR 1928 PC 254 : 29 Cr LJ 828 that the High Court while dealing only with the application for revision, has no jurisdiction to convert the trial Court's finding of acquittal on the charge of murder into one of conviction of murder. *Ibid;* AIR 1955 SC 178 : 1955 Cr LJ 1642 ; AIR 1979 SC 1104 : 1979 Cr LJ 516 : (1980) 1 Cal HN 504.

19. Interference by Supreme Court.—The Supreme Court will not interfere in an appeal by special leave, with a conviction under this section. AIR 1971 SC 2268 : 1971 Cr LJ 1355 ; 1980 Cr LJ 1014 : AIR 1980 SC 1315.

20. Procedure.—Cognizable—Warrant—Not Bailable—Not compou-ndable—Triable by Court of Session.

21. Retrial.—Retrial can be ordered for wrong direction to the jury or trial by a wrong Court. 35 CWN 458 : 32 Cr LJ 598 : AIR 1931 Cal 345 : 44 CWN 651 ; 41 CWN 575 ; AIR 1932 Cal 487 : 33 Cr LJ 645 : 36 CWN 164.

22. Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows—

That you, on or about the....................day of........................., at,....................... committed culpable homicide not amounting to murder with the intention his death on a grave and sudden provocation [as the claim] causing the death of....................and thereby committed an offence punishable under Section 304. clause 1 or clause 2 (as the case may be) of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by me of the above charge.

23. Intention—In *Tholan* v. *State of Tamil Nadu*, AIR 1984 SC 759 (1984 Cri LJ 478) their Lordships believed that when an accused dealt only one blow with a knife the offence is not an offence under Section 302 IPC but an offence under Section 304, Part II IPC. The intention of the accused had been established by single blow but by giving single blow it was interpreted that the accused was having the knowledge and consequences of his act and, therefore, the accused was convicted for the offence under Section 304, Part II, IPC. In *Ranjitsingh Chandrasingh Atodaria* v. *State of Gujarat*, AIR 1994 SC 1060 (1994 Cri LJ 1425) the same principle was applied as laid down by their Lordships in the aforesaid decision (Supra). In Public Prosecutor, *High Court of A.P* v. *Gali Satyanarayana*, 2000 Cri LJ 1753 (A.P.), the accused had inflicted only one stab injury on the left side of chest of the deceased little below nipple causing his death. Therefore, the act of the accused was not an offences punishable under section 302, IPC but it was an offence punishable under Section 304, Part II , IPC.

Intention to cause death - Circumstances from which can be gathered. Court has to proceed to decide the pivotal question of intention, with care and caution, as that decides whether the case falls under S. 302 or 304 Part I or 304 Part II. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) Nature of the weapon used; (ii) Whether the weapon was carried by the accused or was picked up from the spot; (iii) Whether the blow is aimed at a vital part of the body; (iv) The amount offeree employed in causing injury; (v) Whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) Whether the incident occurs by chance or whether there was any premeditation; (vii) Whether there was any prior enmity or whether the deceased was a stranger; (viii) Whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) Whether it was in the heat of passion; (x) Whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) Whether the accused dealt a single blow or several blows. *Hari Singh and Anr. v. State*, 2008 CriLJ 2133.

Single *lathi* injury on the head—Intention to cause injury was held to be absent—However knowledge (requisite) can be inferred. Offence falls under Section 304. Part II. *Badri Prasad* v. *State of Rajasthan*, 1995 Cr LR (Raj) 757.

The dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries. There is also evidence on record to prove ant establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under Clause (4), of Sec. 300 of IPC. *Maniben vs. State of Gujarat,* 2009 (12) SCR 753 : 2009 (8) SCC 796 : 2009 (3) Crimes 298 (SC) : 2009 (12) JT 82 : 2009 (10) Scale 654 : 2009 (5) Supreme 700 : 2009 (4) JCC 2564.

Nobody, chase person with sword for any benevolent purpose. It is unfortunate, instead of causing the death of Aslam Khan the accused caused the death of his brother. It is nothing but change of malice from one brother to another brother. From these facts we are of opinion that it is not a case in which the benefit of Sec. 304-I, IPC or Sec. 304-II, IPC can be given to the accused. One has to see the intention and the intention of the accused in the present case is more than apparent that he chased Aslam Khan with sword and on his failure to catch hold of Aslam Khan with sword he caused the death of an innocent bystander who has not given any provocation to the accused for the murderous act. It is the intention which was predominantly present in his mind when the accused chased Aslam Khan and therefore, this intention he satisfied by inflicting the murderous blow on the deceased on his vital part of body. Therefore, under these circumstances, we are of opinion that the conviction of the appellant under Sec. 302, IPC is well founded and there is no ground to interfere in this appeal.

However, so far as the present case is concerned, we are satisfied that the intention of the accused is more than apparent when he chased Aslam Khan after taking out a sword from his house and since he could not succeed to cause injury on Aslam Khan he diverted his malice on his brother an innocent person who was present and gave no cause to this accused. Therefore, under these circumstances, we do not find any merit to convert the offence under Sec. 302 IPC to either Sec. 304-I, IPC or Sec. 304-II, IPC. *Rahimbux v. State of M.P.,* AIR 2008 SC 3111 : 2008 (8) SCR 213 (SC) : 2008 (7) Scale 763 (SC) : 2008 (6) SLT 35 (SC) : 2008 (3) Crimes 48 (SC) : 2008 (2) JCC 1369 (SC).

Only one blow on head caused death. The action of accused after the blow shows that he never intended to cause his death. Hence conviction altered to one under Section 304, Part II and sentence reduced. *Kailash Hazari Lal* v. *State of M.P,* 1995 Cr LR 182 (MP).

While deciding whether an intention to cause an injury which is, sufficient in the ordinary course of nature to cause death.—Courts must consider the nature of the injuries caused and attendant circumstances. *Jagpati* v. *State of M.P.,* 1995 SCC (Cr) 397 (SC) : AIR 1993 (SC) 1360 : 1994 Supp(1) SCC 460 : 1993 CrLJ 1058.

Non-planned, non-intention and a result of sudden provocation was the cause of death—Conviction under Section 302, rightly converted under Section 304. Part II. *Naval Singh* v. *State of M.P.,* (1994) 1 CCR 242 (MP).

There was found no motive, no intention or no knowledge to cause death. 'Post mortem' report about injury not mentioning nature of injuries and which injury caused death and evidence of Medical Expert cannot be relied upon. Hence conviction under Section 304, Part II set aside and accused convicted under Section 323 instead. *Sugna Ram* v. *State*, (1995) 1 RCD 523 (Raj).

Death was caused with no intention to murder in the heat of passion. In this case it was held that a person being headless doing act which was not premeditated, case falls within the Exception IV of Section 300, I.P.C. and as such the accused-appellant can be held liable under Section 304, Part I of the I.P.C. and not under Section 302, I.P.C. *Korma Munda* v. *State of Bihar*, (1995) East Cr C 691 (Pat).

Accused set the victim on fire—No intention to cause death was made out requisite knowledge that death is likely to be caused can be imputed on the accused. *Prakash and another* v. *State of M.P.*, (1994) 1 CCR 445 (BD).

When the accused was pushing the old deceased. Deceased's head hit the door frame and died hence neither the intention nor the knowledge can be imputed to the accused—Conviction held, to be altered to one under Section 325, I.P.C. *Dina and Dinabhandh* v. *State*, (1995) 4 Crimes 480 (Ori).

It was held that it is a case of intentional landing of blows on vital organ of body and therefore, the accused must be held guilty of intentional infliction of injuries which were likely to cause death. Hence accused deserves to be convicted under Section 304, Part. I.P.C., instead of Section 302, I.P.C. *Naresh Kumar* v. *State of Rajasthan*, (1995) 2 CCR 181 (Raj) (DB).

Accused giving no threat to the complainant so as to cause death or grievous hurt no offence under Section 506, I.P.C. is made out. 1993 Cr LJ 85 (P & H).

Accused assaulted deceased by crow-bar without much force. Deceased dragged for some distance. It was hence held that there being no intention to cause death. Section 304, Part II is applicable. *Krupasindhu Bhoi* v. *State of Orissa*, 1995 Cr LJ 1488 (Ori).

When evidence of related eye-witness is reliable and corroborated by medical evidence delay in lodging FIR is of no consequence. However in absence of intention to cause fatal injury, offence falls under Section 304, Part II. IPC. *Ujjagar Singh* v. *State of Punjab*, 1997 Cri LJ 2633 (P&H).

24. Conviction.—The accused in a fit of anger had thrown a lighted lamp over the deceased. The plea of accused that he did the act in a fit of anger without any intention to do it was not accepted and his conviction under Section 304 Part II was held proper. *Sheikh Nurjehan* v. *State*, 2004 Cr LJ 78 : 2003(2) ALD (CRL) 592 : 2003(2) Andh LT (Cri) AP 291 : 2004(1) Crimes 185.

Appeal against conviction.—If apparently accused had fired only in the air with an idea to scare away the aggressors so that they should scatter then he has obviously committed no offence. It was nobody's case that he had fired at the two dead persons. The finding of both Courts is clear that only accused Nos. 3 and 4 had fired. The High Court dismissed the appeal of appellant Deomuni Sharma on the wrong impression that even he was convicted of the offence under Sec. 302, IPC substantively or with the aid of Sec. 149, IPC, one look at the Trial Court's judgment suggests that he was not so convicted. The Trial Court convicted him only of offence under Sec. 307 read with Sec.

149, IPC. Therefore, the very basis of the High Court judgment against the appellant is knocked down. The other appellants who were convicted for the offence under Sec. 304 Part I, IPC have not filed any appeal nor has the prosecution come up in appeal against this finding and the consequent conviction for offence under Sec. 304 Part I, IPC. Therefore, this finding has become final. Reading the finding as it is, along with the finding given, it is clear that the appellant's conviction which is also not specifically referred to by the High Court is per se incorrect as the appellant was never convicted for the offence under Sec. 302, IPC and even that finding of the Sessions Judge was never challenged by the prosecution. *Deomuni Sharma v. State of Jharkhand.*, AIR 2009 SC 2731 : 2009 (9) SCR 587 (SC) : 2009 (8) Scale 303 (SC) : 2009 (4) Supreme 459 (SC) : 2009 (6) SLT 83 (SC) : 2009 (2) Crimes 490 (SC) : 2009 CrLJ 3948 (SC).

The witnesses have not only named the appellant, but also enumerated the specific role of hitting the deceased by bricks. On analysis of the entire evidence on record, it is abundantly clear that the conviction of the appellant cannot be sustained under Secs. 302/149 IPC. However, we do not agree with the second submission that the appellant also cannot be convicted under Sec. 304 Part II/149 IPC. In our considered view, when the bricks were thrown on the vital parts of the body of the deceased who was an old man of 78 years, in that event, knowledge to commit murder can definitely be attributed to the appellant. In this case, the deceased died instantaneously after receiving the brick injuries. On consideration of the totality of the facts and circumstances of the case, the ends of justice would be met if the conviction of the appellant under Secs. 302/149 IPC is set aside and the appellant is convicted under Secs. 304 Part-II/149 IPC and sentenced to five years imprisonment. *Naimuddin vs State of West Bengal*, 2010 CrLJ 392 (SC) : AIR 2010 SC 505

Upon the refusal to serve wine, accused inflicted one knife blow on the chest—Consequently death of the deceased has occurred and act not being premeditated. No previous enmity was proved hence conviction for murder has to be altered to one under Section 304, Part I. I.P.C. *Prakash* alias *Omprakash* v. *State of Rajasthan*, (1995) 1 CCR 411 (Raj).

There were three external lacerated injuries. Doctor did not opine as to which of these injuries was individually sufficient in the ordinary course of nature to cause death—Appeal was allowed and appellant convicted for offence under Section 304. Part I, I.P.C. *Ratan Kumar* v. *State*, (1995) 8 OCR 79 (Ori).

The evidence of '*J*' (P.W. 1) in this regard is very important. According to appellant he has purchased this land from '*J*' but she has denied having sold this land to him. This takes out the bottom of appellant's claim. Under the circumstances the Sessions Judge made no mistake in holding that appellant was an aggressor and a trespasser. Hence conviction must be sustained. *Bhulau* v. *State of M.P.*, 1994 Cr LR (MP) 21.

Accused assaulted the deceased without premeditation on a sudden fight on heat of passion. Accused also suffered head injury which though simple was on vital part of the body. There was no clear evidence to show intention to cause death. It was held that the act could be said to have been done with knowledge that it was likely to cause death and thus the accused was liable to be convicted for offence of culpable homicide not amounting to murder. *Balu Raosaheb Navale* v. *State of Maharashtra*, 2005 Cr LJ 366 (Bom) : 2004 Adl MR (Cri) 2602 : 2004(2) Bom CR (Cri) 730.

There were no conclusive finding regarding actual cause of death. Injuries found on body of deceased were simple. There were strained relations between appellants and deceased. In the absence of any evidence that injuries inflicted on deceased were of the nature which were likely to cause death or that the accused had knowledge that the same could have caused death of deceased, conviction under Section 304, Part II, I.P.C. is not sustainable. Hence appellant *held*, guilty under Section 323, I.P.C. *Mariana D' Souza (Miss)* v. *State*, 1994 (2) Crimes 435 (Bom).

Offence fell under Section 304, Part II, conviction was made by trial Court—Parties were related to each other injuries on accused party not explained—Benefit of doubt was given—Conviction order was set aside. *Prahlad Apto* v. *State of A.P.*, (1994) 3 Crimes 764 (AP).

Trial for offence which fell under Section 304, Part II, medical evidence corroborating the ocular evidence. Prosecution evidence inspiring confidence—Conviction was *held*, sustainable, *Sadasivam Mohanachandran* v. *State of Kerala*, (1994) 1 CCR 1 (SC) : 1994 SCC (Cr) 165 : 1994 Cr LJ 920 : AIR 1994 SC 654.

Conviction of the accused which fell under Section 304, on account of his hurling a bomb on the mob and causing the death of a lady. Prosecution version being trustworthy and inspiring confidence. Conviction need not be interfered with. *Bimbadhar Parida* v. *State of Orissa*, (1994) 1 East Cr C (NOC) 13 (SC).

Where the accused was not armed with any weapon and had only kicked the victim from behind, it was held that the accused could not have intention to cause death but certainly he had caused such bodily injury to decease which was likely to cause his death and therefore, the accused was liable to be convicted for offence of culpable homicide not amounting to murder. *Magan Singh* v. *State of Uttaranchal*, 2005 Cr LJ (NOC) 189 : (2005) 2 Crimes 516 (Uttaranchal) : 2005(52) All Cri C 396 : 2005(2) Crimes 516 : 2004(4) Cur Cri R 143.

Trial of offence which fell under Section 304, Part II, I.P.C.—Accused's identity not well established and testimony of the sole eye-witness being shaky and not inspiring confidence.—Conviction, was held non sustainable. *Nathu* v. *State of Maharashtra*, (1995) 1 Crimes 309 (Bom).

Assault was made with brick on forehead of deceased. Incident occurred when B.D.O. came for enquiry against sarpanch on complaint from appellant. At the spot 40 to 50 villagers present but no independent witness examined. Only brother of deceased and sarpanch examined as eye-witnesses. Names of assailants not disclosed to B.D.O., registration of F.I.R. suspicious.—Evidence of eye-witnesses not inspiring confidence—Both eye-witnesses inimical with appellant accused. It was held not safe to sustain conviction and appeal was allowed. *Jaspreet Singh.* v. *State of Punjab*, (1995) 4 Crimes 296 (P & H).

Trial for the offence under Section 304, Part II, I.P.C. deceased and accused were brothers. On slight provocation of the deceased, the accused losing his self-control and killing him by stabbing. There was absence of motive for killing. However, evidence on record clearly indicating the guilt of the accused—Barring minor discrepancies in the evidence—Conviction was rightly recorded. *Anver* v. *State*, (1995) 1 Crimes 727 (Mad).

Conviction under Section 304, Part II when offence was of murder. Incident took place at the spur of moment—Only 2-3 fist blows and kicks inflicted. There was found no previous enmity. No intention to cause death and no knowledge that such blows will cause death. Hence conviction was altered to one under Section 323. *State* v. *Ulam Mustafa*, (1995) 1 RCD 126 (Raj).

Where there was voluntarily causing of grievous hurt. Accused's action falling under Section 325, I.P.C.—He cannot be held guilty of offence under Section 304, Part II, for culpable homicide not amounting to murder and hence alteration of sentence from three years' rigorous imprisonment to one year's R.I. under Section 325, I.P.C, justified. *Shailesh* alias *Shailendra son of Bhalchand* alias *Appasaheb Fulzele* v. *State of Maharashtra*, (1995) 1 B Cr C 384 (Bom).

Conviction came under Section 302, I.P.C. when the offence was of murder, injuries inflicted with sharp edge of an axe on non-vital part of body of deceased and fatal injury inflicted on temple region by blunt side of axe. It was thus as revealed from nature and location of injuries assault was not to cause murder. Thus conviction altered to one under Section 304, Part II. *Sunderram* v. *State of M.P.*, 1995 MP LJ 67 (Notes) (MP).

Hitting the head successively with heavy weapon—Indicative of appellant's intention to cause death of the deceased does not cover under the exception. Punishable not under Section 304, Part I but under Section 302. I.P.C. No conversion possible. *Subunga Malik* v. *State*, (1995) 2 CCR 285 (Ori).

Conviction for offence falls under Section 304, Part II—Appeal against the same was filed abnormal conduct of eye-witnesses during trial their testimony not substantiated by any other evidence—Conviction held non-sustainable. *Anna* v. *State of Rajasthan*, 1995 Cr LR (Raj) 794.

Appeal which was filed against seven years imprisonment was challenged in appeal. Thus it was held that the Additional Sessions Judge made no mistake in holding that the appellant was an aggressor and a trespasser, hence conviction of the appellants must be sustained. *Bhulau* v. *State of M.P.*, 1995 Cr LR (MP) 97 (MP).

Conviction was made under Section 304, Part II, I.P.C.—Appeal against the same was filed and there was delay in F.I.R. There was non-examination of the in7dependent witnesses and conviction was based on sketchy evidence—It was held non-sustainable. *Kashi Naresh and Nanhhu Singh* v. *State of U.P.*, (1995) 4 Crimes 356 (All).

Fatal injuries were caused to the accused from merciless beating from the split bamboo and *lathi* on the head of the victim, while stealing mangoes from his grove. The dying declaration of the deceased was corroborated by independent witness disinterestedly. *Held*, not only the dying declaration of the victim recorded by the I.O at the hospital was correct but his conviction was equally justified. (1986) 2 Crimes 349 (Cal).

The injury on accused was caused prior to incident and murder took place in retaliation. No self-defence right is available in retaliation. Hence conviction does not warrant interference, *Bheralal* v. *State of M.P.*, 1995 Cr LR 190 (MP).

Accused assaulted victim to outrage her modesty in presence of three more ladies in a fair—Uncle of victim interfered when accused persons assaulted him also resulted in his death after two days and statement of victim contradictory and full of improvements and not supporting prosecution-story. Evidence of other eye-witness ladies was not convincing—Prosecution evidence being very weak. Hence conviction was set aside. *Anil S/o Balaji Lade* v. *State of Maharashtra*, 1995 Cr LJ 2149 (Bom).

In quarrel between accused and deceased when act of giving stick blows was not preplanned but done at spur of moment, conviction under Section 304, Part II proper. *Karuppiah* v. *State*, 1996 Cri LJ 3776 (Mad).

The accused even according to the prosecution case, was in a fully drunken state. The deceased who was also in a state of complete intoxication was not in a position to talk as stated by P.W. 2 and he would not have been in a position to respond to the demands made by the accused. The accused must have been trying to evoke favourable response from him with regard to the collections made on the previous day. The process of beating, abusing and dragging must have continued for quite some time.

In the result, the conviction and sentence under Section 304, Part I of the Indian Penal Code was confirmed. *Dedukula Khabala* v. *State of A.P.* 1996 Cr LJ 2196 (AP).

In case of injuries on left hand and belly of deceased caused by arrows from long distance when no particular injury which would prove fatal thereby was intended, appropriate conviction would be under Section 304, IPC. *Nara Singh Challan* v. *State*, 1997 Cri LJ 2204 (Ori).

25. Acquittal.—When accused caused injury on head with back side of weapon and victim survived conviction under Section 304 not attracted. *Harendra Nath Mandal* v. *State of Bihar*, 1993 Cri LJ 2830 (Pat).

The accused inflicted simple injury with axe which resulted in death of deceased. Hence accused could be convicted for his individual act even if all other accused were acquitted. *Moti Lal* v. *State of Madhya Pradesh*, (1994) 3 Recent CR 77 (SC) : 1994 Cr LJ 1633 : (1994) 2 East Cr C 353 : AIR 1994 SC 1544.

The statement of eye-witnesses who are related is discrepant and not supported by medical evidence. Their evidence shows that main culprit was *'D'* who has been acquitted. No appeal against his acquittal. In view of this evidence the appellant is entitled to benefit of doubt and therefore entitled to be acquitted. *Bhimsen* v. *State of M.P.*, 1994 Cr LR (MP) 17.

Conviction was made under Section 304, Part II—Fatal knife injuries on accused not explained—Prosecution failed to establish prosecution story—Hence accused was acquitted. *Mohabbat Singh* v. *State of Rajasthan*. 1994 RCC 48 (Raj).

The deceased was allegedly wrongfully confined in police station and assaulted by three police constables. He died after he was admitted in the hospital. The other police personnel stated exactly opposite in cross-examination to what they had stated in examination-in-chief. In the absence of any reliable evidence to show that the accused wrongfully confined the deceased and caused any specific injury to him, the accused was held entitled to acquittal. *Damber Bahadur Chettri* v. *State of Sikkim*, 2005 Cr LJ 808 (Sikkim).

26. Motive.—The *kurta* containing blood-stains was not sent for chemical examination. Death was by use of force. There was no motive and no pre-meditation Hence conviction converted to that under Section 304, Part II I.P.C. instead of under Section, 302, I.P.C. Conviction under Section 323, confirmed. *Chunnu Lal* v. *State*, 1995 JIC 219 (All).

Where a case accused was nephew in relation of the deceased and close friend and motive of crime was not established and accused is not of a bad character, it was observed that conviction under Section 304, Part III should be maintained. 1988 (1) Crimes 208 (Raj).

27. Dying declaration.—Charge was of killing daughter-in-law by mother-in-law. Conviction was given. The written dying declaration on record corroborates statement of P.W. 5 to whom first dying declaration was made. The dying declaration is perfectly correct and does not smell of any infirmity. Hence order of conviction and sentence passed by trial court is confirmed. *Kashibai* v. *State of Madhya Pradesh,* (1995) 3 CCR 323 (MP).

Reliance on Dying declaration. The basis of conviction of the accused is the dying declaration. The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

There is no material to show that the dying declaration was the result or product of imagination, tutoring or prompting. On the contrary, the same appears to have been made by the deceased voluntarily. It is trustworthy and has credibility.

As a matter of fact, the dying declaration refers to one of the parts of the incident as described by PW. 1. Even otherwise the dying declaration clearly implicates the accused appellant. To add to that is the recovery of the weapon of assault. Unfortunately, the trial Court did not discuss the evidence relating to recovery and discarded the same without indicating any reason. There was no discussion by the trial Court to discard the dying declaration. *S.P. Devaraju vs. State of Karnataka,* AIR 2009 SC 1725 : 2009 (12) SCC 676 : 2009 (2) Scale 572 : 2009 (2) JT 408.

Wayward habits of accused resulting in frequent quarrel between accused and his deceased-wife. In the light of the law laid down by this Court we have critically examined dying declaration made by the deceased and the surrounding circumstances. There is no doubt whatsoever that the statement made by the deceased was on her own volition. It was voluntarily made without any coercion or tutoring of anyone. The statement is natural and coherently made by the deceased in a fit state of mind. There is nothing on record to doubt the evidence of PW-2 who recorded the dying declaration and evidence of duty doctor, who certified that the deceased was in fit state of mind to make her statement. Except PW-2 and doctor no other individual was present when she made the statement. We do not find any reason whatsoever not to accept the dying declaration. Suffice it to say that the High Court took a very lenient view in convicting the appellant for the offence punishable under Sec. 304, Part I, IPC and sentencing him to undergo rigorous imprisonment only for a period of seven years. *Ongole Ravikanth v. State of A.P.*, AIR 2009 SC 2129 : 2009 (10) SCR 155 : 2009 (8) JT 88 (SC) : 2009 (8) Scale 824 (SC) : 2009 (5) SLT 137 (SC) : 2009 CrLJ 3944 (SC) : 2009 (3) JCC 2414 (SC).

When death of the deceased by burning caused by his wife. Incident was seen by his son and daughter. Evidence of eye-witnesses and dying declarations established guilty of accused wife. Hence conviction under Section 304, Part I though improper, it is maintained as no appeal was filed by State. *T. Anjanamma* v. *State of Andhra Pradesh*, 1995 Cr LJ 1462 (AP).

Conviction based on dying declaration—Doctor opining that injuries on head being serious death could have been instantaneous—However doctor not ruling out possibility of injured being conscious for some time—*Held*, dying declaration being possible—Evidence of direct witness being simple and straight-forward amply corroborated dying declaration—Held, conviction confirmed, *Panna* v. *State of Rajasthan*, 1994 SCC (Cri) 1140.

28. Knowledge.—Accused was not having any knowledge that such injury would cause death or was likely to cause death. Hence conviction under Section 304, Part II was not proper. However offence under Section 325, I.P.C. was made out as injury was caused by stump *i.e.,* blunt weapon object. *Shailesh* alias *Shailendra* v. *State of Maharashtra*, 1995 Cr LJ 914 (Bom).

In the case accused gave electric connection to the wire around paddy, field for the purpose of hunting boars but instead one person died of electric shock. Owner of the land had seen in the previous evening and had warned the accused that some human being might get caught and die. It was held that the case was where knowledge was involved and not the intention. Therefore, *prima facie*, the acts of the accused would amount to an offence punishable under Section 304. For coming under Section 304-A there should be neither intention nor knowledge. 1987 Cri LJ 1817 (Mad).

Appeal was made against conviction—Injury was by knife—Witnesses proved the case and knowledge of injury to cause death established. Conviction was held justified. *Hussain Ahmad* v. *State of U.P.*, 1994 JIC 122 (All) (DB).

Appellant throwing bomb on a mob—With the knowledge that it had likely to cause death—Thus causing death of a lady—Conviction was made under Section 304, Part II, irrespective of the fact whether the bomb fell on the deceased or *vice versa*. No interference warranted. *Bimbadhar Parida* v. *State of Orissa*, 1994 SCC (Cri) 26 : 1993(4) JT 551 : 1993 Supp(4) SCC 34 : 1993(3) Crimes 284 : 1993(3) Scale 361.

Where accused gave knife blow on vital part of body of the deceased, it can be inferred that accused had knowledge that injury would cause death though he may not have intention to commit murder, hence conviction under Section 304, Part II, proper. *Mavila Thamban Nambiar* v. *State of Kerala*, 1997 Cri LJ 831 (SC) : AIR 1997 (SC) 687 : 1997(1) JT 367 : 1997(1) Scale 145 : 1997(1) Supreme 452.

29. Benefit of doubt.—Prosecution for offence which fell under Section 304, Part II—Accused pleading alibi—Accused being a government servant—Nature of the duties of the accused was such that his absence from duty during lunch hours did not seem probable—Accused, *held*, entitled to the benefit of doubt. *Satya Pal* v. *State of U.P.*, 1995 JIC 77 (Alld).

Prosecution alleging injuries caused by accused with brickbats and *lathis* belied by medical evidence and not free from suspicion—Ocular evidence was held doubtful accused entitled to benefit of doubt. *Avtar Singh* v. *State of Punjab*, 1994 CrLJ 876 (P&H).

In the present case, which is based on circumstantial evidence the probability cannot be ruled out that the said dal was cooked by some other lady, who was also admittedly present in the house of *B* on the date of the incident. Consequently, this hypothesis can also not be ruled on that the said dal was served without knowing that poison was mixed in the said dal. In any case there is no evidence to indicate as to which of the two accused appellants mixed the said poison in the said dal and therefore, both of the accused appellants were entitled to get benefit of doubt and were entitled to be acquitted of the charges framed against them. *Smt. Haribai* v. *State of M.P.*, 1996 Cr LJ 2143 (MP).

Discrepancy between description of assailant given in FIR and actual description of features of accused given in identification memo, entitle accused to be given benefit of doubt. *State of U.P.* v. *Avinash*, 1997 Cri LJ 966 (All).

30. Confession.—In case of circumstantial evidence each of circumstances relied on by prosecution must be proved without any missing link between circumstances establishing that the deceased alone committed the offence. The corroboration of extra-judicial confession need not be in material particulars but can be only corroboration in general. Motive alone cannot be a deciding factor but in instant case non-examination of '*V*' a friend of accused does not affect sanctity of extra-judicial confession, accused acquitted. *Panchavamam* v. *State*, (1995) 21 LW (Cr) 248 (Mad).

The extra-judicial confession is believable as rightly done by the trial Court and the High Court. The same not was made to a stranger but to a friend. Therefore, the trial Court and the High Court have rightly acted upon the extra-judicial confession. At the same time the background in which the assault has been made clearly shows that Sec. 302 IPC has no application. The assault was made in the course of sudden quarrel without pre-meditation. The accused was not armed at the relevant point of time. Even according to prosecution he picked up the wooden log which was lying there and made the assault.

That being the position, we alter the conviction to Sec. 304 Part II IPC. Custodial sentence of 8 years would meet the ends of justice. *Shiva Karam Payaswami Tewari vs. State of Maharashtra*, AIR 2009 SC 1692 : 2009 (11) SCC 262 : 2009 (1) JT 625 : 2009 (1) SCR 442 : 2009 (1) Scale 717 : 2009 (1) Supreme 461.

Accused causing death of his wife. There was grave and sudden provocation. Altercations between them was over wife's extra-marital affairs, and deceased wife compared manner of sexual intercourse of her paramour with her. It is enough for accused to have grave and sudden provocation to cause her fatal injuries—Confessional statement was made by accused. Conviction under Section 304, Part I was upheld. *State of Karnataka* v. *R. Varadaraju*, (1994) 1 Crimes 736 : (1994) 2 Ker LJ 40 (Kar).

Accused husband confessed to have assaulted deceased wife with axe as recorded by special Judicial Magistrate is inadmissible in evidence. *Bhansaheb* v. *State of Maharashtra*, 1997 Cri LJ 467 (Bom).

(a) Confession—Various discrepancies.—The case of the prosecution is that the sole accused killed his friend, by throwing boulder on the head of the deceased, in front of the house of the deceased at about 10.00 p.m. and dragged the dead body of the deceased into his hut, and concealed the dead body under the cot of the deceased, and ran away. It is also the version of the prosecution that on next day of occurrence at about 8.00 a.m. two persons, the prosecution witnesses came to the Police Station, and stated that the accused confessed about the murder committed by him, and shown the dead body to them, and on the confession made by the accused to them, they reported the same to the Inspector of Police, and he registered the same under Ss. 302 and 201, IPC. The only evidence available as against the accused is the extra-judicial confessions alleged to have been made by him to two persons. Some variation appeared in between the versions of those two persons. It was not clear as to in which language the accused communicated with those persons and whether they understood that language. While FIR filed with police mentioned of "one granite stone", the prosecution version was that two stones were used by accused in killing the deceased. The seized stones were not sent for examination. Thus there is discrepancy relating to weapon used. The alleged place of occurrence was in the midst of other huts and it was improbable that if anything happened in pursuance of quarrel between the accused and the deceased, the neighbours and others would not have gathered and witnessed the same. Thus in view of the facts and circumstances of the case, the accused could not be convicted relying upon the discrepant extra-judicial confession. He is entitled to the benefit of doubt and acquittal. *George Peter v. State of A.P.*, 2005 CriLJ 1607 (AP).

31. Sudden quarrel.—Occurrence of crime happening most unexpectedly in a sudden quarrel without premeditation there was found, no intention to cause death or fatal injuries—Knowledge was full that injury inflicted was likely to cause death. Hence offence under Section 304, Part I, I.P.C. made out. *State of Rajasthan* v. *Ratan Lal*, 1995 Cr LR 425 (Raj).

This cannot be stated to be a case of sudden quarrel because the accused persons after the quarrel went inside and came back with arms. In the instant case though the witnesses stated that after initial exchange of hot words and quarrel the accused persons went inside and came back, it is to be noted that they have fairly accepted that while the exchange of hot words, quarrel was continuing and immediately *i.e.* in less than two and three minutes they came back.

That being so, in the peculiar facts of the case we are of the considered view that appropriate conviction would be under Sec. 304 Part I read with Sec. 149 IPC. The conviction is accordingly altered. The other convictions remain unaltered. *Ramjit vs. State of Uttar Pradesh*, 2009 (11) SCC 373 : 2009 CrLJ 1139 : 2009 (1) JT 342 : 2009 (1) Scale 446 : 2009 (1) SCR 184 : 2009 (1) Supreme 583.

When accused committed offence under grave and sudden provocation he is liable to be convicted under Section 304, Part I. *Murugesan* v. *State*, 1993 Cri LJ 2565 (Mad).

When there was sudden quarrel and one knife injury was inflicted to the deceased intention of causing death by injury not proved. Hence offence made out under Section 304, Part II. *Raimal* alias *Raila* v. *State of Rajasthan*, 1995 Cr LR 98 (Raj).

Case of the prosecution would go to show that when the accused and the injured witness Rajammal were undressed for having sexual intercourse for money the deceased person Mani had demanded money from the accused and since the accused did not pay the money deceased Mani had caused injuries with stone on the accused which infuriated the accused to cause injuries against the said Mani which lead to his death. The said circumstances would go to show that the injury sustained by the accused on his left chest and the case of the prosecution that the demand of money for the alleged illegal sexual intercourse had enraged the accused to sustain sudden provocation against the deceased Mani and the accused had caused injuries to the deceased Mani only on such provocation of the said deceased Mani.

Therefore, the prosecution did not prove any enmity as envisaged in the charges framed against the accused and when there was no previous enmity in between these two persons there could not be any understanding between the accused and the deceased person to have unlawful and illegal sexual intercourse with the said Rajammal by the accused for money.

In the said circumstances, this Court is of the view that the offence committed by the accused against the deceased Mani would fall under Section 304, Part I, IPC since it was not intentionally done but only a culpable homicide not amounting to murder. *Eswaran @ Shanmugavel vs. State*, 2010 (3) Cri LJ 3180 (Mad).

The extra-judicial confession is believable as rightly done by the trial Court and the High Court. The same not was made to a stranger but to a friend. Therefore, the trial Court and the High Court have rightly acted upon the extra-judicial confession. At the same time the background in which the assault has been made clearly shows that Sec. 302 IPC has no application. The assault was made in the course of sudden quarrel without pre-meditation. The accused was not armed at the relevant point of time. Even according to prosecution he picked up the wooden log which was lying there and made the assault.

That being the position, we alter the conviction to Sec. 304 Part II IPC. Custodial sentence of 8 years would meet the ends of justice. *Shiva Karam Payaswami Tewari vs. State of Maharashtra*, AIR 2009 SC 1692 : 2009 (11) SCC 262 : 2009 (1) JT 625 : 2009 (1) SCR 442 : 2009 (1) Scale 717 : 2009 (1) Supreme 461.

It was a clear case of sudden fight in the heat of passion upon a sudden quarrel between the parties and the accused has not taken undue advantages and acted in a cruel manner, the provisions of Exception 4 to Section 300, I.P.C. being attracted, the appellant would thus be liable for culpable homicide not amounting to murder. Hence conviction and sentence under Sec. 302, IPC is set aside. He now stands convicted for an offence under Sec. 304, Part I, IPC and sentenced to undergo rigorous imprisonment for five years. *Tara Chand* v. *State of Haryana*, (1994) 3 CCCases 64 (P&H).

When accused student gave kick and fist blows which resulted in fatal injuries to deceased, accused liable to be convicted under Section 325. *Rajesh Anantram Thakur* v. *State of Maharashtra*, 1993 Cri LJ 208 (Bom).

The doctor's evidence does not show that there is any mark of violence on the neck of the appellant. In any event the deceased was not armed and even if the plea of the appellant is to be accepted he has clearly exceeded the right of self-defence and would also be punishable under Section 304, Part I, I.P.C. In any event no interference is called for so far as his conviction is concerned. Now coming to the sentence it is seen from the facts and the circumstances that it was a sudden quarrel and it took place because the girl was being taken away to her in-law's house. Further there is only one injury on the deceased. Taking these circumstances into consideration while confirming the conviction under Section 304, Part I, I.P.C. the Court reduced the sentence of 4 years rigorous imprisonment. *Kamal Singh* v. *State of M.P.*, (1994) 1 PLJR (SC) 111 at p. 112 : 1994 Cr LJ 136 (SC).

When by congent evidence single blow by father on son during sudden quarrel resulting in to latters is established, conviction under Section 304, Part II, IPC, is justified. *Jagdish Mahto* v. *State of Bihar*, 1997 (2) East Cr C 321 (Pat) ; See also *State of U.P.* v. *Shyan Veer*, 2005 Cr LJ 2606 (SC) : AIR 2005 (SC) 4108 : 2005(2) Crimes 155 : 2005(3) Supreme 566.

32. Severe Beating.—Death of a School boy due to beating by teacher. The matter was reported in newspaper – FIR registered under Section 304/201 IPC during the pendency of writ petition and the concerned teacher was suspended – In such circumstances as the law took its course in the due course the writ petition not entertain and matter directed to be handled with cere. *Hira Devi v. Smt.Deola Khan Devi and Others*, AIR 2002 NOC 97.

33. Culpable Homicide.—There was absence of evidence as to the depth of the injury. Conclusion difficult that the injury was sufficient in the ordinary course of nature to cause death. No intention to cause death was found appellant had the requisite knowledge that by dealing the blows by blunt side of the axe on back side of the neck he was likely to cause death. Hence an offence of culpable homicide as per Section 299, I.P.C. made out being punishable under Section 304, II, I.P.C. *Sonu* v. *State*, (1995) 8 CCR 41 (Ori).

Culpable homicide—Degree of. In the scheme of the IPC culpale homicide is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Sec. 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Sec. 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishment provided for the three grades. Culpable homicide of this degree is punishable under the second part of Sec. 304.

In the instant case, the culpable homicide of his second wife by accused husband, who was suspecting illicit relationship of deceased with the guest who had witnessed accused sitting on chest of deceased and assaulting her with hands, held, was liable to be punished u/Sec. 304 Part II and not for murder u/Sec. 300 and custodial sentence of ten years was held sufficient to meet the ends of justice. *Budhi Lal vs State of Uttarakhand*, AIR 2009 SC 87 : 2009 CriLJ 360 (SC)

Deceased gave birth to three girls so mother-in-law/accused was unhappy and threw burning-wick on clothes of deceased and thereby set them on fire. The post-mortem report of the deceased was placed on record during the trial and doctor, who conducted the post-mortem examination was also examined as a witness in the trial. The said documentary and oral evidence of the doctor, as adduced, that he also treated the patient and conducted the post-mortem examination made it crystal clear that the deceased remained under treatment in hospital for 8 days and died after 8 days of the incident in question. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Sec. 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Sec. 304 Part II of IPC.

We find that the view taken by the trial Court was a cogent and plausible view and, therefore, we hold that the conviction and sentence imposed by the trial Court is justified. Considering the totality of the circumstances and the fact that the appellant is of 85 years of age and had undergone the sentence imposed by the trial Court under the provisions of Sec. 304, Part II of IPC. *Maniben vs State of Gujarat*, 2010 AIR SCW 570 : AIR 2010 SC 1261

Both parties were armed but accused was armed also with fire-arms. Accused caused serious gunshot injuries to deceased with knowledge that it was likely to cause death. There was no justification for merciless assault. The right of self-defence extended was only to cause hurt and not death. Hence not entitled to right of self-defence. Accused convicted under Section 304, Part II for offence of culpable homicide not amounting to murder. *Balwan Singh* v. *State of U.P.*, 1994 Cri LJ 2052 (All).

From the evidence on record, Court finds that there had been an altercation between the deceased and the appellant, before the shots were fired. The fact is testified by witness who stated that the two quarrelled with each other, because of the land dispute, before the shots were fired. The first shot was fired by the appellant in the air, which suggests that he did not have any intention to kill the deceased, who was his real brother, but wanted only to browbeat and scare him and assert his dominance over him, may be on account of the fact that the deceased was younger to him. It was only the second shot, which caused the death. This shot was also not aimed at any vital part of the body. It was aimed just below the right shoulder. The shot, as per the opinion of Doctor Sharma, was fired from a distance of only 6-7 feet. Appellant was a Home Guard volunteer and, therefore, he was supposed to have been trained at handling the firearms, before he was so appointed. His firing a shot from a distance of only 6-7 feet, aiming the upper chest, just below the right shoulder, suggests that he did not intend to cause the death, though he can be presumed to have had the intention to cause an injury, which could have caused death. Therefore, we hold the appellant guilty not of the offence of murder, under Section 302 of the Indian Penal Code, but of offence of culpable homicide not amounting to murder, punishable under Section 304 (first part) of the Indian Penal Code. *Jodh Raj. vs. State of H.P.*, 2010 (2) CrLJ 2488 (HP).

In the instant case accused stabbed the deceased wife on the chest on her refusal to have sexual intercourse with him and it was proved that the said act was done out of sheer frustration. It was held that this was an act of culpable homicide not amounting to murder. *Ghansham* v. *State of Maharashtra*, 1996 Cr LJ 27 (Bom).

Conviction under *an act not amounting to murder*. It is quite clear from the record that there was an altercation preceding the incident of murder in which the accused-appellant was insulted by the deceased and by doing so the deceased provoked the accused-appellant. The deceased also took out the 'Khukri' which was under the pillow with the intention of assaulting the accused-appellant and the accused-appellant in order to save herself grappled with the deceased and during that process she also received injuries. The prosecution has failed to give any explanation with regard to those injuries received by the accused-appellant. Further, it is also established in evidence that the 'Khukri' used in the commission of offence was kept by the deceased under her pillow while she was sleeping in the veranda outside the house. Clearly, there was no intention on the part of the accused-appellant to kill the deceased. That being the position, we are of the considered view that the present case cannot be said to be a case under Sec. 302 IPC but it is a case falling under Sec. 304 Part II IPC. It is trite law that Sec. 304 Part II comes into play when the death is caused by doing an act with knowledge that it is likely to cause death but there is no *intention* on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death.

Held, the accused to be guilty for offence under Sec. 304 Part II IPC. Her conviction under Sec. 302 IPC is, therefore, set aside. The accused-appellant has already undergone about seven years of imprisonment. We, therefore, alter the sentence to the period already undergone by the accused-appellant. *Jagriti Devi vs. State of Himachal Pradesh*, AIR 2009 SC 2869 : 2009 (3) Crimes 289 (SC) : 2009 (8) JT 648 : 2009 (10) SCR 167 : 2009 (9) Scale 48 : 2009 (5) Supreme 691 : 2009 (5) SLT 614.

When attack was not preplanned and victim died after 17 days of occurrence. Offence under Section 304, Part II made out. *Balbir Singh* v. *State of Haryana*, 1996 Cri LJ 2663 (P & H).

When fatal injury was caused by blunt side of axe and death occurred after three days, there was no intention to cause death and hence conviction under Section 304, Part II is proper. *Jeev Dan* v. *State*, 1996 Cri LJ 3929 (Raj).

Let us now examine whether by the act committed the appellant is liable for the offence under Section 302, IPC or Section 304, Part I, IPC. In cross-examination witness has specifically stated that the children at times irritated the accused calling him as 'Baya'. Other witness in cross-examination has also admitted that people called the accused as Sarat Baya in the locality. In view of this evidence, it can be safely concluded that the appellant caught hold of the deceased, assaulted her and threw her into the well as the children irritated him. Taking an overall view of the fact situation, this Court is satisfied that the appellant is guilty of committing an offence under Section 304, Part I, IPC. Accordingly, conviction of the appellant under Section 302, IPC is converted to one under Section 304 (Part-I). *Sarat Chandra Sahoo vs. State of Orissa*, 2010 (3) Cri LJ 3084 (Orissa).

When accused aimed at head of deceased by inflicting blow with such a force causing fracture of bones, it cannot be said that he had no knowledge that injury on head was likely to cause death. *Karuppa Pillai* v. *State*, 1996 Cri LJ 3880 (Mad).

When prosecution story supported by independent eye-witnesses found reliable and corroborative of medical evidence and stab injury on person of deceased son-in-law was not preplanned or with intention to cause death, conviction under Section 304, Part II, proper. *Sivanandi* v. *State*, 1996 Cri LJ 4469 (Mad).

When accused inflicted cut injuries to deceased, a paramour of his mother, who shouted for help, no right of private defence is available to accused. *Sivakumar* v. *State*, 1996 Cri LJ 4229 |Mad).

The word 'Culpable homicide' has been defined in Section 299 I.P.C. Section 299 is divided into three parts. The first part refers to the act by which the death is caused by being done with the intention of causing death. That part corresponds to the first part of Section 300. The second part of Section 299 speaks of the intention to cause such bodily injury as is likely to cause death. This has corresponding provisions in Clause 11 I.P.C. Section 304 Part I covers cases which by reason of the exception under Section 300 are taken out of the purview of Clauses (1), (2) and (3) of Section 300, but otherwise would fall into it and also clauses which fall within the second part of Section 299 corresponds to clause "Fourthly" of Section 300. Section 304, Part II I.P.C. covers those cases which fall within the Third Part of Section 299 but do not fall within the Fourth clause of Section 300. *Rawail Singh v. State of Punjab and others*, 2002 Cri LJ 3075 (P&H) : 2002(3) All Cri LR 265 : 2002(2) Rce Cri R 706.

During the marriage ceremony of the son of Parwati where the women folk, who were participating in the festivities, were teased by the deceased in an inebriated state. The resultant fall-out was the immediate response to the said incident with the intention of preserving the honour and dignity of the said women. It is on account of the said incident that subsequently the accused persons assaulted Ishwar and when he tried to run away, they chased him and on being caught, he was fatally injured by Anil @ Balli and Sucha Singh with knives. Although, it has been urged that the Appellants herein had knowledge that both Anil and Sucha Singh were carrying knives, the same is not borne out from the evidence and their role in the incident in chasing the victim and, thereafter, holding him, was more likely to teach him a lesson as was sought to be projected as his defence. In the absence of any common intention, the conviction of the Appellants under Section 302 with the aid of Section 34 cannot be sustained. It is no doubt true that the evidence of PW. 5 the complainant and PW. 7 another eye-witness was corroborated by the injuries on the body of the victim, but that by itself would not establish common intention as far as the appellants in the present appeal are concerned.

The role attributed to them would, in our view, attract the provisions of Section 304 Part I IPC and not Section 302 read with Section 34 IPC. The appeal as far as the appellants' conviction under Section 302 read with Section 34 IPC must, therefore, succeed and their conviction must be altered to one under Section 304 Part I read with Section 34 IPC. *Raju and Anr. vs. State of Haryana*, 2010 (2) CrLJ 1924 (SC).

The accused persons had obstructed the deceased from casting his vote as per the story of the prosecution and the deceased was assaulted and, therefore, it shall have to be observed that the accused persons have committed any lessor offence punishable under IPC or the law as to Election and if the Investigating Agency finds that these petitioners any of them can be held guilty of the said offence, then the Investigating

Agency can take appropriate steps and file appropriate report. The offence under Sections 143 and 147 are the offences against the State, so order of this Court would not come in the way of the police, if the police intends to charge sheet the accused for the said offence along with other offence if the same is found to have been committed. The complaint being CR No. 1-238 of 2001 registered with A-Division Police Station, Bharuch for the offence punishable under Section304 of IPC quashed. *Hiralal Motibhai Patel and Others v. State of Gujarat.* 2002 CRI. L.J. 2781. Guj. H.C. : 2002 Cri LR (SC MAH GUJ) Guj 280 : 2002(2) GCD GUJ 907.

34. Circumstantial Evidence.—In appeal from conviction, the evidence was re-appraised and it was found that the P.Ws. 7 and 10 were hostile whereas the presence of P.W. 9 was doubtful. The circumstantial evidence fell short of driving guilt home to the accused. None had deposed on other injuries and what caused them. Circumstantial evidence was contradicted by the medical evidence. *Held*, the accused was entitled to acquittal. (1986) 2 Crimes 483 (Del).

Circumstantial evidence—Conditions precedent.—There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in 1952. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

Raju vs. State, AIR 2009 SC 2171 : 2009 (1) Crimes 377 : 2009 (11) SCC 111 : 2009 (2) SCR 783 : 2009 (3) JT 183 : 2009 (3) Scale 179 : 2009 (2) Supreme 65.

The place of occurrence was accessible to an outside. Hence involvement of an outside cannot be ruled out. It cannot be conclusively held that accused was the author of the crime and none-else. The absconding of the accused after the occurrence itself cannot be considered as a circumstance to fasten him with liability. *Antaryami Sahu* v. *State of Orissa,* (1994) 2 Crimes 356 (Ori).

Last seen.—Evidence of witness is clear and cogent. His presence at the spot has been established. He used to have business transactions with the deceased. He stated about the present appellant holding a handle of soil cutter. Though the deceased and the present appellant were engaged in exchange of hot words, that could not have given an impression to witness that accused would take the life of the deceased. Therefore, the fact that he left the place on being told by the deceased to do so cannot be a ground to disbelieve his evidence. According to him he had seen the deceased and the accused engaged in wordy tussle around 9.00 p.m. The wife of the deceased PW-1 found his dead body at about 9.30 p.m. The time gap when the deceased was last seen alive in the company of the accused and when his dead body was seen is not very large. Admittedly, the bone of contention between the deceased and the accused was non-payment of the commission on account of which they were quarreling. The trial Court and the High Court have rightly held the appellant to be the author of the crime. *Raju v. State, by Inspector of Police*, AIR 2009 SC 2171 : 2009 (2) SCR 783 (SC) : 2009 (11) SCC 111 : 2009 (3) JT 183 (SC) : 2009 (3) Scale 179 (SC) : 2009 (2) Supreme 65 : 2009 (1) Crimes 377 (SC).

Last seen theory—When not reliable.—There are three main incriminating circumstances against the accused. The first piece of evidence is the suggestion that the third person who was urinating close by the bridge was Gopal Sah, the second, the extra judicial confession made by Dasrath Sah and the third, the recovery of alleged murder weapon – a sickle. We are of the opinion that this evidence is, to say the least, unacceptable. It has come in the statement of PW. 8 Kameshwar Choudhary that he had seen Dasrath Sah alonog with the deceased near the bridge and that another person was urinating close by. It is the suggestion and inference that this person was Gopal Sah.

We find that in this situation the statement of PW. 5 Mohd. Nadaf that he had seen the three convicted accused moving swiftly away from the direction of the site of the murder at about 7.30 p.m. or that he had seen the appellant Gopal Sah with a sickle in hand is hardly sufficient to hold him guilty of murder. We are, further, of the opinion that an extra judicial confession is, on the face of it, a weak piece of evidence and the Courts are reluctant in the absence of a chain of cogent circumstances to rely on this evidence for the purpose of recording a conviction. In any case, we find that the confession made by Dasrath Sah can, if at all, be used against him and not against his co-accused. The statement of the Investigating Officer with respect to the place where the two murder weapons had been allegedly thrown makes the recovery itself tenuous. Moreover, as the sickle allegedly in the hands of Gopal Sah had been recovered from a pond three months after the murder, no evidentiary value whatsoever can be attached to this circumstance as well.

The argument of the State Counsel that as the appeal of Bhushan Sah had been dismissed on merits, the appeal of Gopal Sah must meet the same fate must now be examined. We observe that Bhushan Sah's appeal had been dismissed in limine on the ground of limitation as also on merits but we have chosen to hear the present appeal after leave had been granted by this Court long before Bhushan's special leave petition had been filed. We, even otherwise, are of the opinion that the evidence involving Bhushan Sah is qualitatively and quantitatively different from the evidence against Gopal Sah, as would be apparent from the circumstances noted above, not only with respect to the last seen but also relating to the recovery of various items from his house which could be said to be relatable to the murder. We must, therefore, conclude that the dismissal of the special leave petition of Bhushan Sah *in limine*, would not by itself be a ground to dismiss the appeal of Gopal Sah.

For the reasons stated above, we find the judgment of the trial Court and the High Court in so far as Gopal Sah is concerned to be unsustainable. He is accordingly acquitted of all charges. The appeal is allowed in the above terms. *Gopal Sah vs. State of Bihar*, 2008 (16) Scale 224 : 2009 (1) SLT 369 : 2009 (1) JCC 322.

The court begins with circumstance (a) last seen. In respect of this circumstance, these is evidence of Yeshhodabal, P.W. 2 and Gangasagar, P.W. 7 (mother and wife of the deceased Narayan respectively) and Nivrutti Thombre, P.W.3 – The evidence of Yeshodabai and Gangasagar shows that on 26.2.1992 at about 7 p.m the appellant came to their house. He and the deceased Narayan had dinner and thereafter, he said he and Narayan would sleep in the field and thereafter he left with Narayan to the latter's field where they slept. In the said field, Nivrutti Thombre also slept at a distance of 50 ft. from them. At about 2 to 2.30 a.m., Nivrutti heard cries of the deceased "Save me. Nivrutti Mama" and hearing them Nivrutti rushed to the place where Narayan and appellant were sleeping. He saw an axe in the hands of appellant and acquitted accused Dayandeo and Sakharam running away. After going through the evidence on the record held that the appellant came to their place on 26.2.1992 at 7p.m., had dinner with Narayan and, thereafter the two of them slept in the field of Narayan. The court therefore, observed that evidence of Nivrutti Thombre has rightly been relied upon by the trial Judge. *Sopan Punjaram Mule v. State of Maharastra* 2002 Cri LJ 376 (Bom.).

35. Private defence.—The land was in possession of the accused. The complainants tried to forcibly take possession of the land thus they are trespassers. The complainants were armed with *'Kassiya'*—Accused could not have apprehanced death by *"Kassiys"* yet they inflicted a gun shot injury thereby killing a person, hence accused have exceeded the right of private defence, conviction under Section 304, Part I is therefore confirmed. *Dilip Singh* v. *State of Rajasthan*, (1994) RCC 520.

The right of private defence is essentially a defensive right circumscribed by the governing statute *i.e.* the IPC, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure. While providing for exercise of the right, care has been taken in IPC not to provide a mechanism whereby an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived.

In the present case the High Court has rightly held that even if it is accepted that at some point of time the appellant was exercising the right of private defence, the same was exceeded and has rightly found him guilty under Sec. 304 Part I, IPC and sentenced him to undergo imprisonment for five years. The sentence as imposed cannot be considered to be harsh. On payment of fine of Rs.20, 000/-, same was to be paid to the heirs of the deceased. Here again there appears to be no infirmity in the order of the High Court. *Ranveer Singh vs. State of Madhya Pradesh*, AIR 2009 SC 1658 : 2009 Cr LJ 1534 : 2009(3) SCC 384 : 2009(1) JT 544 : 2009(1) Scale 740 : 2009 631.

There was scuffle between appellant and deceased when deceased forbade appellant from ploughing land. Appellant fired shot with pistol on deceased. No evidence to establish that there was grave apprehension about his safety. Appellant cannot be said to have exercised right of private defence. Occurrence took place in course of a sudden quarrel.

Merely because there was a quarrel and some of the accused persons sustained injuries, that does not confer a right of private defence extending to the extent of causing death as in this case. Though such right cannot be weighed in golden scales, it has to be established that the accused persons were under such grave apprehension about the safety of their life and property that retaliation to the extent done was absolutely necessary. No evidence much less cogent and credible was adduced in this regard.

Considering the background facts it is clear that the appellant cannot be said to have exercise the right of private defence. However, there is substance in the plea that the occurrence took place in the course of a sudden quarrel. That being so the conviction is altered from Sec. 302 IPC to 304 Part I IPC, custodial sentence of ten years would meet the ends of justice. *Santokh Singh v. State of Punjab.*, AIR 2009 SC 1923. : 2009 (2) SCR 412 (SC) : 2009 (11) SCC 197 : 2009 (2) JT 468 (SC) : 2009 (2) Scale 661 (SC) : 2009 (2) Supreme 118 (SC) : 2009 (1) Crimes 397 (SC) : 2009 (2) JCC 1014 (SC).

Exceeding of Self-defence. We have heard learned Counsel for the parties at length and perused the judgments and depositions on record. The deceased had received 20 incised injuries caused on various parts of the body in general and on vital parts of the body in particular. The deceased was killed mercilessly by inflicting twenty incised injuries and mostly on the vital parts of the body.

Even if we accept the version of the High Court that the accused had the right of private defence, in the facts and circumstances of the case, but he had exceeded his right so he was convicted under Section 304 Part I IPC.

On examination of the injuries on the accused it is clearly borne out that those injuries are very minor and superficial in nature whereas twenty incised injuries inflicted on the deceased were of very serious nature and character. The Sessions Court has gravely erred in acquitting the accused on the face of the testimony of the witnesses in the case. We have to examine the evidence in proper perspective - why should ordinarily PW. 1, mother of the deceased would falsely implicate the accused and let off the real assailant? Similarly, why PW. 2, nephew of the deceased would save the real assailant and falsely name the accused? The High Court in the impugned judgment while reversing the judgment of the Sessions Court convicted the accused under Sec. 304 Part I IPC

The appellant must be convicted at least under Sec. 304 Part I IPC. No interference is called for. The appeal being devoid of any merit is accordingly dismissed. *Moorthy vs. State of Tamil Nadu,* 2009 CrLJ 1104 : 2008 (13) JT 265 : 2008 (15) Scale 315 : 2008 (16) SCR 271 : 2008 (9) SLT 344.

When several injuries caused to complainant with blunt weapon and injuries on deceased being sufficient to cause death in normal course, accused exceeded his right of self-defence and conviction under Section 304, Part I, IPC would be proper. *Kehar Singh* v. *State of Rajasthan,* 1997 Cri LJ 1753 (Raj).

The High Court observed that according to the appellants incident occurred in two different places in different phases and in the incident of assault to the deceased and the witnesses they were not present and they sustained injuries caused by the deceased and some of the injured witnesses at the house of Kamal. The High Court has in part accepted the stand of the appellants that they were exercising the right of private defence, but at the same time the evidence also shows that the appellants committed criminal trespass. Therefore, they cannot claim the benefit of exception of having acted in exercise of right of private defence.

On a combined reading of the judgments of the trial Court and the High Court it is clear that the evidence is to the effect that the accused appellants were upto some stage exercising the right to protect and defend their properties. But thereafter they exceeded the right. Therefore, this appears to be a case where instead of convicting the appellants under Sec. 302 IPC it would be proper to convict the appellants for offence punishable under Sec. 304 Part I, IPC. Custodial sentence of 10 years would meet the ends of justice. *Madan and Ors. v. State of M.P.*, AIR 2008 SC 3083 : 2008 (10) SCR 855 (SC) : 2008 (11) SCC 657 : 2008 (8) JT 156 (SC) : 2008 (10) Scale 33 (SC) : 2008 (5) Supreme 260 (SC) : 2008 (7) SRJ 401 (SC) : 2008 CrLJ 3950 (SC) : 2008 (3) SCC (Cr) 942 : 2008 (3) Crimes 102 (SC) : 2008 (3) JCC 1944 (SC).

In a Madras case, the accused was shot at by accused on spur of moment. The circumstances that accused was last seen with deceased during purchases of air gun from shop of one of the prosecution witnesses, conduct of accused trying to hide himself after occurrence and extra-judicial confession to the village administrative officer were held prove the guilt of the accused. However, it was found that there was no plan or premeditation and therefore, conviction of accused under Section 304, Part-II was held justified. *Sivakumar* v. *State*, 2004 Cr LJ 3805 (Mad) : 2004 Mad LJ Cri 813 : 2003 All MR (CRI) 1685 : 2004(1) Bom CR (Cri) 89.

The trial Court and the High Court found that this is not a case where it can be said that the appellants were exercising the right of private defence. The plea taken was that the accused persons also suffered injuries and, therefore, the defence version of false implication and exercise of right of private defence should be accepted. The High Court noticed that the injuries on the accused persons were superficial in nature. After analyzing the evidence, the trial Court and the High Court have found that there was no question of exercising the right of private defence. The trial Court and the High Court with reference to the evidence on record found that the so-called injury on accused has to be viewed with suspicion. Although accused claimed and alleged that he had sustained bhala injury, the injury report discloses that the injury found on him by the Doctor indicated that the accused had suffered injury by hard blunt substance and the injuries were simple. Therefore, the High Court's judgment so far as the conviction and sentence of accused is concerned is affirmed. However, considering the long passage of time and the period of sentence imposed, we think it appropriate to extend to other appellants the benefits of Sec. 360 Cr.P.C. *Nasiruddin Khan and Ors. v. State of Bihar.*, AIR 2008 SC 3198 : 2008 (10) Scale 528 (SC) : 2008 (5) Supreme 431 (SC) : 2008 (7) SLT 436 (SC) : 2008 (8) SRJ 143 (SC) : 2008 (3) Crimes 196 (SC).

Accused persons had a legitimate right to the use of reasonable force to defend their property. The right of private defence falls under two categories *i.e.* (1) as a total and (2) as a partial defence. In the first category, there will be no offence but in the 2nd category by virtue of Exception 2 to Section 300, IPC the offence of murder is reduced to the offence of culpable homicide not amounting to murder. It is well-settled that even where accused exceeds right of private defenee and causes fatal injury in good faith where infact it was not so necessary, then under Exception 2 to Section 200, IPC, then it will be still a lesser of once than murder, if the intention of the accused was to do no more harm than which in his behalf was necessary and he did not act with a vengeful motive in the purported exercise of his rights. *Amar Gond and others. v. State of U.P* 2002 Cri LJ 1234 (All) : 2002 All LJ 76 : 2001(43) All Cri C 992 : 2001(3) All Cri R 2263

In instant case, there was a sudden fight in which a person was shot at and kille and another two persons were injured. The scrutiny of the prosecution evidence and th attending circumstances wholly demolished the defence version of two accused persons One injured person filed F.I.R. immediately after the incident and thereafter the tw injured persons were sent for medical examination. The Investigating Office immediately proceeded to the spot and recovered one DBBL gun and one countrymad pistol. Such recovery was made immediately after the lodging of the F.I.R., lendin credence to the prosecution version. F.I.R. itself had been lodged with promptitude wit no time gap for concoction or deliberation. The injuries found on person of accuse were superficial and simple. The fact that they were caused by a person of prosecutio side did not mean that aggressor was prosecution side. The accused persons had also after their arrest, filed an F.I.R., in which ultimately final report was submitted. Th accused did not thereafter file a private complaint. One accused shot dead the decease and another accused caused firearm injuries to another person. The murder was no premeditated. Thus conviction of one accused under Sec. 304, Part I, Penal Code an another accused under Sec. 323, Penal Code was proper. Since another accused use illicit countrymade pistol, he was also liable to be convicted under Sec. 25 of the Arms Act. *Budh Singh and another v. State of U.P.*, 2005 CriLJ 2005 (Allahabad).

36. Injuries.—*Minor, insignificant or superficial injuries.* Minor, insignificant o superficial injuries on person of accused need not be explained by the prosecution *Mohammad Ashraf* v. *State of UP*, 2004 Cr LJ 2690 (All).

Perusal of the entire evidence gives an impression that there was prior enmity between deceased and the accused persons and on the given day the accused persons assaulted him, but, then most of the injuries were dealt on the lower parts of the body which reveals that they had no intention to murder. *Garjan Sahu and Ors. vs. State o Orissa*, 2010 (2) CrLJ 1880 (Ori).

Single lathi blow on head causing death—Scope. When the accused-appellant saw the face of the deceased he simply picked up his lathi and with that gave one blow on the head of the deceased. The said blow was so forceful that as a consequence of which the deceased died within an hour and before he could be taken to the hospital. There is a direct nexus between the blow of lathi and death of the deceased which is immediately caused after giving the blow.

Although it is a case of culpable homicide not amounting to murder, but considering the nature of the injuries which was caused on a vital part of the body, we are of the considered view that there was intention on the part of the accused-appellant to cause death of the deceased.

We, therefore, alter the conviction of the appellant from Sec. 302, IPC to Sec. 304 Part I IPC. In our considered opinion, custody and sentence of 10 years would be appropriate and sufficient. *Indrasan vs. State of Uttar Pradesh*, AIR 2009 SC 2760 : 2009 (8) JT 680 : 2009 (3) Crimes 217 (SC) : 2009 (9) Scale 58 : 2009 (9) SCR 1127 : 2009 (5) Supreme 198.

37. Bail.—The present affidavits were not *alibi* evidence but evidence of denial which on its face was procured after the rejection of 1st bail application. Such evidence of denial of complicity of accused in commission of crimes when stated on affidavits during the course of investigation or after the charge-sheet was submitted was not to be taken into notice and cannot be ground for grant of bail. Hence no case was made out for grant of bail on due application for bail. *Amod Kumar Sharma* v. *State of U.P.*, 1995 UP Cr R 35 (All).

38. Benefit of probation.—In a case where the benefit of probation was extended to two co-accused persons and no appeal was filed challenging it. It was held that the accused could not take advantage of such benefit granted to co-accused persons, more so when his role in crime was established and he was main brain behind the crime. *Chaudhari Ramjibhai Narasangbhai* v. *State of Gujarat*, AIR 2004 SC 313 : 2004 Cr LJ 280 : 2003(4) Crimes 471 (SC) : 2003(8) Supreme 67 : 2004(1) SCC 184.

Sec. 4 of the Probation of Offenders Act empowers the Court to release a person on probation of good conduct, subject to the conditions that the offence is not punishable with death or imprisonment for life. Only in the event, the provisions of the said Act are applicable, Sec. 6 of the Act can be taken recourse to.

Appellant was charged with commission of an offence under Sec. 302 of the Indian Penal Code. He has been found guilty under Sec. 304 Part I thereof which provides for imprisonment for life or imprisonment of either description of a term which may extend to imprisonment for life. In this view of the matter, the provisions of the Act are not applicable.

The learned trial Judge has not heard the appellant on the question of sentence as is provided for under Sub-Sec. (2) of Sec. 235 of the Code of Criminal Procedure. Although the learned Counsel is correct, but keeping in view the fact that the conviction of the appellant was under Sec. 304 Part I of the Indian Penal Code, we are of the opinion that even otherwise the sentence imposed on him is just and proper. *Bala Baine Linga Raju vs. State of Andhra Pradesh*, 2009 CrLJ 3426 : 2009 (2) Crimes 394 (SC) : 2009 (6) SCC 706 : 2009 (13) JT 657 : 2009 (7) SCR 595 : 2009 (7) Scale 73 : 2009 (4) Supreme 75 : 2009 (4) SLT 219.

39. Single blow or injury.—It is not laying down that in no case of single blow or injury, the accused cannot be convicted under Section 302 IPC. In cases of single injury, the facts and circumstances of each case has to be taken into consideration before arriving at the conclusion whether the accused should be appropriately convicted under Section 302 IPC or under Section 304 Part II IPC. *Gurmukh Singh vs. State of Haryana*, 2010 (1) CrLJ 450 (SC).

40. Murder or Culpable Homicide—Proof.—The finding that deceased, who was a child of tender age, died a homicidal death is not challenged before this Court. The finding recorded by the High Court that the appellant and her husband had confined their child, in the bathroom of rented premises for a period of 14 days is based on the analysis and appreciation of evidence tendered by prosecution witnesses and more particularly evidence of landlord, PW-5 and that of his son PW-7. The fact that deceased died due to starvation is amply proved by the testimony of Medical Officer who performed autopsy on the dead body of the deceased and contents of the post mortem notes. The fact that child, was found dead in the bathroom is also established by the reliable and trustworthy testimony of PW-6. The appellant has failed to show error in the reasonings or the conclusions of the High Court. No perversity, miscarriage of justice, shocking misreading of evidence or gross misapplication of the provisions of Indian Penal Code could be pointed out by the learned Counsel for the appellant. There are no reasonable grounds for believing that the appellant had not committed the offence in question. The High Court, in effect has confirmed the finding recorded by the trial Court that the appellant and her husband had confined their child, in a bathroom and caused her death by not providing food and water. The finding recorded by the High Court that the appellant and her husband had definite knowledge that their act of confining deceased, in a bathroom would result into her starvation which was likely to cause her death and, therefore, the appellant has committed offence punishable under Section 304, Part II IPC is eminently just and well-founded. Therefore, this Court is of the firm opinion that the conviction of the appellant recorded under Section 304, Part II read with Section 34 is not liable to be interfered with in the instant appeal.

As on today, the appellant is of more than 67 years of age. The record further indicates that the appellant has also a major daughter, who was aged 10 years at the time of the incident and a son. On the facts and in the circumstances of the case, this Court is of the opinion that interest of justice would be served if conviction of the appellant under Section 304, Part II, read with Section 34 of the Indian Penal Code is maintained and the sentence is reduced to the period already undergone. *Sau. Panchashila Dada Meshram vs. State of Maharashtra*, 2010 (2) CrLJ 1919 (SC).

Deceased gave birth to three girls so mother-in-law/accused was unhappy and threw burning-wick on clothes of deceased and thereby set them on fire. The post-mortem report of the deceased was placed on record during the trial and doctor, who conducted the post-mortem examination was also examined as a witness in the trial. The said documentary and oral evidence of the doctor, as adduced, that he also treated the patient and conducted the post-mortem examination made it crystal clear that the deceased remained under treatment in hospital for 8 days and died after 8 days of the incident in question. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under Cl. (4) of S. 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered u/Sec. 304 Part II of IPC.

We find that the view taken by the trial Court was a cogent and plausible view, under of therefore, we hold that the conviction and sentence imposed by the trial Court, g justified. Considering the totality of the circumstances and the fact that the appellant is of 85 years of age and had undergone the sentence imposed by the trial Court under the provisions of Sec. 304, Part II of IPC, we set aside the conviction and sentence of the appellant imposed by the High Court of Gujarat and restore the judgment and order passed by the trial Court. *Maniben vs State of Gujarat*, 2010 AIR SCW 570 : AIR 2010 SC 1261

In the instant case, the appellant inflicted a stab injury on complainant. Seeing that PW. 1-complainant was being hurt, Beena-deceased his wife came to rescue. In the heat of passion, deceased was also stabbed. It fell at the buttock. Beena-deceased ran. The appellant followed her and kicked her. As a result, she fell down. Though the appellant could stab her again, he didn't. The stab cut iliact artery, caused bleeding which resulted in the death. Injury was neither intended nor inflicted targeting a vital part. But, it struck at the buttock. The injury was sufficient to cause death in the ordinary course of nature and the victim succumbed to the injuries. Our considered view is that there was no intention to cause death, but the intention was only to inflict injuries to deceased. Therefore, no offence under Section 302, IPC was established, but only an offence under Section 304, IPC, Part II was established. Conviction under Section 302, IPC is liable to be altered to Section 304, IPC, Part II. *Mohanan vs. State of Kerala*, 2010 (3) Cri LJ 2920 (Ker).

Submission that the appellants had committed an offence only under S. 304, Part II of the Indian Penal Code cannot be accepted for more than one reason. Appellants had formed an unlawful assembly. They came to the place of occurrence with deadly weapons. The overt acts attributed to them resulted in causing serious injuries on the head of the deceased. They not only were grievous in nature, the skull of the deceased was also found fractured. The intensity of the assault on the person of the deceased by the appellants, therefore, can be well imagined. When three injuries have been caused on vital parts of the body, we have no doubt in our mind that the appellants knew that the said injuries were likely to cause death or cause such bodily injury which may result in death. *Padmanaban vs. State*, AIR 2010 SC 47 : 2009 (10) JT 172 : 2009 (10) Scale 526 : 2009 (12) SCR 252 : 2009 (5) Supreme 763 : 2009 (6) SLT 751.

41. Non-examination of minor injury on accused—Effect of.—Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries.

When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. In the case at hand, triffle and superficial injuries on accused are of little assistance to them to throw doubt on veracity of prosecution case, particularly, when the accused who claimed to have sustained injuries has been acquitted. *Siri Kishan vs. State of Haryana*, 2009 (6) SCR 1184 : 2009 (12) SCC 757 : 2009 (8) JT 305 : 2009 (6) Scale 438.

e sentence—Factors to be taken into consideration.—These are
are required to be taken into consideration before awarding
to the accused. These factors are only illustrative in character and
h case has to be seen from its special perspective. The relevant
: (a) Motive or previous enmity; (b) Whether the incident had taken place on the spur of the moment; (c) The intention/knowledge of the accused while inflicting the blow or injury; (d) Whether the death ensued instantaneously or the victim died after several days; (e) The gravity, dimension and nature of injury; (f) The age and general health condition of the accused; (g) Whether the injury was caused without premeditation in a sudden fight; (h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted; (i) The criminal background and adverse history of the accused; (j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock; (k) Number of other criminal cases pending against the accused; (l) Incident occurred within the family members or close relations; (m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment? These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused. The list of circumstances enumerated above is only illustrative and not exhaustive. *Gurmukh Singh vs. State of Haryana*, AIR 2009 SC 2697 : 2009 (3) Crimes 416 (SC) : 2009 (11) JT 122 : 2009 (11) Scale 688 : 2009 (13) SCR 548 : 2009 (8) SLT 122.

43. Unlawful Assembly.—*Elements of Sec. 149* covers *element of Sec. 147.*—The plea that in case of unlawful assembly and murder the trial Court after, coming to the finding that charge under Sec. 147 of IPC was not established, could not hold the appellants guilty under Sec. 304, Part II read with Sec. 149, would not be tenable. The charge under Sec. 147 was a separate and distinct charge. There was no need of framing separate charge under Sec. 147 of as elements of Sec. 149 covers the elements of Sec. 147. When the trial Court found the appellants guilty under Sec. 304, Part II read with Sec. 149 the elements of Section 147 of IPC merged with the elements of Sec. 149. Observation of the trial Court that charge under Sec. 147, was not established was a mistake as the trial Court failed to consider that the main charge was under Sec. 304 read with Sec. 149 and the said charge automatically covers elements of Sec. 147. From the evidence of eye-witness presence of all the accused persons at the place of occurrence was well-proved and their evidence clearly proves formation of unlawful assembly whose common object was to assault the deceased and others and their evidence clinchingly proves that the accused person were armed with deadly weapons like sickle and lathi. Two eye-witnesses were themselves the injured persons who were assaulted by the accused and their evidence is the best evidence and they are the best witnesses in this case. From evidence, elements of Sec. 304, Part II read with elements of Sec. 149 were well established and finding of the trial Court that Sec. 147 was not established is inconsequential and such a finding does not favour the accused and does not wipe out elements of Sec. 149. *Ananta Deb Singha Mahapatra and Ors. v. State of W. B.*, 2007 CriLJ 1705 (Calcutta).

44. Administration of drug—Error in stating offence.—The charge under Section 304 framed against the appellant-accused was with definite allegation of culpable homicide not amounting to murder by reason of administration of drug without taking precaution for reaction there from. This is totally different from causing hurt by means of administration of unwholesome drug. On no count a definite charge of culpable homicide can be an error for causing hurt. Going by Sec. 214, Cr. P.C., in every charge words used in describing an offence shall be deemed to have been used in the sense attached to them by law under which such offence is punishable. Therefore, to construe the section relating to culpable homicide as only an error for causing hurt by unwholesome drug will lead to misleading so far as the accused is concerned resulting in failure of justice so far as his opportunity to defend is concerned. Therefore, the contention that mentioning of Section 304, I.P.C. in the charge was only an error for Section 328, I.P.C., the ingredients of which have been brought in evidence, and therefore, the conviction can be confirmed as under Sec. 328, I.P.C., as the accused is in no way prejudiced by such error in stating the offence, would not be tenable. *Radha Sasidharan v. State of Kerala*, 2006 CriLJ 4702 (Ker).

* * * * *

Sec. 304-A. Causing death by negligence.—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

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1. Amendment—Section 304-A has been inserted by the Indian Penal Code amendment Act, 1870 (7 of 1870), Section 12.

2. *Mens rea.*—Sections 304-A, like other sections of the Penal Code. requires a *mens rea* or guilty mind. The rashness or negligence must be such as fairly to be described criminal. Mere carelessness is not sufficient for conviction under this section. AIR 1958 Sing 100. Rashness means doing an act with the consciousness of a risk that evil consequences will follow but with the hope that they will not. Negligence is a breach of duty imposed by law. In criminal cases, the amount and degree of negligence are the determining factors. There must be *mens rea* in criminal negligence also. In order to establish criminal liability the facts must be such that the negligence of the accused went beyond a mere matter of comprehension and showed such disregard for the life and safety of others. *Russel on Crimes* 1960 Ed. p. 641 AIR 1957 Madh Pra 236 : 1957 Cr LJ 1416 : 1957 Jab LJ 208.

3. Scope.—In order to constitute the offence under Section 304-A of the I.P.C. the prosecution should prove that the death of the person must have been caused by the accused by doing any act in a rash and negligent manner and as such there must be positive proof that the rash or negligent act of the accused was proximate cause which resulted in death of the deceased. Before a person is convicted for the offence under Section 304-A of the I.P.C. it must be proved that the act was done with conscious risk and consequences of death was likely to follow therefrom and there was *mens rea* in doing such negligence act. *Ladu Kishore Chaudhary* v. *State of Orissa*, 2000 Cri LJ 3617. This section applies to rash and negligent acts and does not apply to the cases where hurt is voluntarily caused, 2 Bom LR 613. In AIR 1950 All 300, *Agarwalla, J.*, said "This section obviously does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a 'rash' or negligent act. A negligent act is an act done without doing something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or act which a prudent or reasonable man would not do in the circumstances attending it. A rash act is a negligent act done precipitately. Negligence is the genus, of which rashness is the species. It has sometimes been observed that in rashness the action is done precipitately with the consciousness that the mischievous or illegal consequences may follow, but with a hope that they will not. But it is not necessary that there should always be this consciousness of the consequence. This is also untrue as the observations of Lord Atkin in *Andrews* v. *Director of Public Prosecution*, 2 All ER 552 : 1937 AC 576 will show".

Offences made under Section 304-A. I.P.C. Death of boy due to electrocution on a field. Field not belonging to accused—Involvement of accused was fully established. accused charged on ground of recovery of iron rod and copper wire kept in his house—No evidence to show as to how and from where service connection and electricity taken and as to how deceased was electrocuted. Investigating agency or electricity department not indentifying source from which electric energy was unlawfully taken. Hence it was held that mere conjectures and suspicion will not bind accused with criminal liability. Conviction set aside. *Chakkarvarthy* v. *State*, (1995) 2 LW (Cr) 776 (Mad).

Petitioner, a truck driver, while driving a truck was involved in an accident resulting in death of a boy aged 8 years. He was sentenced under Sections 304-A and 279. As regards sentence under Section 279 it was argued that petitioner could not have been sentenced under Section 279 separately after he had been found guilty under Section 304-A. The submission was found to be acceptable as some of the facts found as ingredients of the offence under Section 304-A covered the ingredients of offence under Section 279. The sentence of fine under Section 279 was therefore, set aside. 1987 Cri LJ 1403 (Madh Pra).

Accused driving mini door auto allegedly dashed against deceased, who sustained head injuries and died on spot. Mere fact that a witness happened to be a person known to owner of offending vehicle shall not be enough to hold him to be an interested witness.

Witness in categorical terms has given a vivid description of the accident and he has given details of how the accident took place. According to his testimony he saw the offending vehicle coming at a high speed and hitting the cyclist and then the pedestrian (deceased Chinnan @ Chinnasamy) and thereafter drifting towards the nearby bush. The nature of accident was described by witness as rightly pointed out by the Government Advocate will be enough to arrive at a conclusion that the vehicle was driven rashly and negligently, as a result of which the accident took place. The witnesses cannot be expected to mention the legal terminology while speaking the plain facts relating to the accident. It is for the Court to decide based on such evidence whether the act of rash and negligence on the part of the petitioner was established or not. The Courts below, on an appreciation of evidence, have arrived at a correct conclusion that the rash and negligent act on the part of the petitioner was proved beyond reasonable doubt. There is no scope, whatsoever, to hold the same to be either defective or infirm warranting interference in this criminal revision case. *Ponnusamy vs. State*, 2010 (3) CrLJ 2656 (Mad).

Default in making payment of instalments by a finance company. Superdari was granted by Magistrate—Petition challenging the order was made. It was held that the inference of High Court is not called for and the present petition moved for the limited purpose of *superdari* during trial of challan case is dismissed without prejudice to the rights and relief claimed by him in civil suit pending in civil Court. *Harkesh Kumar* v. *State of Punjab*, 1994 Cr LT 316 (P & H).

In the above-mentioned case reported in 1937 AC 576. Lord Atkin. Said. "Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied, 'recklessness' most nearly covers the case. It is difficult to visualise a case of death caused by 'reckless' driving in the connotation of that term in ordinarly speed which would not justify a conviction of man-slaughter, but it is probably not all embracing, for 'recklessness' suggests an indifference to risk, whereas the accused may have appreciated the risk and intended to avoid it, and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction". *Vide* and Elliost's Case, 16 Cox Cr C 710 ; *Rex* v. *John*, 3 Car & P 635 : 172 ER 579 ; AIR 1950 Mad 308 ; AIR 1945 All 16 : 46 Cr LJ 260; AIR 1944 Nag 285 : ILR 1944 Nag 732 ; AIR 1944 Sind 124 ; AIR 1944 Nag 285 ; AIR 1943 PC 72 : 44 Cr LJ 589 (PC) : AIR 1942 All 328 : 43 Cr LJ 921; AIR 1941 Lah 459.

The rash and negligent act referred to in this section means the act which is the immediate cause of death and not any act or omission which can at best be said to be a remote cause of death. Where, therefore, there was no rashness or negligence on the part of the driver of a motor lorry so far as his use of the road or the manner of driving was concerned, he cannot be convicted under 304-A on the ground that the brakes of the lorry were not in perfect working order and that the lorry carried on horn 164 Ind Cas 333 : 9 RO 89 : 37 Cr LJ 975 : 1936 OWN 720 : 1936 Cr C 1083 : AIR 1936 Oudh 400. The provisions of this section seems to apply to cases where there is no intention to cause death and no knowledge that the act done, in all probability, would cause death. 14 Cal 566. Acts, probably or possibly involving danger to others, but which, in themselves, are not offences, may be offences under Sections 336, 337 or 304-A, if done without due care to guard against the dangerous consequences. 4 Cal 764. Where the act causing death of the accused it is its nature criminal, this section has no application. 12 Mad 56. This section does not apply where there is neither culpable rashness nor culpable negligence in the sense in which those terms are usually accepted. 14 CPLR Cr 126 ; LBR (1872-1892), 89 ; UBR (1897-1901) Vol I. 314 ; LBR (1872-1892), 89 ; LBR (1872-1892), 308; 1 Weir 324 ; 1 Weir 326 ; 14 Bom LR 887 ; 7 PWR 1913 ; Rat Un Cr C 964 ; 15 ALJ 615. This section is not intended to cover cases where there is no intention to cause hurt. 3 ALJ 394 ; *see* also 3 ALJ 678 ; 25 Cr LJ 449 ; 36 Cal 302 ; 38 Cal 855 ; 4 Cal 815 ; 30 CWN 66 ; 14 Bom LR 887. This section has no application where the offence is committed voluntarily. 4 Cal 764.

This section does not apply to a case in which there has been voluntary commission of an offence against a person. 1963 (1) Cr LJ 762 : AIR 1963 HP 18. If a man intentionally commits any offence and consequences beyond his immediate purpose result, the result is not to be attributed to mere rashness ; if knowledge could not be imputed, still the wilful offence does not take the character of rashness, because its consequences have been unfortunate but acts probably or possibly involving danger to others which in themselves are not offence within the meaning of Section 304-A, Penal Code, and kindred actions, if done without due care to guard against dangerous consequences, 15 Cr LJ 512 ; 18 Cr LJ 193 ; 14 Ind Cas 195 : 16 CWN 1055 : 39 Cal 585 : 17 Bom LR 217 : 16 Cr LJ 305 : 28 Ind Cas 641. To find a person, who had caused the death of another with an enlarged spleen by blows inflicted on the body and was charged with culpable homicide, guilty under Section 304-A, it would not do for the juries to infer rashness from the mere fact of the prevalence of the disease of the spleen in the district : but they must be satisfied of the accused's knowledge of such prevalence and of the danger to life involved in the striking on the trunk of the body of a person who might be affected with the disease. 4 Cal 815. Where a person is beaten and death ensued on account of the rupture of a deceased spleen, the offence is one under Section 321 and not under Section 304-A, Penal Code. Rat Un Cr C 63 ; *see* also Rat Un Cr C 67 ; 11 PR 1880 Cr ; 5 PWR 1912 : 157 PLR 1913.

In India, looking at the passive submission, and submissiveness of the native servant, it would be a dangerous doctrine of hold that the master inside a carriage is entirely guiltless, if his directions brought about the rash and negligent driving. 1 Weir 322 : 6 MHC App. 31. A conviction under Section 304-A is not sustainable where death has resulted from violence intentionally directed against the deceased by the accused. The conviction should be under Section 323, I.P. Code. 11 PR 1880 Cr. Where, being insulted in a drunken brawl, the accused threw down the deceased and stamped his feet on his body and death ensued within twenty days, the offence was one under Section 323 of the Penal Code, and not under Section 304-A. Rat Un Cr C 67. Where it is found that the speed of the motor vehicle was not excessive and the lorry was driven on the left side of the road, it is difficult to convict the accused for rashness and negligence. AIR 1950 Ajm 45. If the surgical operation by an unskilled practitioner caused death of the patient, an offence under this section is committed. 14 Cal 566. Where the act causing the death of the accused is in its nature criminal Section 304-A of the Penal Code has no application 12 Mad 56 : 1 Weir 326. Mere carelessness is not sufficient for conviction under this Section. This section like other section of the Penal Code requires a *mens rea or* guilty mind. The rashness or negligence must be such as fairly to be described criminal. AIR 1938 Sind 100 : 39 Cr LJ 566 ; *see* also AIR 1941 288 : 42 Cr LJ 621 : ILR 1941 All 441 ; AIR 1939 Pesh 33 : 40 Cr LJ 854 ; AIR 1947 All 49 : 1946 ALJ 502.

Simple lack of care such as will constitute civil liability is not enough to prove a charge of homicide by negligence. A very high degree of negligence is required to be proved before a charge under Section 304-A of the Penal Code is established. 1951 MWN 154 : (1951) 2 MLJ 25 ; (1962) 2 Mad LJ 508, (in sections of the Penal Code where the means required is negligence, the word 'negligence' is not used in any way different from the word 'negligence' in civil law, but there is bound to be difference between the proof of negligence required to sustain a conviction for criminal negligence and proof of negligence required in civil suit to obtain compensation for damages) ; (1962) 2 Mad LJ 508 : 1962 Mad LJ (Cr) 668.

The prosecution must prove that the accused was guilty of rashness or negligence is utter indifference to consequences. ILR 1959 Cut 709 : 1959 (1) Ori JD 703. Section 304-A does not apply to a case in which there has been the voluntary commission of an offence against the person. Acts which are in themselves criminal will not be acts which may be termed as negligent. AIR 1955 All 626 : 1955 Cr LJ 1448. Before a conviction can be heard under Section 304-A, a very high degree of negligence which must amount to recklessness or utter indifference to consequences and not merely negligence of tort. AIR 1954 All 186: 1954 Cr LJ 405 (negligence and rashness are the same things).

Interested witness. Having scrutinized the evidence on record, merely because two witnesses have turned hostile, would not by itself mean that either the identity or the rash and negligent driving by the petitioner has not been proved on record. All that witnesses are clear in their depositions that it was the petitioner who was driving the vehicle. They have been subjected to searching cross-examination and the veracity of their evidence in examination in chief has not been controverted. Learned Counsel submits that deceased PW. 1 has to be treated as an interested witness and his evidence is to be scrutinized with greater care and caution. True, PW. 1 is an injured person and it is his daughter who died and his other family members received injuries, but that fact by itself does not render his evidence untrustworthy. This principle has been affirmed by the Supreme Court in *Kalegura Padma Rao vs. State of Andhra Pradesh*, represented by the Public Prosecutor, AIR 2007 SC 1299 = 2007 (12) SCC 48, holding :

> "We may also observe that the ground that the witness being a close relative and consequently, being a partisan witness, should not be relied upon has no substance. This theory was repelled by this Court as early as in *Dalip Singh's* case, AIR 1953 SC 364 = 1953 Cri LJ 1465, in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed (AIR Page 366, Para 25) :
>
> "We are unable to agree with the learned Judge of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in *'Rameshwar vs. State of Rajasthan'*, AIR 1952 SC 54 at Page 59 = 1952 Cri LJ 547. We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of Counsel".

The golden rule of assessing evidence of any witness is to see as to whether in the natural sequence of events, the person deposing as a witness is one who is naturally familiar with the facts stated under oath, his testimony stands the test of cross-examination and he has no motive to implicate the accused. These factors established on record and witnesses have no motive to falsely implicate the petitioner. *Krishan Sinh vs. State of HP*, 2010 (3) Cri LJ 3048 (HP).

4. Culpable rashness, etc.—Culpable rashness is acting with the consequences that mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precaution to prevent this happening. The immutability arises from acting despite the consequences. Culpable negligence is acting without the consciousness that illegal and mischievous effects will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had, he would have had the consciousness. The immutability arises from the neglect of the civil duty of circumspection. 7 MHC 119. To come under this section the death should be the direct result of a rash and negligent act of the accused, and that act must have been the proximate and efficient cause without the intervention of another negligence. 4 Bom LR 679 ; 3 Bom LR 494 ; 32 Cal 645. Criminal rashness is hazarding a dangerous or wanton act, with the knowledge that it is so and that it may cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to consequence. 30 CWN 66 : 33 Cal 333 : 91 Ind Cas 889 : 27 Cr LJ 153 ; *see* 30 Cal 302 : 13 CWN 362 : 9 Cr LJ 204 ; *see* also AIR 1933 Rang 326 : 1933 Cr C 1284 : AIR 1934 Mad 209 : 66 MLJ 318 : 35 Cr LJ 691. Where the act is voluntarily caused this section has no application. 2 Bom LR 613 ; 38 Cal 855 : 15 Cr LJ 513.

The prisoner had been in charge of a police-station, the vicinity of which had been troubled by thieves. On the occasion a thief had fired at the prisoner. If having been reported to the prisoner that three thieves were prowling about, he, with other men, went out to patrol. They saw a man crouching under a tree, and thinking he must be a thief, the prisoner fired at him and killed him. The man proved to be a *haleara*. The prisoner wrote a false report to the effect that the deceased had been killed by thieves. *Held*, that, under the circumstances, the accused was guilty of an offence under Section 304-A. AWN 1881 156. The owner of a ferry having the exclusive right to be carry passengers across a certain river at a particular spot, and being found to be punished under Section 304-A, if he causes the death of any passenger by drowning owing to the unsoundness of the boats. 16 All 472 : AWN 1894, 182 ; *see* also 6 All 248 : AWN 1884 71. Rash act means extra-hasty act. AIR 1933 Rang 326 : 1933 Cr C 1284. Overloading a lorry is not rash and negligent act within Section 304-A. 137 Ind Cas 262 : 33 PLR 492 : 33 Cr LJ 436 : AIR 1932 Lah 319 : AIR 1932 Lah 366.

Culpable rashness is acting consciously that mischievous and illegal consequences may follow; but with hope that they will not and often with the belief that the actor had taken sufficient precaution to prevent happening. *State of Maharashtra vs. Dhananjay Laxmanrao Bhagat and Ors.*, 2010 (2) CrLJ 1980 (Bom) (Nagpur).

Where the evidence of a Civil Surgeon showed that milk was administered in such quantity as to kill the child, but there was no evidence to show that the mother was aware of it, *held*, that she was not guilty of an offence under Section 304-A 5 NWP 38. The accused who was watching his field one dark night, hearing a noise in the field shouted whereupon a thief ran out of it whom he followed and struck with a stick. The thief fell down, and the accused caused him and took him to the Zamindar's house. The thief became insensible and subsequently died from the effects of the blow which the accused had given him. *Held*, with reference to the terms of Section 304-A that the conviction under that section bad. AWN 1881, 103.

Where, in the deceased's omission to immediately drive pigs, that were grazing upon the accused's land, the latter took up a piece of a trick and threw it at the deceased from a distance of five paces, and it struck him over the spleen, which being in diseased state, was ruptured, and death ensued ; *held*, that the accused was guilty only of hurt, and not of causing death by a rash and negligent act. 3 All 597 : AWN 1881, 37. Intentional violence is not a rash or negligent act. 11 PR 1180 Cr. Where the accused struck his servant, who was suffering from an enlarged spleen, and thereby caused his death by its rupture, *held*, that he was not guilty of an offence under Section 304-A. 7 PR 1877. Where death is caused by an act, which is in itself an offence, Section 304-A is not applicable. 15 PR 1882 Cr ; *see* also 134 Ind Cas 772 : 32 Cr LJ 1248 : AIR 1931 Lah 275. Where the accused seeing a stooping child in the early morning, in a place considered by the villagers to be haunted, and considering the child to be a spirit or demon, caused his death by inflicting blows, before he discovered his mistake. *held*, that he was properly convicted under Section 304-A, as he did not act in good faith, *i.e.*, with due care and attention. 11 PR 1888 Cr Section 304-A does not apply to cases of death caused by direct violence intended to cause bodily injury, but without the knowledge that this is likely to cause death. 34 PR 1887 Cr. Where death was caused by the wife administering poison received from her paramour to her husband, the wife all the while thinking the substance to be only a charm and having no knowledge of the poisonous nature of the substance administered till she did *see* the effect, *held*, that she was guilty only of an offence under Section 304-A. 60 PR 1897 Cr. Where the accused struck the deceased on the head while he was standing on the edge of a well, by which the deceased lost his balances and was drowned. *held*, that he was guilty of an offence under Section 304-A, as he did not cause death by doing an act with the knowledge that he was likely by such act to cause death. 33 PR 1889 Cr. When during a quarrel between the complainant and the accused's father the accused struck a blow with a stick on the complainant, but fell upon a child of two years, which the complainant had on his hip during the quarrel, thereby causing the child's death, *held*, that although the blow, if it has hit the complainant, could not have been likely to cause more than simple hurt, the accused was guilty of an offence under Section 304-A. under the circumstances of the case. 28 PR 1888 Cr. Section 304-A, I. P. Code, must be read along with Sections 336, 337 and 338 and all these sections are confined in their operation to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient. 16 ALJ 615. Where on a charge of murder the Sessions Judge disagrees with the verdict of the jury in favour of the accused, it is open to him to convict the accused under Section 304-A, 25 Bom LR 610. On a certain night the two appellants fought with each other, each using a knife. There were no other witness to the occurrence. Each appellant was convicted under Section 307, I.P. Code, on the evidence of his opponent and the corroborative evidence of the wound caused to opponent and the admissions of the appellant that he was himself wounded in the occurrence. Each appellant received five six serious wounds and would have died if he had not received early medical attendance. In each case the condition of the wounded man was so serious that his dying deposition was taken. *Held*, that neither of the appellants could be legally convicted under Section 307, I.P. Code, but that they were both guilty under Section 326, I.P. Code. 2 Rang 558. Criminal rashness in hazarding a dangerous or wanton act with the knowledge that is so and that it may cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as the consequence. 30 CWN 66. When the accused hit one of his companions in shooting a bear he cannot be said to have acted either negligently or rashly. 9 Lah LJ 482. The words "rashly" and "negligently" mean doing an act without due diligence and caution. The words are comparative words. AIR 1952 Ajmer 34 : 1952 Cr LJ 1236. The question whether the accused's conduct amounted the culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection of the case. In such cases it is necessary to avoid being influenced by the prejudice arising out of the loss of a life which is so dominant a factor in accident cases. ILR 1953 Hyd 95 : 1953 Cr LJ 42 : AIR 1953 Hyd 123 (AIR 1950 All 300 and AIR 1926 Cal 300 relied on) : 1953 Cr LJ 1850 : AIR 1953 TC 617. Acting with the consciousness that mischievous and illegal consciousness may follow but with the hope that will not follow is culpable rashness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow. 1959 MPLJ (Notes) 138 ; *see* also 1964 MPLJ (Notes 69 : 1954 All WR (HC) 134 : 1964 All CR 118 : 1965 (1) Cr LJ 524 : AIR 1965 All 196 (distinction between civil and criminal liability).

This section applies to cases into which neither intention nor knowledge of the kind contemplated in Sections 299 and 300 is present AIR 1976 SC 1012 : 1976 Cr LJ 732.

5. Rash or negligent driving—A rash act is primarily an over hasty act. It is opposed to a deliberate act. Still a rash act can be a deliberate act in the sense that it was one without due care and caution. Culpable rashness lies in running the risk of doing an act with recklessness and with indifference as to the consequences. Criminal negligence is the failure to exercise duty with reasonable and proper care and precaution guarding against injury to the public generally or to any individual in particular. It is the imperative duty of the driver of a vehicle to adopt such reasonable and proper care and precaution. The principle of *reslpsa loquitor* is only a rule of evidence to determine the onus of proof in actions relating to negligence. The said principle has application only when the nature of the accident and the attending circumstances would reasonable lead to the belief that in the absence of negligence the accident would not have occurred and that the thing which caused injury is shown to have been under the management and control of the alleged wrong door. *Mohammad Ajmuddin* v. *State of A.P.*, 2000 Cri LJ 3508 (SC) : AIR 2000 (SC) 2511 : 2000(7) SCC 72 : 2000(8) JT 317 : 2000(3) Crimes 119 (SC).

Accused while overtake took his vehicle completely at wrong side of road at high speed and dashed against scooter coming from opposite direction. Due to wrong side and high speed witnesses proving his rash and negligent driving, held, conviction is proper. *Zamir Khan vs State*, 2010 (4) CriLJ 4044 (Bom).

There were some speed breakers near the spot. Therefore, ordinarily the applicant should have controlled his vehicle. Panchnama, however, shows that the victim was possibly standing at the centre of 10 ft. road and signaling applicant's vehicle to stop. P.W. 2 P.S.I. Yusuf Mansub Ali was in the party, which accompanied P.I. Pawar. He, too, stated that though Signal was given by Police Officer to stop the luxury bus, driven by the applicant, the applicant did not stop the bus and it gave dash to Police Officer. Cross-examination as regards, whether the witness ought to have been at the spot is irrelevant for finding out as to how the mishap occurred. The remaining paragraphs of the cross-examination do not show that the witness had either not seen the incident or that the accident occurred due to victim's negligence. Though it was sought to be suggested to the witness that the road turned before approaching the spot, he categorically stated that there was no turn. Thus, there was absolutely no turn or bend on the road which could have prevented the applicant from noticing a Police Officer in uniform on road. Even if it is taken that Police Officer was actually standing in the middle of the road, as rightly pointed out by the learned Additional Public Prosecutor, a suggestion made in cross-examination of P.W. 3 Police Constable Pawar nails the applicant.

It was suggested to the witness of the cross-examination that the luxury bus, driven by the applicant, was not prepared to stop. Police Officer started to cross the road and in hurry of getting to stop the luxury bus Police Officer himself dashed against the bus. Thus, according to the applicant himself, even after seeing the Police Officer signaling the bus to stop, he was not prepared to stop the bus and dashed against the officer who was attempting to stop the bus. Witness was a passenger in luxury bus, which had already been stopped, and stated that he had not seen the accident, which is not improbable. Considering this state of defence, it cannot be said that the learned Magistrate or the learned Sessions Judge erred in concluding that the mishap occurred on account of rash and negligent act of the applicant and that the mishap led to death of Police Officer. *Sanjay Rambhau Patil vs State of Maharashtra*, 2010 CriLJ 1407 (Bombay).

Negligence and rashness can be said to be essential elements for applicability of provision. *State of Karnataka vs. Muralidhar*, AIR 2009 SC 1621 : 2009 (4) SCC 463 : 2009 (4) SCR 400 : 2009 (4) JT 108 : 2009 (4) Scale 35.

The evidence of witnesses clearly show that the vehicle was being driven at a very high speed. Evidence on record show that more than 50 persons were there in the truck and the appellant was driving the same at a very high speed. One of the witnesses has stated that the truck was being driven as if it was an aeroplane. Therefore, the conviction as recorded cannot be faulted. *Kuldeep Singh v. State of H.P.*, AIR 2008 SC 3062 : 2008 (10) SCR 1063 (SC) : 2008 (8) JT 219 (SC) : 2008 (10) Scale 64 (SC) : 2008 (7) SRJ 560 (SC) : 2008 CrLJ 3932 (SC) : 2008 (3) JCC 2141 (SC) : 2008 (3) Recent CR 933 (SC).

A passenger might fall down from a moving vehicle due to one of the following causes: it could be accidental; it could be due to the negligence of the passenger himself; it could be due to the negligent taking off of the bus by the driver. However, to fasten the liability with the driver for negligent driving in such a situation there should be the evidence that he moved the bus suddenly before the passenger could get into the vehicle or that the driver moved the vehicle even before getting any signal from the rear side. A driver who moves the bus forward can be expected to keep his eyes ahead and possiblility on the sides also. A driver can take the reverse motion when that driver assures himself that the vehicle can safely be taken backward. It is a wrong proposition that for any motor accident negligence of the driver should be presumed. An accident of such a nature as would *prima facie* show that it cannot be accounted to anything other than the negligence of the driver of the vehicle may create a presumption and in such a case the driver has to explain how the accident happened without negligence on his part. Merely because a passenger fell down from the bus while boarding the bus, no presumption of negligence can be drawn against the driver of the bus. *Ibid.*

In *Mohammad Ajmuddin case (Supra)* the possible explanation of the driver was that he was unaware of even the possibility of the accident which happened. It could be so. When he moved the vehicle forward his focus normally would have been towards what was ahead of the vehicle. He was not expected to move the vehicle forward when passengers are in the process of boarding the vehicle. But when he got a signal from the conductor that the bus can proceed he was expected to start moving the vehicle. The evidence in the instant was too scanty to fasten him with criminal negligence. Some further evidence was indispensably needed to presume that the passenger fell down due to the negligence of the driver of the bus. Such further evidence was lacking in the instant case. Therefore, the Court was disabled from concluding that the victim fell down only because of the negligent driving of the bus.

In the instant case the evidence in relation to the identity of the accused who was alleged to have dashed the scooter resulting into death of scooter driver and injuries to pillon rider who was carrying the gas cylinder was cryptic. The evidence relating to the rashness or negligence or excessive speed was missing. Non-seizure of gas cylinder and non-examination of pillon rider was a fator against the prosecution. In view of the circumstances and facts, the conviction of accused was held not proper. *Smt. Manju Baradia v. State Chhattisgash*, 2001 Cri LJ 3762 (Chathisgarh).

In a case of accident where a pedestrian was killed the doctor who conducted the post-mortem was not examined and no explanation was offered by the prosecution before the court as to why he was not examined. It was held that the cause of death was not proved and the accused was entitled to acquittal. *Jerald v. State by Inspector of Police*, 2001 Cri LJ 3656 (Madras).

In a case, where the deceased did not stop the cart he was driving, the accused assaulted him with lathi on his back due to which he fell down and wheel of cart passed through his body. It was held that the conviction of accused for causing death by negligence was justified. *Shiv Dani Singh* v. *State*, 2004 Cr LJ 1338 (Jhar) : AIR 2004 Jhar HCR 168 : 2003(2) East Cri C 512.

In a Delhi case where the accused, who had allegedly caused the death by negligent driving of bus, neither examined owner nor produced other evidence to show that he was not driving the bus on a given date. It was held that the plea of false implication was not available, as his name and number of bus was mentioned in FIR. However, the sentence of imprisonment was reduced to the period already undergone. *Kishore Chand* v. *The State*, 2003 Cr LJ 3321 (Delhi) : 2002(97) DLt 705 : 2002(62) DRJ 519 : 2002(3) Rec Cri R 401.

Where the accused while driving his truck rashly and negligently. killed a boy of eight years who was standing on the side of road, the defence plea that accident occurred due to mechanical failure was not accepted as there was no evidence of witnesses that the accused after incident stopped truck at a distance of 3 kms and ran away and conviction of accused was held proper. *Chhanga* v. *State*, 2003 Cr LJ 4306 (MP). In *State* v. *Bhagirath*, 2003 Cr LJ 4608 (MP) : 2003(2) MPHT 520 : 2003(2) MPLJ 462, where a woman was standing by the side of road was killed due to rash and negligent driving, conviction was held proper.

In a Delhi case scooterist was hit by accuser's truck from behind resulting in his death. The site plan prepared by the investigating officer showed about negligence attributed to the accused. It was not the case of accused that the scooterist suddenly applied breaks and the accused was taken unaware, which led to accused's truck hitting scooter from behind. It was held that the testimony of witnesses could not be discarded merely because they did not use words "rashness" or "negligent" and instead used words " high speed" and that the conviction of accused was proper. *Paras Nath* v. *State of Delhi*, 2004 Cr LJ 731 (Delhi) : 2003(107) DLT 169 : 2004(1) Rec Cri R 154.

Contravention of Rule (4) of Orissa Motor Vehicles Rules, 1940 was held itself, to be culpable negligence. (1969) 4 Ori JD 372. The degree of rashness and negligence on the part of the accused required to be proved in criminal cases should be of such a nature that an inference about the commission of a crime may be safely made against him. Simple lack of care which may give rise to civil liability will not be enough for the purposes of establishing guilt under Section 304-A. Driving a bus when both its brakes are out of order is itself a negligent act. 1961 (2) Cr LJ 561. The driver of the truck heavily loaded with timber and carrying in violation of the Motor Vehicles Rules permitting carrying of only 6 persons and driving down that road at a speed of 25 to 30 miles per hour and when negotiating a bend in the road from left to the right the truck went for about 40 yards to the extreme left of the road which was 17 feet wide, knocked down 6 curved stones fixed on the left rolled down into a ditch below and turned turtle killing down 6 persons on the spot. *Held*, that in the circumstances of the case the incident was the direct result of reckless and negligent driving by the petitioner in utter disregard of the safety of the passengers travelling in it and there was no question of error of judgment. AIR 1961 Ori 45 : 1961 All Cr R 207 : 1961 (1) Cr LJ 300 ; *see* also 1961 Raj LW 466 ; 1960 Raj LW 680 : ILR (1960) 10 Raj 1415 ; AIR 1959 Mad 497 : 1959 Mad LJ (Cr) 31 : (1959) 1 Mad LJ 46 : 1959 Cr LJ 1344 : 1959 Mad WN 67, where it was held that in an offence under Section 304-A. I.P. Code, where a death is caused by the negligent and rash driving of motor can consists of two factors (*a*) speed and (*b*) failure to apply the brakes in time. *See* also 25 Cut LJ 175 (for test of rash or negligent driving) ; AIR 1954 All 186 : 1954 Cr LJ 405 : 1953 All LJ 689 ; AIR 1954 Mys 491 : 34 Mys LJ 166; 1957 Raj LW 104 ; ILR 1954 Cut 603 (passenger allowed to sit on the top of goods due to negligence of driver).

Accused driving a truck dashed against a cyclist from opposite direction also hitting a tree and stopping later beyond 180 feet. Driving indicated to be at excessive speed and rash. Burden was on the accused to prove how the unfortunate accident occurred. The principle of *res ipsa loquitur* was applied. 1965 MLJ (Notes) 114 (1950 NLJ 300 : AIR 1945 Neg 212 : ILR 1945 Nag 556 was followed).

Criminal negligence is the gross and culpable neglect of failure to exercise that reasonable and proper care and precaution to guard against injury either to the public in general or to individual. AIR 1972 SC 685 : 1972 Cr LJ 496; 1968 Cr LJ 1501 : AIR 1968 SC 1319. Reckless driving or driving in a manner dangerous to public life is rashness AIR 1975 SC 1966 ; AIR 1975 SC 1324. But the negligence that may give rise to civil liability will not be enough for the purpose of establishing the crime under Section 304, I.P. Code. AIR 1967 Mad 365. There must be nexus between the death of a person and the negligent act of the accused. AIR 1968 SC 829 ; AIR 1957 MP 236 : (1969) 35 Cut LT 723 (it must be shown that the act was done with the consciousness of a risk that evil consequence of death was likely to follow therefore and/or there was *mens rea* in the doing of the negligent act alleged against the accused) : AIR 1965 All 196 ; AIR 1979 SC 1848 : 1979 Cr LJ 1394 : 1979 Cr LJ 1258 : 1979 Cr LJ 1136 : AIR 1979 SC 1227.

Petitioner's convicted for rash and negligent driving of vehicle resulting in death of a person. No sufficient ground shown for cause of delay in filing appeal against conviction before ADJ and medical certificate filed by him showing advise for his rest upto a particular date in future showing that it was obtained just for purpose of condonation of delay. Thus revision was dismissed. *Devinder Singh* v. *State of Punjab*, (1995) 2 CC Cases 81 (P & H).

Now the question whether the prosecution has able to established the case against the petitioner. The answer is in the negative. It has not been establish clearly and conclusively that the petitioner was driving the vehicle rashly and negligently. Rather, the evidence points out that the vehicle was being maintained properly and before handing over the vehicle to the petitioner, it was thoroughly checked. The speed of the vehicle has not been established. The evidence on this aspect is varying, but looking to the slope and the evidence that points out that the petitioner was a good driver with a clean record, it is reasonable to conclude that he was driving the vehicle at a low speed. Further, no tangible evidence has been produced suggesting clearly that the wheel sheered off after the impact and not before that. As a matter of fact, this was crucial point which should have been established to show that the petitioner was either rash in driving the vehicle or negligent in not taking care to *see* that it did not strike the sides. In such a situation, it is worth while to depend on the evidence which points out that not only brake system had failed, but also the wheel had sheered off. Whereafter the vehicle had moved to the left then to the right before falling down the road after hitting the parapet.

Therefore, looking to the evidence in the light of the legal principles involved in this case, it is difficult to uphold the conviction of the petitioner by the District Court Martial. The petitioner cannot be convicted on the basis of vague and contradictory versions of the prosecution witnesses, though it is unfortunate that a number of lives have been lost. The Confirming Authority as well as the Appellate Authority have not given any reasons for rejecting the petition. *Lalit Kumar* v. *Union of India*, 1990 (2) Sim LC 233.

The deceased sat on the pillion of a motor cycle driven by the accused. A bus ahead struck on an electric pole whose live-wire fell electrocuting the deceased (pillion rider). *Held*, the accused was not guilty of the offence under Section 304-A. I.P.C. 1986 Cr LJ 542 (Raj) : 1985 Raj LW 162 : 1985 Raj LR 293.

Accident occurred on kutcha portion of right side of road, in which a boy standing there was dashed and died due to injuries caused by this accident—Place of accident is itself indicative of negligent manner in which vehicle was being driven. Conviction by High Court was fully justified. As occurrence took place 15 years ago. appellant be released on probation of good conduct. *A.P. Raju* v. *State of Orissa*, 1995 SCC (Cr) 675 : (1995) 2 East Cr C 486 (SC).

Statement of accused is to be considered as a whole and the accused cannot be convicted by using only one part of his statement. *Surendra Kumar* v. *State*, 1996 Cr LJ 94 (All).

When driver of bus who could have seen passenger entering bus from front entrance but did not wait till she entered bus and instead started bus speedily which resulted in fall and death of passenger under rear wheel guilt of accused is proved beyond doubt. *Kaliaperumal* v. *State*, 1996 Cri LJ 3658 (Mad).

There must be direct nexus between death of person and rash and negligent act of accused. *Sudalaimuthu* v. *State*, 1997 Cri LJ 1038 (Mad).

In *Ladu Kishore Chaudhary* v. *State of Orissa*, 2000 Cri LJ 3617 (Orissa) there was absolutely no meterial to show that the petitioner was driving at a high speed with total disregard for life and safety of others so as to criminally make himself liable for rashness and negligence. There were one or two shops near the place of occurrence, where mere driving the vehicle at a high speed may not amount to rash and negligent act. There was no material on record to show that the truck came on non-tar portion causing the accident. The accused was held entitled to acquittal of the charge.

On the high way the vehicles have right of way and if a person deceives to cross the high way, the rules of the road require that the person would have to wait until the transfer has based and only then embark on crossing the highway. It is a very familiar error committed by pedestrians even on the national highway that they saunter and to the road regardless of the movement of the traffic and if a person does a suicidal act of this type, then it would be imperissible for a court in situation of this type to hold the driver of the vehicle responsible for the consequences of the act. In the instant case the incident had accused at night one may presume therefore, that the light conditions were relatively poor and in this background if the deceased, alighted from the jeep and was impatient to get to the other side of the road and made his way across the highway regardless of the on coming vehicles, there was every possibility that he was the main. Contributory to the incident in quatrain. *State* v. *Mahammed Yusuf*, 2001 CriLJ 5 (Kant).

Having regard to the serious nature of the accident, which resulted in the death of four persons, the learned single Judge should not have interfered with the sentence imposed by the Court below. It may create and set an unhealthy precedent and send wrong signals to the subordinate Courts which have to deal with several such accident cases. If the accused are found guilty of rash and negligent driving, courts have to be on guard to ensure that they do not escape the clutches of law very lightly. The sentence imposed by the courts should have deterrent effect on potential wrong-doers and it should commensurate with the seriousness of the offence. Of course, the Courts are given discretion in the matter of sentence to take stock of the wide and varying range of facts that might be relevant for fixing the quantum of sentence, but the discretion shall be exercised with due regard to larger interest of the society and it is needless to add that passing of sentence on the offender is probably the most public face of the criminal justice system. *State of Karnataka v. Sharanappa Basanagouda Aregoudar*, AIR 2002 SC 1529 : 2002(3) JT 243 : 2002(3) Scale 83 : 2002(2) Supreme 500.

Rash or negligent driving—Contra. For convicting a person under Section 304-A of the I. P. C., it is necessary that the death of the person must be caused by rash and negligent act of the accused. In the present case, from the evidence, it is clear that although the applicant was driving the truck, but neither he was driving the vehicle rashly nor the prosecution could prove any negligent on his part. If a truck driver starts his truck and someone riding motor-cycle come behind and attempts to cross the truck and received stroke from back portion of it, it cannot prove negligence of the truck driver. Thus conviction and sentence passed by the Trial Court and affirmed by appellate Court, is set aside and appellant is acquitted of the charge under Sec. 304-A. *Ramcharan v. State of M.P.*, 2007 CriLJ 2884 (Chattisgarh).

6. Causing death by negligence driving.—What the petitioner has done in course of his examination under Section 313 Cr. P.C. is simply denying everything. He does not say anything, and even to the general question that is asked at the end as to whether he has got anything to say, he did not choose to say anything, nor did he care to explain the manner in which the accident occurred, *i.e.* in order to rebut the above said presumption as regards the accident occurring due to his negligence, and in order to show that accident occurred for a particular reason not attributable to his negligence. This was, therefore, an appropriate case wherein, on the basis of presumption that the Supreme Court was speaking about that conviction could be based. The trial court did not record the statement of the accused under Section 313 Cr.P.C. in a satisfactory manner. It was necessary for the Magistrate to enable the petitioner/accused personally to explain each of those circumstances appearing in the evidence, therefore, the examination of the accused was faulty. *Keshwamurthy v. State*, 2002 Cri LJ 103 (Kant.).

Accused driving mini door auto allegedly dashed against deceased, who sustained head injuries and died on spot. Mere fact that a witness happened to be a person known to owner of offending vehicle shall not be enough to hold him to be an interested witness.

Witness in categorical terms has given a vivid description of the accident and he has given details of how the accident took place. According to his testimony he saw the offending vehicle coming at a high speed and hitting the cyclist and then the pedestrian (deceased Chinnan @ Chinnasamy) and thereafter drifting towards the nearby bush. The nature of accident was described by witness as rightly pointed out by the Government Advocate will be enough to arrive at a conclusion that the vehicle was driven rashly and negligently, as a result of which the accident took place. The witnesses cannot be expected to mention the legal terminology while speaking the plain facts relating to the accident. It is for the Court to decide based on such evidence whether the act of rash and negligence on the part of the petitioner was established or not. The Courts below, on an appreciation of evidence, have arrived at a correct conclusion that the rash and negligent act on the part of the petitioner was proved beyond reasonable doubt. There is no scope, whatsoever, to hold the same to be either defective or infirm warranting interference in this criminal revision case. *Ponnusamy vs. State*, 2010 (3) CrLJ 2656 (Mad).

In a case, the deceased was crushed under rear wheel of truck while alighting due to his full pant being entangled in side hook of truck. Accused did not offer any explanation as to whether he had moved the truck after receiving indication from some one. The eye-witnesses stated that the accused moved the truck without ensuring that all passengers had alighted safely. It was held that death of deceased was direct and proximate cause of the act of the accused and that the conviction of accused under Section 304A was proper. *Munna Khan* v. *State*, 2004 Cr LJ 525 (Chh) : 2003(8) all Ind Cas 298 : 2003(2) MPHT 29.

Driving was in rash and negligent manner as road was narrow but speed was high and there was sign board indicating go-slow. It was held that acquittal of driver by trial Court has resulted in miscarriage of justice. The accused was, therefore, convicted but sentence was reduced to the period already undergone. *State* v. *Maduvalappa Fakirappa*, 2004 Cr LJ 3712 (Kant) : AIR 2004 Kant HCR 2515 : 2004(4) All cri LR 130 : 2001(6) Kant LJ 28.

On the basis of the evidence on record it was proved beyond reasonable doubt that the accused was driving the truck in question on a public way in a rash and negligent manner thereby endangering the human life and as a consequence of such driving a child of 5-1/2 years was crushed to death. It was held that conviction of accused was proper. *State of HP* v. *Madan Lal*, 2005 Cr LJ 803 (HP).

7. Inadequate sentence.—If the accused are found guilty of rash and negligent driving, courts have to be on guard to ensure that they do not escape the clutches of law very lightly. The sentence imposed by the Courts should have deterrent effect on potential wrong-doers and it should commensurate with the seriousness of the offence. Of course, the courts are given discretion in the matter of sentence to take stock of the wide and varying range of facts that might be relevant for fixing the quantum of sentence, but the discretion shall be exercised with due regard to larger interest of the society and it is needless to add that passing of sentence on the offender is probably the most public face of the criminal justice system. *State of Karnataka v, Sharanappa Basnagouda Aregoudar*, 2002 Cri L.J 2020 (SC) : AIR 2002 (SC) 1529 : 2002(2) Crimes 30 : 2002(3) Scale 83.

Sentence—Lenient view. Coming to the question of sentence, in *Dalbir Singh v. State of Haryana*, 2000(5) SCC 82 : 2000 AIR SCW 1653, Para 13, it has been stated as follows :

> "......While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the Court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles."

Kuldeep Singh v. State of H.P., AIR 2008 SC 3062 : 2008 (10) SCR 1063 (SC) : 2008 (8) JT 219 (SC) : 2008 (10) Scale 64 (SC) : 2008 (7) SRJ 560 (SC) : 2008 CrLJ 3932 (SC) : 2008 (3) JCC 2141 (SC) : 2008 (3) Recent CR 933 (SC).

8. Duty of motor car driver.—Where there is heavy vehicular traffic on the road and the road is invisible in a cloud of dust, it is the duty of all motorists under these conditions to stop their cars. To continue driving must obviously be dangerous when it is impossible to see anything at all in the neighbourhood. The position is aggravated when the motorist gets on the wrong side of the road and collides with another car. He is in such circumstances guilty of rash and negligent act. ILR 1940 Lah 646 : 42 Cr LJ 465 : AIR 1941 Lah 113. Accused is guilty under this section when he causes death of a child, by driving lorry at a speed of 50 or 55 miles per hour. AIR 1941 Lah 459 ; *see* also AIR 1945 All 16 : 49 Cr LJ 260 : ILR 1944 All 674. Negligence means want of requisite degree of care. ILR 1944 Nag 732 : AIR 1944 Nag 285. The principles of *resipsa loquitur* does not conflict with the principle of criminal jurisprudence that the burden of proving an offence lies on the prosecution. It means that the circumstances are themselves eloquent of the negligence of some body who brought about the state of things which is complained of. ILR (1945) Nag 556 : AIR 1945 Nag 242. In a serious case of rash driving of a motor bus, a lenient sentence should not be passed. 1937 MWN 1328 : but *see* AIR 1937 Bom 96 : 38 Cr LJ 600. But where the driver is guilty of error of judgment he should not be convicted under this section. AIR 1938 Sind 700 : 39 Cr LJ 566. The mere fact that just before the accident the accused asked his driver to blow the horn and overtake the car which was going ahead does not warrant a charge under Section 304-A read with Section 114. AIR 1939 Mad 571 : 40 Cr LJ 850. Mere velocity of the vehicle is not the only criterion of rash and negligent driving. It may consist in talking, while driving, risks which, by the exercise of little diligence, could have been avoided. AIR 1935 Nag 200 : 36 Cr LJ 1368 ; *see* also AIR 1934 Mad 209 : 35 Cr LJ 691. A driver of a motor vehicle who is himself negligent cannot plead in his defence the negligence of a pedestrian whom he knocked unconscious and killed. *Ibid* ; *see* also AIR 1938 Sind. 100 : 39 Cr LJ 566. But *see* AIR 1957 MP 236 : 1957 Cr LJ 1416 (where contributory negligence can be pleaded) ; 1963 (1) Cr LJ 692 ; 1962 All Cr 376 : 1962 (1) Cr LJ 189 ; AIR 1958 MP 205 : 1958 MPC 213 : 1958 Jab LJ 331 : ILR 1957 MP 357 : 1958 Cr LJ 1032, where it was held that plea of contributory negligence was open also to a driver not possessing licence.

A driver who suddenly fasted with a perilous situation had to decide in split second how best to act in order to avoid it and even if he decided upon a cause which might subsequently be shown to be wrong, he was not criminally liable, 1964 MPLJ (Notes) 63. The Court has to judge what is the amount of care and circumspection which a prudent and reasonable man could consider it to be sufficient having regard to all circumstances of the case. 1979 Cr LJ 1255.

9. Negligence.—Negligence is an omission to do something which a reasonable and prudent man guided upon those considerations which would ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. *State of Maharashtra vs. Dhananjay Laxmanrao Bhagat and Ors.*, 2010 (2) CrLJ 1980 (Bom) (Nagpur).

Negligence or rashness—Meaning of. Sec. 304-A speaks of causing death by negligence. This Sec. applies to rash and negligent acts and does not apply to cases where death has been voluntarily caused. This Sec. obviously does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a rash and negligent act. A negligent act is an act done without doing something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or act which a prudent or reasonable man would not do in the circumstances attending it. A rash act is a negligent act done precipitately. Negligence is the genus, of which rashness is the species. It has sometimes been observed that in rashness the action is done precipitately that the mischievous or illegal consequences may fall, but with a hope that they will not. Lord Atkin in *Andrews v. Director of Public Prosecutions* (1937) AC 576 at p. 583 : 2 All ER 552) observed as under:

> "Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied 'recklessness' most nearly covers the case. It is difficult to visualize a case of death, caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter; but it is probably not all embracing, for

> 'recklessness' suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it, and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction." *State of Karnataka v. Muralidhar*, AIR 2009 SC 1621.

Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'. *Jacob Mathew* v. *State of Punjab*, 2005 CR LJ 3710 (SC) : AIR 2005 (SC) 3180 : 2005(6) SCC 1 : 2005(5) Supreme 297 : 2005(3) Crimes 63 (SC).

What constitutes negligence has been analysed in *Halsbury's Laws of England (4th Edition) Volume 34 paragraph 1 (para 3)* as follows :

> "Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care negligence in the popular sense has no legal consequence, where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury. The duty of care is owned only to those persons who are in the area of foreseeable danger, the fact that the act of the defendant violated his duty of care to a third person does not enable the plaintiff who is also injured by the same act to claim unless he is also within the area of foreseeable danger. The same act or omission may accordingly in some circumstances involve liability as being negligent although in other circumstances it will not do so. The material considerations are the absence of care which is on the part of the defendant owed to the plaintiff in the circumstances of the case and damage suffered by the plaintiff, together with a demonstrable relation of cause and effect between the two".

In this context the following passage from *Kenny's Outlines of Criminal Law, 19th Edition* (1966) at page 38 may be usefully noted :

> "Yet a man may bring about an event without having adverted to it at all he may not have foreseen that his actions would have this consequence and it will come to him as a surprise. The event may be harmless or harmful. If harmful, the question rises whether there is legal liability for it. In tort at common law this is decided by considering whether or not a reasonable man in the same circumstances would have realised the prospect of harm and would have stopped or changed his course so as to avoid it. If a reasonable man would not, then there

> is no liability and the harm must lie where it falls. But if the reasonable man would have avoided the harm then there is liability and the prepertrator of the harm is said to be guilty of negligence. The word negligence denotes and should be used only to denote, such blameworthy inadvertence, and the man who through his negligence has brought harm upon another is under a legal obligation to make reparation for it to the victim of the injury who may sue him in tort for damages. But it should now be recognized that at common law their is no criminal liability for harm thus caused by inadvertence. This has been laid down authoritatively for manslaughter again and again. There are only two states of mind which constitute *mens rea* and they are intention and recklessness. The difference between recklessness and negligence is the difference between advertence and inadvertence they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence The common habit of lawyers to qualify the word "negligence" with some moral either such as 'wicked' 'gross' or 'culpable' has been most unfortunate since it has inevitably led to greet confusion of thought and of principle. It is equally misleading to speak of criminal negligence since their is merely to use an expression in order to explain itself."

In a case, the deceased fell down from third floor, while he was watching tying of rope to weight which was being lifted from ground floor and died. It was held that the act of the deceased could not be attributed to the accused persons who were lifting weight and that there was a rash and negligent act on the part of the accused, more so when there was absence of *mens rea. G.D. Ghai* v. *State of Karnataka*, 2004 Cr LJ 1024 : 2004(2) Crimes 34 : 2004(2) Rec Cri R 561 : AIR 2004 Kant HCR 205.

"Negligence", says the *Restatement of the law of Torts published by the American Law Institute (1934) Vol.I.* Section 28 "is conduct which falls below the standard established for the protection of others against unreasonable risk of harm". It is stated in *Law of Torts by Fleming at page 124 (Australian Publication 1957)* that this standard of conduct is ordinarily measured by what the reasonable man of ordinary prudence would do under the circumstances. In *Director of Public Prosecutions* v. *Camplin* (1978) 2 All ER 168 it was observed by *Lord Diplock* that "the reasonable man" was comparatively late arrival in the laws of provocation. As the law of negligence emerged in the first half of the 19th century it became the anthropomorphic embodiment of the standard of care required by law. In order to objectify the law's abstractions like "care" "reasonableness" or "foreseeability" the man of ordinary prudence was invented as a model of the standard of conduct to which all men are required to conform.

In *Syed Akbar* v. *State of Karnataka*, (1980) 1 SCC 30 : 1979 Cri LJ 1374 it was held that "where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgement. As pointed out by Lord Atkin in *Andrews* v. *Director of Public Prosecutions* (1937) (2) All ER 552) simple lack of care such as will constitute civil liability, is not enough; for liability under the criminal law very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied 'rackless' most nearly covers the case."

According to the dictionary meaning 'reckless' means 'careless', 'regardless' or 'heedless' of the possible harmful consequences of one's acts. It presupposes that if thought was given to the matter by the doer before the act was done. It would have been apparent to have that there was a real risk of its having the relevant harmful consequences, but granted this recklessness covers a whole range of states of mind from failing to give any thought at all to whether or not there is any risk of those harmful consequences, to recognizing the existence of the risk and nevertheless deciding to ignore it. In *R.* v. *Briggs* (1997) a All ER 475 it was observed that a man is reckless in the sense required when he carries out a deliberate act knowing that there is some risk of damages resulting from the act but nevertheless continues in the performance of that act.

In *R.* v. *Caldwell* (1981) 1 All ER 961, it was observed that :—

> "Nevertheless, to decide whether someone has been 'reckless' whether harmful consequences of a particular kind will result from his act, as distinguished from him actually intending such harmful consequences to follow does call for some consideration of how the mind of the ordinary prudent individual would have reacted to a similar situation. If there were nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility of that kind of harmful consequences, the accused would not be described as 'reckless' in the natural meaning of that word for failing to address his mind to the possibility nor if the risk of the harmful consequences was so slight that the ordinary prudent individual on due consideration of the risk would not be deterred from treating it as negligible could the accused be described as reckless in its ordinary sense if, having considered the risk, he decided to ignore it (In this connection the gravity of the possible harmful consequences would be an important factor. To endanger life must be one of the most grave). So to this extent, even if one ascribes to reckless only the restricted meaning adopted by the court of Appeal in Stephenson and Briggs, of foreseeing that a particular kind of harm might happen and yet going on to take the risk of it. It involves a test that would be described in part as objective in current legal jargon questions of criminal liability are seldom solved by simply asking whether the test is subjective or objective."

The decision of *R.* v *Caldwell (Supra)* has been cited with approval in *R* v. *Lawrence* (1981) 1 All ER 974 and it was observed that:

> "--- Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if , before doing the act. He either fails to give any thought to the possibility of there being any such risk or having recognized that there was such risk. He nevertheless goes on to do it".

In *M. Shafi Garoo* v. *The State*, 2000 Cri LJ 2172 (Del.) death of a caddie was caused due to rash and negligent stroke of player while playing golf and a charge was framed under Section, 304A, IPC. The prosecution case hinged solely on the evidence of the caddies who opined that had the petitioner played the stroke with case and caution, the ball would not have hit the deceased. The Court observed as under :

> "The question for consideration is whether the opinion of the said witnesses who are to be examined as expert witnesses, measures up to the well accepted principles of judging the credibility of such an evidence. There is nothing in the statements of the said witnesses to show or suggest that they had made any scientific study or research in respect of the game of golf. No doubt, caddies might have acquired some experience in the game of golf but that is not sufficient to make them as experts in the said game and to give the label of expert evidence to their evidence. That apart, one fails to understand what is care or caution which could have been exercised by the petitioner in playing of offending stroke. It is not that the deceased caddie was standing in the line of the stroke and that petitioner should not have hit the ball till the caddle moved out of the way. It is worth mentioning that the site plan prepared by the investigation officer clearly show that at the relevant time the deceased Amit James was not near or around the petitioner. On the contrary it indicates that there was sufficient distance between the two. It also indicates that the deceased caddie was out of the line of the stroke. In these circumstances, the petitioner's act of playing the offending stroke did not create an obviously or real risk or harmful consequences resulting from it. While playing the offending stroke, the petitioner was not taking any risk in difference to the consequences. That being so, this circumstances of playing the stroke did not bespeak negligence or dereliction of duty to exercise due care and caution.
>
> "I find that there is nothing on the record to show that at the relevant time the petitioner did not exercise reasonable care to ensure that the deceased caddie was not exposed to any danger or that the petitioner had played the offending stroke in such a manner as to create an obvious or serious risk of causing physical injury to some person who might happen to be present in the golf course and that in playing the stroke in that manner the petitioner did so without having given any thought to the possibility of there being any such risk or having recognized that there was some risk involved, had nonetheless gone on to take it. It appears that the stroke played by the petitioner had accidentally deflected causing fatal injury to the deceased caddie. No reasonable player could be expected to anticipate the extraordinary event that happened on the day in question and led to consequences that could not reasonably be anticipated. An error of judgement of the kind such as the one in the instant case which comes to light only on post accident reflection, but could not be foreseen by the petitioner in that fragmented moment before the accident, is not a sure indeed of culpable negligence within the meaning of section 304-A IPC."

In a case, the car being driven by the accused hit a road side tree resulting in the death of two persons hurt travelling in the car in addition to causing hurt to another occupant and grievius to another occupant of the car. The road was of a width of 19 ft of cement and tar road with 6 ft Kacha road on either side. According to report of 1 MV Inspector the accident was not due to mechanical defect in the vehicle. The Court held that in such a situation, an accident of that nature would *prime facie* show that the same could not be accounted to anything other than the negligence of the driver of the vehicle and that a presumption in that regard arose. The Court further held that it was for the accused to explain how the accident occured without the negligence on his part. *Keashavamurthy v. State* 2002 Cri LJ 103 (Kant).

In *Aman Pal v. State* 2002 Cri LJ 290(All) gun shot was fired deceased, his legs were form, thereafter his head was severed from the trunk and headless dead body was burnt. The eye-witness and medical evidence supported the prosecution story. FIR containing the names of all assailants was lodged promptly. The evidence of eye-witness was found reliable and story corroborated by other evidence. Conviction under Section 302 read with 149, 148 and 201, IPC was held proper.

In the case the injured was taken to dispensary. Obviously when the child was taken to the dispensary it was the duty of the Pharmacist to either diagnose the injury correctly or advise for immediate check up by an expert or doctor. In absence of such advice by pharmacist the Headmaster or the Class-Teacher could not have realized the gravity of the injury. As it appears from the materials that child was brought to the Headmaster who offered him a stool to sit. The complainant was informed over phone about the incident and on her query the Headmaster also intimated that there is nothing to worry about and since no such apprehension was ever expressed by pharmacist and when the child was found deteriorating he was immediately sent back in the school bus. In such circumstances the petitioners can not he held liable for negligence causing death of the child. *Ramesh Chandra Mohapatra and another v. State of Orissa and others*, 2002 Cri LJ 3453 : 2002(3) Crimes 119 : 2002(3) Cur Cri R 66.

Although in an appeal from an order of acquittal the powers of the High Court to reassess the evidence and reach its own conclusions are as extensive as in an appeal against an order of conviction, yet, as a rule of prudence it should always give proper weight and consideration to such matters as (i) the views of the trial Judge as to the credibility of the witnesses; (ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (iii) the right of the accused to the benefit of any doubt; and (iv) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses, where two reasonable conclusions can be drawn on the evidence on record the High Court should as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the Court below. In other words, if the main grounds on which the Court below has based its order acquitting the accused, are reasonable and plausible, and cannot be entirely and effectively dislodged or demolished, the High Court should not disturb the acquittal. *State of Rajasthan v. Kesa and others.* 2002 Cri LJ 432 Raj. H.C.

10. Allegation of gross negligence.—The plea of Association of Victims of Uphaar Tragedy to frame charges under Section 304 IPC against accused Shri. Sushil Ansal and Shri Gopal Ansal, in addition to the charges already framed against them, cannot be sustained on them, in as such as *prima facie* a case of negligence only is made out against them. The allegations against them show gross negligence, want on carelessness and callous indifference with regard to the upkeep and maintenance of the cinema. Had rapid dispersal facilities been available to the patrons in the balcony, no death or injury could have taken place and as such, this court is of the considered view that there are no good and sufficient grounds for slapping a charge under Section 304 IPC against these two accused. *Sushil Ansal v. State*, 2002 Cri LJ 1369 (Delhi) : 2002(4) All Cri LR 527 : 2002(1) Cur Cri R 309 : 2002(95) DLT 623.

11. Criminal Negligence.—Criminal negligence means gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard an individual in particular against injury. *State of Maharashtra vs. Dhananjay Laxmanrao Bhagat and Ors.*, 2010 (2) CrLJ 1980 (Bom) (Nagpur).

"Criminal negligence" is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge arises, was the imperative duty of the accused person to have adopted. 30 CWN 66, *see* also 1952 ALJ 553 : 1952 AWR (HC) 604. Where owing to strong wind and rough water, a ferry-boat overturns and sinks resulting in loss of life, the lesses of the ferry cannot be convicted of an offence under Section 304A, Penal Code, unless it is shown that the boat, although overcrowded was in an unseaworthy condition at the time of the occurrence. 16 Cr LJ 72 : 26 Ind Cas 664. Where death is caused by a negligent act, an offence under this section has not been committed inasmuch as there was no likelihood of the result following. 1 M 224 : 1 Weir 325 ; AIR 1941 Mad 766 : 43 Cr LJ 126. Contributory negligence on the part of person killed is no defence of itself to a charge under Section 304-A. AIR 1938 Sind 100 ; *see* also 6 All 248 : 1884 AWN 71.

Very high degree of negligence is required. Charge of professional negligence on a medical person is a serious one as it affects his professional status and reputation and as such the burden of proof would be more onerous. A doctor cannot be held negligent only because something has gone wrong. He also cannot be held liable for mischance or misadventure or for an error of judgment in making a choice when two options are available. The mistake in diagnosis is not necessarily a negligent diagnosis. Even under the law of tort medical practitioner can only be held liable in respect of an erroneous diagnosis if his error is so palpably wrong as to prove by itself that it was negligently arrived at or it was the product of absence of reasonable skill and care on his part regard being held to the ordinary level of skill in the profession. For fastening criminal liability very high degree of such negligence is required to be proved. Death is the ultimate result of all serious ailments and the doctors are there to save the victims from such ailments. Experience and expertise of a doctor are utilised for the recovery. But it is not expected that in case of all ailments the doctor can give guarantee of cure. *Malay Kumar Ganguly vs Sukumar Mukherjee & Ors.*, 2010 AIR SCW 769 : AIR 2010 SC 1162

Where a snake-charmer, exhibiting a cobra with unextracted fangs in public, placed it on the head of one in the crowd to display his own skill and with no intention of causing harm, whereupon the cobra, in being pushed off the spectator, hit him and caused his death, *held*, that the snake-charmer was guilty of an offence under Section 304 and not merely under Section 304-A of the Penal Code. 5 Cal 351 : 1 CLR 580. Where a girl 17 years of age being tired of her husband's ill-treatment attempted to commit suicide by jumping into a well and she has no consciousness that her child was on her neck and she jumped with the child and the child died of the jump though the girl survived. *Held*, that she was guilty under Section 304-A. 27 Bom LR 604 : 87 Ind Cas 840 : 26 Cr LJ 1016 : A1R 1925 Bom 310.

The accused who is arraigned with negligence cannot claim the benefit of an error of judgment when she exercised none. 18 SLR 199 : AIR 1925 Sind 233. The accused's liability is determined by what is the proximate cause. If the proximate cause is negligence of the accused, the presence of another and contributory cause is not a defence. *Ibid* death should be direct result of rash and negligent act, 145 Ind Cas 612 : 1933 ALJ 205 : 34 Cr LJ 1013 : 55 All 263 : AIR 1933 All 232 : but *see* AIR 1937 Bom 96 : 38 Cr LJ 660. Person killing another in act of unloading pistol which he knows to be loaded is guilty of negligence. AIR 1930 Lah 462 : 1930 Cr C 531. The accused who was driving a motor-bus when coming across a stationary tram car instead of proceeding straight drove the bus to the other side of the tram with the result that a boy was knocked down and killed. It appeared that the accused did not blow the horn while so crossing and that he accelerated the speed while in the act of crossing and immediately after. *Held*, that the act of the driver in making the deviation was not such a rash act as would bring the case within Section 304-A, I.P. Code. *Held*, however that the conduct of the accused is not blowing the horn and in accelerating the speed just when passing close to the tramcar amounted to culpable negligence and that he was liable to be convicted under Section 304-A, I.P. Code. 30 Bom LR 665 : 11 Ind Cas 657 : 29 Cr LJ 897 : AIR 1928 Bom 208.

Prosecution must prove accused guilty of culpable negligence to bring case under Sections 304-A and 338. 1962 Raj LW 281. The accused a snake charmer administering his pills disciples along with heated liver of .goats, but in the absence of proof that death was the direct result of taking pills, he can not be held guilty under Sections 304-A and 337. 30 Cut LT 18 : 1964 (2) Cr LJ 42 : AIR 1964 Ori 173.

Victim died due to drowning in swimming pool. Deceased himself had unauthorisedly and surreptitiously entered in pool which was meant for adult trained swimmer and drowned. None of the witnesses deposed about negligent act of any of the accused which can be said to have caused death of deceased or which could establish connection between the death of deceased as direct result of negligence of any of the respondents/accused. The trial Court did consider the evidence of each witness examined in the case but could not find acceptable evidence to establish nexus between death of deceased with any rash and negligent act of any of the accused, as proximate cause of death. *State of Maharashtra vs. Dhananjay Laxmanrao Bhagat and Ors.*, 2010 (2) CrLJ 1980 (Bom) (Nagpur).

Criminal rashness is hazarding a dangerous or wanton act with the knowledge that is so and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences, criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arises, it was the imperative duty of the accused person to have adopted. ILR 1962 Nag 93 : 1952 Cr LJ 1191 : AIR 1952 Nag 268.

A ferry contractor whose previous licence for service had expired took the risk of putting the boat in water and ferring passenger and transporting them as floods in the river were receding was guilty under Section 304-A for rash and negligent act, but the servants of the ferry contractor were not guilty under the section. 1962 All Cr R 257 : 1963 All (1) Cr LJ 44 : ILR 1962 Bom 404 : AIR 1963 Bom 1.

Owner fixing live naked electric wire of high voltage across passage to his latrine to dissuade trespassers but without giving any warning that the wire was live one. The trespasser got shock and died some time after. *Held*, that the occupier is guilty of offence under Section 304-A, (1964) 1 SCJ 417 : (1964) 2 SCA 198 : (1963) 2 SCWR 419 : 1963 Cur LJ (SC) 123 : 1964 (1) Cr LJ 138 : AIR 1964 SC 205 (To become crime, act need not be actionable wrong) *Ratnappa Shivaalingappa Jeevani & Anr.* v. *State of Karnataka*, 2006 Cr LJ 1579.

It was allged that the accused had obtained direct illegal connection from the electric pole. Deceased came into contact with the same and died due to electrocution in neighbouring field of accused. charge of theft of energy was not proved against the accused. Evidence showed that the agriculturists used uninsulated electric fencing around their lands to protect crops from wild animals. Owner of field where dead body was found and other neighbouring agriculturists were not examined. It was held that the mere fact that wire was running up to a particular point, it could not be said that the said act would have been Act of accused and this conviction of accused under section 304A was not proper. *Jodu Ramulu* v. *State of AP*, 2005 Cr LJ (NOC) 216 (AP) : (2005) 1 Andh LT (Cri). 9.

Criminal negligence has been defined as meaning gross and culpable neglect of failure to exercise the reasonable and proper care which it was the imperative duty of the accused to have exercised. (1968) 1 SCR 121 ; AIR 1971 Bom 164 : 72 Bom LR 492 ; 1980 Cr LJ (NOC) 132 : 49 Cut LT 337 ; AIR 1972 SC 685 : 1972 Cr LJ 496 ; *Jacob Mathev* v. *State of Punjab*, 2005 Cr LJ 3710 (SC).

The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'. *Jacob Mathew* v. *State of Punjab*, 2005 Cr LJ 3710 (SC) : AIR 2005 (SC) 3180 : 2005(6) SCC 1 : 2005(3) Crimes 63 (SC) : 2005(5) Supreme 297.

The *sine qua non* for an offence under Section 304-A namely rashness or negligence was singularly missing and the charge so framed should be groundless, 1981 Cr LJ 1067 ; 1979 Cr LJ 1281.

12. Criminal proceedings—Quashing of.—The petitioner gave on contract repair of well when two persons got buried under the debris due to collapse of wall. The occurrence was just an accident and could be termed as misfortune and that criminal intention to cause death cannot be imputed to petitioner, under Section 304-A, I.P.C. criminal proceedings quashed. *Dharampal* v. *State of Haryana*, (1995) 1 CC Cases 407 (P & H).

Petitioners were laymen they could not be held liable for negligence of persons who were constructing it. At any rate, death was not as a result of act of two petitioners. Hence FIR in question as a whole and consequent proceedings are quashed. *Krishan Lal* v. *State of Haryana*, (1994) 1 Recent CR 259 (P & H).

In a Supreme Court case, the accused was charge-sheeted for offence under Section 304A IPC triable by Magistrate. Subsequently, the charge was altered to Section 304, Part-II triable by Court of Session. It was held that court of trial was empowered to alter charge to Section 304, Part-II triable by Court of Session, as it caused no prejudice to accused and the trial was directed to proceed on the basis of charges framed by Magistrate's Court. It was clarified that if Magistrate came to the conclusion that there was sufficient material to charge serious offence under Section 302, Part-II, he would proceed to do so. Finding given by the High Court in a petition under Section 482, Cr PC for quashing charge as to non-existence of material to frame charge for an offence under Section 304, Part-II IPC was held premature. *State of Maharashtra* v. *Salman Salim Khan*, 2004 Cr LJ 920 : AIR 2004 (SC) 1189 : 2004(1) Crimes 172 : 2003(8) Supreme 891 : 2004(1) SCC 525.

13. Criminal negligence of a medical practitioner.—Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence. *Jacob Mathew* v. *State of Punjab*, 2005 Cr LJ 3710 (SC) : AIR 2005 (SC) 3180 : 2005(6) SCC 1 : 2005(3) Crimes 63 (SC) : 2005(5) Supreme 297.

Child suffering from Dengue fever died in hospital of accused while taking treatment. District Civil Surgeon reported that excess fluid was administered to child which was fatal. Record to prima facie indicate negligence on part of accused. Held, he cannot be discharged. *Dashavatar Gopalkrishna Bade vs State of Maharashtra*, 2010 (4) CriLJ 4056 (Bom).

Doctor caused death of deceased as he put oxygen mask on deceased which was without oxygen in cylinder. Civil Surgeon wrote letter to in-charge of Police Station that it was responsibility of Ward-in-charge to check whether cylinders were empty. He did not mention that for this act, the doctor has responsible. Similarly, witness ward-incharge has mentioned that in emergency it is his duty to check the oxygen cylinder as to whether the same is filled or empty. This letter and the statement of this departmental witness indicate that prima faciely it was not the duty on doctor to check the cylinder. It is a fact that they did not treat the deceased at all. On these facts of their non-availability, they cannot be held responsible for such criminal negligence, on which they can be prosecuted for the offence punishable under Section 304-A of IPC. As rightly submitted on behalf of these doctors, at the most they can be dealt with in accordance with their service rules, if any lapse appears on their part. *State of M. P. etc vs Ramlakhan Singh & Ors. etc.*, 2010 Cri LJ 1574 (MP).

Doctor was not available when called in emergency and as result patient died. It is a fact that they did not treat the deceased at all. On these facts of their non-availability, they cannot be held responsible for such criminal negligence, on which they can be prosecuted for the offence punishable under Section 304-A of IPC. As rightly submitted on behalf of these doctors, at the most they can be dealt with in accordance with their service rules, if any lapse appear on their part. *State of M. P. etc vs Ramlakhan Singh & Ors. etc.*, 2010 Cri LJ 1574 (MP).

The doctor is not presumed to have given guarantee to cure. He is required to exercise the degree of care and skill expected of a reasonable and prudent medical practitioner. It is a matter of common sense that a medical practitioner is not obliged and can never be expected to achieve success in all cause. His duty like other professionals is to exercise reasonable care, caution and skill. If he is found failing in exercise of such things, obviously then, he is to be visited with legal consequences either under the civil law or under criminal law. Even a best surgeon is likely to make honest error in judgement. Therefore, what is required to be judged is causation, nexus of injury with the action alleged to be negligent. A doctor is never presumed to be infallible. He is also not obliged to achieve success in every clinical case that he treats. Doctor cannot be held negligent simply because something goes wrong. Doctor can be found guilty only if he falls short of standard of reasonable skilful medical practice. The part played by Anaesthetist by having failed to check up during the preoperative anaesthesia test as to whether the patient would withstand 3 ml. local anaesthesia drug which was administered through spinal cord to the patient, especially when he had sustained injuries both on the head and leg, may amount to criminal negligence which would warrant Anaesthetist facing the proceeding under Section 304-A, I.P.C. But such a criminal negligence cannot be attributed to the surgeons though it is stated by the prosecution that both the doctors who were responsible for the medical treatment for the patient, have not checked whether all medical check up formalities including anaesthesia test was properly performed before the operation. The responsibility of those doctors who were incharge of operation and their failure to checkup the performance of the medical formalities through Anaesthetist before commencing operation, might reflect negligence, which may attract civil law and certainly not criminal law. *Lakshmanan Prakash* v. *State*, 1999 Cri LJ 2348 (Madras).

Before parting with the case of *Lakshmanan Prakash* the Madras High Court further observed that—

> "After the instant case was reported in the newspaper, immediately after the registration of the case, there was a fear both in the mind of the public and in the

mind of the doctors. The doctors became reluctant to conduct even emergent operations apprehending the criminal prosecution. The people also began to be afraid to go to the doctors to undergo operation apprehending the mismanagement by the doctors. Though this fear got subsided in course of time, this Court feels that the fear psychosis developed in the mind of the doctors apprehending the arrest and prosecution, has got to be erased. At the same time, the doctors also should be reminded of their duties so that the fear of the public for the doctor's mishandling could be alleviated. The prime object of the medical profession is to render service to humanity with full respect for the dignity of man. The reward of financial gain is only a subordinate consideration. Whosoever choose this profession assumes the obligation to conduct himself in accordance with its ideals *viz.* A physician should be an upright man, instructed in the art of healings, physicians should merit the confidence of patients entrusted to their cares, rendering to each a full measure of service and devotion. Physician should try continuously to improve medical knowledge and skill and should make available to their patients and colleagues the benefits of their professional attainments . In his management, the physician should never forget that the health and the lives of those entrusted to his care depend on his skill and attention. A physician is expected to uphold the dignity and honour of his profession. Once having under taken a case the physician should not neglect the patient. The doctors declare, while taking their pledge at the time of registration, that they would maintain the utmost respect for human life and practise their profession with conscience and dignity, and that the health of the patients would be their first consideration."

A great care should be taken before imputing criminal negligence to professional man acting in the course of his profession. A doctor is not criminally responsible for a patient's death unless his negligence and incompetence passed beyond a mere matter of comprehension and showed such disregard of for life and safety as to amount to a crime against the State. The degree of negligence required is that it should be gross, and neither a jury nor a Court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation. Merely because too strong a mixture was once dispensed and a number of persons were made gravely ill, a criminal degree of negligence cannot be said to have been proved. 207 IC 104 : 44 Cr LJ 569 : A1R 1943 PC 72 : 1943 ALJ 427 ; *see* 1965 [1) Cr LJ 763 : AIR 1265 SC 831 [a homeopath administering poisonous medicine without studying its effect).

The death of patient was caused due to negligence of accused in not putting a cuffed endotracheal tube of proper size in a prescribed manner. It was held that though act may amount to negligence but it was not so reckless or grossly negligent as to make him criminally liable. Proceedings were quashed. *(Dr.) Duresh Gupta* v. *Govt. of NCT of Delhi*, 2004 Cr LJ 3870 (SC) : AIR 2004 (SC) 4091 : 2004 (3) Crimes 149 : 2004 (6) Scale 432.

A doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not, in fact, possess that knowledge, he is *prima facie* acting with rashness or negligence. *Jacob Mathew* v. *State of Punjab*, 2005 Cr LJ 3710 (SC) : AIR 2005 (SC) 3180 : 2005(6) SCC 1 : 2005(3) Crimes 63 (SC) : 2005(5) Supreme 297.

The cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304A of IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards. However, it cannot be said that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that is to emphasize is the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. *Jacob Mathew* v. *State of Punjab*, 2005 Cr LJ 3710 (SC) : AIR 2005 (SC) 3180 : 2005(6) SCC 1 : 2005(3) Crimes 63 (SC) : 2005(5) Supreme 297.

All the averments made in the complaint, even if held to be proved, do not make out a case of criminal rashness or negligence on the part of the accused appellant. It is not the case of the complainant that the accused-appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a case of non-availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law (or may not be—we express no opinion thereon) but the accused appellant cannot be proceeded against under Section 304A IPC on the parameters of Bolam's test. *Jacob Mathew* v. *State of Punjab*, 2005 Cr LJ 3710 (SC) : AIR 2005 (SC) 3180 : 2005(6) SCC 1 : 2005(3) Crimes 63 (SC) : 2005(5) Supreme 297.

The spinal anesthesia was given and it developed respiratory problems. The Nursing Home was devoid of basic facilities. Hence it cannot escape the liability and are liable to be tried for negligence. State *of M.P.* v. *(Dr.) Bharti Patidar*, 1995 Cr LR 243 (MP).

Negligence on part of hospital and each of treating doctors—Cumulative effect. A patient would feel the deficiency in service having regard to the cumulative effect of negligence of all concerned. Negligence on the part of each of the treating doctors as also the hospital may have been contributing factors to the ultimate death of the patient. But, then in a case of this nature, the Court must deal with the consequences the patient faced keeping in view the cumulative effect.

In the instant case, negligent action has been noticed with respect to more than one respondent. A cumulative incidence, therefore, has led to the death of the patient. It is to be noted that doctrine of cumulative effect is not available in criminal law. The complexities involved in the instant case as also differing nature of negligence exercised by various actors, make it very difficult to distil individual extent of negligence with respect to each of the respondent. In such a scenario finding of medical negligence under Sec. 304-A cannot be objectively determined.

This Court is of the opinion that for the death of deceased although all doctors were negligent, the extent thereof and keeping in view our observations made hereinbefore, it cannot be said that they should be held guilty for commission of an offence under Sec. 304-A of the Indian Penal Code. We furthermore in a case of this nature do not intend to exercise our discretionary jurisdiction under Article 136 of the Constitution of India having regard to the fact that a judgment of acquittal has been recorded by the Calcutta High Court. *Malay Kumar Ganguly vs Sukumar Mukherjee & Ors.*, 2010 AIR SCW 769 : AIR 2010 SC 1162

Contributory negligence—Determination of.—To conclude, it will be pertinent to note that even if we agree that there was interference by Kunal Saha during the treatment, it in no way diminishes the primary responsibility and default in duty on part of the defendants. In spite of a possibility of him playing an over-anxious role during the medical proceedings, the breach of duty to take basic standard of medical care on the part of defendants is not diluted. To that extent, contributory negligence is not pertinent. It may, however, have some role to play for the purpose of damages. *Malay Kumar Ganguly vs. Sukumar Mukherjee*, 2009 (9) SCC 221 : 2009 (10) JT 256 : 2009 (13) SCR 1 : 2009 (10) Scale 675 : 2009 (6) SLT 164.

Interference in treatment by husband of patient. It is to be noted here that Nursing Superintendent being a professional cannot take this plea. Moreover, the same is not borne out of records at AMRI. Even if we assume this statement to be true, in a professional setting of this nature, these interferences should have been resisted by them. Interference cannot be taken to be an excuse for abdicating one's responsibility especially when an interference could also have been in the nature of suggestion.

It will be pertinent to note that even if we agree that there was interference by husband during the treatment, it in no way diminishes the primary responsibility and default in duty on part of the defendants. In spite of a possibility of him playing an over-anxious role during the medical proceedings, the breach of duty to take basic standard of medical care on the part of defendants is not diluted. To that extent, contributory negligence is not pertinent. It may, however, have some role to play for the purpose of damages. *Malay Kumar Ganguly vs Sukumar Mukherjee & Ors.*, 2010 AIR SCW 769 : AIR 2010 SC 1162

Distinction with Tort Law or Consumer Protection Act. Standard of proof as also culpability requirements under Sec. 304-A of Indian Penal Code stands on an altogether different footing. On comparison of the provisions of Penal Code with the thresholds under the Tort Law or the Consumer Protection Act, a foundational principle that the attributes of care and negligence are not similar under Civil and Criminal branches of Medical Negligence law is borne out. An act which may constitute negligence or even rashness under torts may not amount to same under S. 304-A. *Malay Kumar Ganguly vs. Sukumar Mukherjee*, 2009 (9) SCC 221 : 2009 (10) JT 256 : 2009 (13) SCR 1 : 2009 (10) Scale 675 : 2009 (6) SLT 164.

Treatment not to be in accordance with medical protocol. The cleavage of opinion, if any, as we have noticed hereinbefore, is between pro-steroid group and anti-steroid group. Accepted treatment protocol so far as the pro-steroid group is concerned has also been noticed by us. We have proceeded to determine the question of negligence on the part of the respondents herein principally on the premise that even if the opinion of the pro-steroid group is followed, the respondents have failed and/or neglected to even act strictly in terms of the treatment protocol laid down by them. The opinion of the anti-steroid group appears to be more scientific and structured but the same by itself, we are conscious of the fact, would not lead us to the conclusion that the respondents are guilty of gross negligence.

It is also to be noted at this juncture, that there may well be a difference of opinion on the course of action to be adopted while treating a patient of TEN, but the treatment line followed by Dr. Mukherjee which entailed administration of 80 mg of Depomedrol injection twice is not supported by any school of thought. The treatment line, in this case, does not flow from any considered affinity to a particular school of thought, but out of sheer ignorance of basic hazards relating to use of steroids as also lack of judgment. *Malay Kumar Ganguly vs Sukumar Mukherjee & Ors.*, 2010 AIR SCW 769 : AIR 2010 SC 1162

Hospital knowingly fail to provide some amenities. This Court must bear in mind that negligence is attributed when existing facilities are not availed of. Medical negligence cannot be attributed for not rendering a facility which was not available. In our opinion, if hospitals knowingly fail to provide some amenities that are fundamental for the patients, it would certainly amount to medical malpractice. As it has been held in *Smt. Savita Garg vs. Director, national Heart Institute*, 2004 AIR SCW 5820, that a hospital not having basic facilities like oxygen cylinders would not be excusable. Therein this Court has opined that even the so-called humanitarian approach of the hospital authorities in no way can be considered to be a factor in denying the compensation for mental agony suffered by the parents. The aforementioned principle applies to this case also insofar as it answers the contentions raised before us that the three senior doctors did not charge any professional fees. *Malay Kumar Ganguly vs Sukumar Mukherjee & Ors.*, 2010 AIR SCW 769 : AIR 2010 SC 1162

Notice to doctor or hospital—Pre-requisites for issuing. While this Court has no sympathy for doctors who are negligent, it must also be said that frivolous complaints against doctors have increased by leaps and bounds in our country particularly after the medical profession was placed within the purview of the Consumer Protection Act.

Many doctors have stopped giving (even as family physicians) Morphia or Pethidine injection even in emergencies despite the fact that from the symptoms the doctor honestly thought that the patient was having a heart attack. This was out of fear that if the patient died the doctor would have to face legal proceedings.

Similarly in cases of head injuries (which are very common in road side accidents in Delhi and other cities) earlier the doctor who was first approached would started giving first aid and apply stitches to stop the bleeding. However, now what is often seen is that doctors out of fear of facing legal proceedings do not give first aid to the patient, and instead tell him to proceed to the hospital by which time the patient may develop other complications.

Hence Courts/Consumer Fora should keep the above factors in mind when deciding cases related to medical negligence, and not take a view which would be in fact a disservice to the public.

We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the Criminal

Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a *prima facie* case of medical negligence should notice be then issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in *Jacob Mathew vs. State of Punjab*, 2005 (6) SCC 1 : 2005 AIR SCW 3685, otherwise the policemen will themselves have to face legal action. *Martin F. D'Souza vs. Mohd. Ishfaq*, AIR 2009 SC 2049 : 2009 (3) SCC 1 : 2009 (2) JT 486 : 2009 (3) SCR 273 : 2009 (2) Scale 629 : 2009 (2) Supreme 40 : 2009 (2) SLT 20.

Criminal liability—*Doctor cannot be held guilty*. Charge of professional negligence on a medical person is a serious one as it affects his professional status and reputation and as such the burden of proof would be more onerous. A doctor cannot be held negligent only because something has gone wrong. He also cannot be held liable for mischance or misadventure or for an error of judgment in making a choice when two options are available. The mistake in diagnosis is not necessarily a negligent diagnosis. Even under the law of tort medical practitioner can only be held liable in respect of an erroneous diagnosis if his error is so palpably wrong as to prove by itself that it was negligently arrived at or it was the product of absence of reasonable skill and care on his part regard being held to the ordinary level of skill in the profession. For fastening criminal liability very high degree of such negligence is required to be proved. Death is the ultimate result of all serious ailments and the doctors are there to save the victims from such ailments. Experience and expertise of a doctor are utilised for the recovery. But it is not expected that in case of all ailments the doctor can give guarantee of cure. *Malay Kumar Ganguly v. Sukumar Mukherjee & Ors.*, 2010 AIR SCW 769 : AIR 2010 SC 1162

14. Guidelines for Medical practitioners.—Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced *prima facie* evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld. *Jacob Mathew* v. *State of Punjab*, 2005 Cr LJ 3710 (SC) : AIR 2005 (SC) 3180 : 2005 (6) SCC 1 : 2005 (5) Supreme 297 : 2005 (3) Crimes 63 (SC).

15. Death must be causa causans of rash or negligent act.—A conviction can be sustained under Section 304-A if death is the direct result of rash or negligent act of the accused. AIR 1959 MP 284 : 1959 Cr LJ 983 : 1960 Jab LJ 308 ; 61 Bom LR 1309 : ILR 1959 Bom 1753 ; AIR 1954 Assam 169 : ILR (1953) 5 Assam 412 : 1954 Cr LJ 1279. On materials of the case the Supreme Court held in AIR 1954 SC 271 : ILR 1954 Patiala 66 : 1954 Cr LJ 727, that the accused was guilty of an offence under Section 304-A as the death of the victim was the result of the rash and negligence act of the accused ; *see* also AIR 1960 MP 50 : 1960 Cr LJ 234.

Medical evidence as also the evidence of the witnesses, show that the driver was heavily drunk. Drunkenness without anything more, would constitute rashness. 1988 (1) Cri LC 118 (Ker).

In case of death occurred as a direct consequence of the gross and wilful negligence of the petitioner it was observed that to sustain a charge of causing death by negligent act it was necessary that death should have been the direct result of the negligent act. That act must be the proximate cause, without any other supervening act or intervention. 1987 Cri LJ 200 (Ker).

16. Conviction.—Death caused by negligence. Car-driver abruptly opening door of his car and knocking down cyclist. Just then lorry coming from behind running over cyclist who died. Death caused due to running over of lorry. Driver of lorry can be convicted under Section 304-A. It was held that car-driver though negligent can be convicted only under Section 337, I.P.C. *P.S. Jose* v. *State of Kerala*, 1994 Cri LJ 363 (Ker).

Conviction for rash and negligent driving—Validity. When deceased a girl was about to board offending bus driven by accused-driver took bus speedily and made her to fall down whereby she sustained injuries and ultimately died. No material contradiction in evidence of prosecution witnesses. The question that would arise is as to what made her to fall down from the bus? The accident occurred because of the conductor having given wrong signal and the driver having rash and negligently started and driven the offending bus without taking care to see as to whether the passengers, including the victim, boarded the bus properly or not. Hence, Absolutely there is no material contradiction in the deposition of witnesses. It is pellucidly and palpably clear that the occurrence took place because of the negligent act of the conductor in giving whistle and the driver of the bus having taken the bus in a rash and negligent manner. Neither the conductor nor the driver can fob off their respective responsibilities as against each other and try to wriggle out of the responsibilities also.

It can be said that occurrence took place because of negligent act of conductor in giving whistle and driver of bus having taken bus in a rash and negligent manner. Neither conductor nor driver can fob off their respective responsibilities by blaming each other. However, cutting across technicalities, the analysis of the depositions of those witnesses would reveal that the findings of the Courts below cannot be found fault with. As such, it is clear that both the driver and the conductor of the offending bus were responsible for causing the accident for which they have been rightly convicted by both the Courts. *Rajaram & Anr vs State*, 2010 Cri LJ 1644 (Madras).

Child suffering from Dengue fever died in hospital of accused while taking treatment. District Civil Surgeon reported that excess fluid was administered to child which was fatal. Record to prima facie indicate negligence on part of accused. Held, he cannot be discharged. *Dashavatar Gopalkrishna Bade vs State of Maharashtra*, 2010 (4) CriLJ 4056 (Bom).

Illegal long extension of electric wire by respondent causing death of deceased. Hence offence of culpable negligence was proved—Acquittal set aside and convicted and sentenced to pay fine of Rs. 5,000/- payable to L.Rs. of the deceased. *State of M.P.* v. *Bhagwandas*, (1995) 1 CCR 286 (MP).

Victim died due to electrocution. Prosecution of the accused for offence under Section 304-A. It was held that high degree of negligence and rashness has to be proved—Ordinary negligence not sufficient to record conviction. *State of H.P.* v. *Lilla Datt*, (1995) 1 Crimes 481 (HP).

When it is established that accused caused death of eight persons due to rashness and negligence of accused in motor accidents, conviction of accused was proper. *M.A. Waheed* v. *State*, 1996 Cr LJ 1059 (AP).

17. Sentence.—It is very dangerous to attempt to distinguish in cases falling under Section 304-A between the proximate and ultimate cause of death due to a rash and negligent act. The mere fact that a human life is lost due to negligent driving of motor car does not justify the Court in passing a deterrent sentence, if the loss of life could not have been reasonably anticipated by the accused. In considering the question of enhancement of sentence one has to consider whether the rash and negligent act of the accused shows consciousness on his part as regards the risk to which he was exposing other persons. The severity of the sentence must depend to a great extent on the degree of callousness which is present in the conduct of the accused. AIR 1937 Bom 96 : 38 Bom LR 1111 : 186 Ind Cas 870 : 38 Cr LJ 660 : 9 RB 411; *see* also AIR 1934 Oudh 18. It is no part of the duty of the Court to punish with savage sentences every motorist who has the misfortune to have an accident, which results in a loss of life, even though the accident is due to an error of judgment on the part of the driver. The circumstances of each case must be considered in imposing sentence. Moreover, one has to remember that driving motor cars has become an essential part of human activities and it is impossible to avoid a certain number of accidents. *Ibid.*

In a case of this sort the sentence to be imposed cannot be measured by the consequences of the act, unless those consequences were necessarily inherent in the act, 168 Ind Cas 865 : 38 Cr LJ 658 : 9 RB 410 : 38 Bom LR 1111 : AIR 1937 Bom 80. For sentence *see* also AIR 1960 Mys 177 : ILR 1959 Mys 477 : 1960 Mad LJ (Cr) 318 : 1960 Cr LJ 965 ; AIR 1960 Madh Pra 105 : 1959 MPLJ 856 : 1959 Jab LJ 495 : 1960 Cr LJ 482. In regard to the sentence the Court must keep out false prejudices in cases of accidents. AIR 1959 Mad 497 : 1959 Mad WN 67 : 1959 Mad LJ (Cr) 31 : (1959) 1 Mad LJ 46 : 1959 Cr LJ 1344. The imposition of one punishment on a driver of a motor vehicle under Section 304-A. I.P. Code for causing death by negligence and a further punishment for the same offence under Section 121 of the Motor Vehicles Act for using a vehicle in unsafe condition is opposed to law. AIR 1955 Mad 548 (1954) 2 MLJ 765 : 1965 Cr LJ 1267 ; AIR 1960 Mys 177.

Sentence—Lenient view. Coming to the question of sentence, in *Dalbir Singh v. State of Haryana*, 2000 (5) SCC 82 : 2000 AIR SCW 1653, Para 13, it has been stated as follows :

> "......While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the Court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles."

Kuldeep Singh v. State of H.P., AIR 2008 SC 3062 : 2008 (10) SCR 1063 (SC) : 2008 (8) JT 219 (SC) : 2008 (10) Scale 64 (SC) : 2008 (7) SRJ 560 (SC) : 2008 CrLJ 3932 (SC) : 2008 (3) JCC 2141 (SC) : 2008 (3) Recent CR 933 (SC).

The applicant was prosecuted for the offence punishable under Section 304A of the Penal Code but actually the applicant had given dash to a Police Officer who was trying to stop the vehicle and therefore, ought to have been prosecuted and tried for an aggravated assault, if not murder. This is not a case where benefit of probation could be extended to the applicant. The contention of the learned Additional Public Prosecutor is unexceptionable and therefore, there is no question of considering the applicant for being dealt with under the Probation of Offenders Act or under Section 360 of the CrPC in spite of his young age or absence of previous criminal history. It is true that the sentence imposed i.e. rigorous imprisonment for two years, was maximum prescribed for the offence punishable under Section 304A of the Penal Code. However, in the circumstances, recounted above, it cannot be said that the sentence calls for any interference. *Sanjay Rambhau Patil vs State of Maharashtra*, 2010 CriLJ 1407 (Bom.).

Bus was driven at high speed as stated by eye witness and not have any mechanical failure. Concurrent finding of fact that bus was being driven rashly and negligently. Six months' simple imprisonment and a direction to the appellant to pay a fine of Rs. 1,000/- for commission of the offence punishable under Sec. 304A and simple imprisonment for one month and to pay a fine of Rs. 500/- for the offence punishable under Sec. 279 of the Indian Penal Code cannot be said to be shocking. *B. Nagabhushanam v. State of Karnataka*, AIR 2008 SC 2557 : 2008 (8) SCR 444 (SC) : 2008 (5) SCC 730 : 2008 (6) JT 568 (SC) : 2008 (7) Scale 716 (SC) : 2008 (6) SLT 292 (SC) : 2008 (3) SCC (Cr) 61 : 2008 (2) JCC 1423 (SC) : 2008 (3) Recent CR 50 (SC).

Sentence shall be adequate and not only be symbolic. AIR 1966 Bom 122 : AIR 1961 Ori 95.

Where the deceased was thrown out of truck due to a jerk and case was pending for a longtime, the sentence was reduced to the period already undergone. *Bharat Pandhari Nath More* v. *State*, 2004 Cr LJ 205 (Bom) : 2004 All MR CCRi 136 : 2004(1) Bom Cr (cri) 958.

In a case where the death was caused by negligence, petitioner had already suffered rigour of trial for 13 years. He had already undergone incarceration for four months. The accused had no record of previous conviction. There was no complaint against him while he was on bail. It was held that no useful purpose would be served in requiring him to undergo remaining portion of his sentence at belated stage and hence the sentence of imprisonment was reduced to period already undergone. *Dhanpal Singh* v. *State*, 2004 Cr LJ 2724 : 2004(111) DLT 464 : 2004(74) DRJ 506.

In a case where the deceased was crushed under the wheel of truck while alighting, as his full part was entangled in the side hook of truck. The deceased had move the truck without ensuring that all the passengers had alighted safely. It was held that the benefit of probation of offenders Act could not be extended to accused in view of the fact that he was carrying passengers in flagrant violation of rules in open truck which was not meant for carrying passengers. *Munna Khan* v. *State of MP (Now Chhattisgarh)*, 2004 Cr LJ 525 (Chh) : 2003(8) All Ind Cas 298 : 2003(2) MPHT 29.

The trial Court by observing that the accused driver was a poor man of young age and swayed by nature of offence and circumstances under which the offence was committed, awarded sentence lesser than maximum punishment prescribed by law. The High Court held it improper. *Babul Chakraborty* v. *State of Tripura*, 2005 Cr LJ 4712 (Gau) : 2006(39) All Ind Cas 842 : 2006(1) Gau LR 568.

Where the incident of causing death by negligence driving occurred more than 10 years before and the accused was under stress and strain of investigation and trial, the sentence was reduced to three months simple imprisonment and fine of Rs. 1000/-. *State of HP* v. *Madan Lal*, 2005 Cr LJ 803 (HP) : 2004(2) Cur LJ (CCR) 22 : 2003(2) Shim LC 406.

The fact of the accused being a young boy of 24 years of age, this being his first offence and he being the only bread, earner of the family will have to be given some weight in considering quantum of sentence. *Sanjay* v. *State of Maharashtra*, 1999 Cri LJ 2923 (Bom).

Where a truck and auto-rickshaw collided against each other but due to the negligence of both the drivers, the rickshaw dashed against a child who was killed. The Supreme Court increased the fine and ordered a sum out of the fine to be paid to the mother. AIR 1977 SC 892 : 1977 Cr LJ 549 ; AIR 1972 SC 2127 : 1972 Cr LJ 1393 ; (1982) 2 SCC 439 (sentence of the raised from Rs. 2000/- to Rs. 10.000/- to be paid as compensation).

Six person's died due to rash and negligent driving. Others injured—Agony of four years in trial—Appeal not decided while six months passed—Benefit of probation was not given. Punishment was modified and sentence reduced. *Gurcharan Singh* v. *State of Punjab*, (1994) 2 CC Cases 1 : (1994) 1 CC Cases 267 : (1994) 1 Recent Cr R 580 : (1994) 3CC Cases 35 (P & H).

Majority of accidents are caused because of negligent and reckless driving. The purpose of punishment is to deter rash and negligent driving. Hence it is now to amend the provisions of Section 304-A to make it more stringent on question of punishment. These offenders do not deserve to be released on probation. *Pravinsinh Himatsinh Zala* v. *State of Gujarat*, (1995) 1 GLR 595 (Guj).

The deceased was standing on foot board and fell down on sharp turn in fast speed. He expired in hospital. Hence there is no merit in revision but sentence reduced to period already undergone. *Shivdev Singh* v. *State (Delhi Administration)*, (1995) 58 DLT 462 (Del).

Where car was in high speed and deceased received injuries while crossing the road because brake could not be applied—*Held*. sentence reduced to six months. *Chandramohan Nair* v. *State of Kerala*, 1994 SCC (Cri) 1750.

While negotiating a sharp turn truck of applicant brushed side by side against another truck coming from opposite direction resulted in death of one person and injuries to few others. It is correct that applicant alone was not responsible for accident. The drivers of both vehicles were rash and negligent. However it will not mitigate the responsibility of the applicant. Hence conviction under Sections 304-A and 279, I.P.C. is confirmed but sentence reduced to one month's simple imprisonment and fine increased to Rs. 5,000/- other sentences are upheld. *Sudesh Kashinath Naik* v. *State of Goa*, 1994 B Cr C 449 (Bom).

Prosecution for rash and negligent driving and hence was convicted. Appeal against the same was filed and conviction was sustained—However, in the peculiar facts of the case sentence reduced to period already undergone.—*Hari Ram* v. *State*, (1995) 1 Crimes 40 [Del).

Conviction was made under Section 304-A, I.P.C. Sentence of one year's, imprisonment with fine—Reduction of sentence was made with prolonged litigation. Hence it was held that sentence reduced to period of 7 months, already undergone. *Darshan Singh* v. *State of Punjab*, (1995) 2 CC Cases 547 (P & H).

Rash and 'negligent' driving of truck hence convicted—Concurrent findings—Prayer seeking reduction of sentence mitigating circumstances was considered, and sentence of imprisonment reduced to already undergone and fine imposed. Revision allowed partly. *Simrath Singh* v. State *of Rajasthan*, 1995 Cr LR (Raj) 344.

Where the accused, a truck driver, caused accident due to his rash and negligent driving resulting into death of three persons and injuries to five persons sitting in the truck, it was held that the accused did not deserve any leniency on account of delay of the disposal of the case and that the accused had to undergo the penance of the crime he had committed. *Chunni Lal* v. *State of Rajasthan*, 2000 Cri LJ 2499 (Raj).

There was negligent and rash driving—Three persons dead as a result, no help to victims as petitioner runaway—Benefit of probation was not given. But considering agony of trial sentence was reduced to one year from two years—Rs. 1.00 to 15.00 given to heirs. *Tulsa Ram* v. *State of Haryana*, (1994) 1 CC Cases 266 (P & H).

Where petitioner was only earning member of his family and was not previous convict—Benefit of probation be given—Awarded payment of Rs. 10,000 to the legal heirs of deceased. *Jagir Singh* v. *State of Punjab*, (1994) I CC Cases 630 : (1994) 2 CC

Cases 270 : (1994) 2 Crimes 566 : (1994) 2 Recent Cr R 118 : (1994) 2 Recent Cr R 350 (P & H).

Conviction order passed for an offence under Section 304-A, petitioner was the only earning member and was not previous convict. Hence sentence reduced to 3 months R.I. and payment of compensation to the decease awarded. *Gurinder Singh* v. *State of Punjab*, (1994) 3 CC Cases 548 (P & H).

Death was due to accident. Negligence of the driver established—Claim was made before claims Tribunal—Claim and appeal against dismissal, claimant was held entitled to award of Rs. 1,50,000/ *Haji Zainulla Khan* v. *Nagar Mahapalika, Allahabad*, 1994 SCC (Cri) 1568.

Conviction and sentence of fine of Rs. 500 was imposed—State appeal for enhancement of sentence. It was held the reasoning of Magistrate itself showed that he entertained about guilt of the accused. Hence matter is liable to be sent back for fresh trial. *State* v. *Ibrahimsab Maibubsab*, (1994) 2 Crimes 283 : (1994) 2 Kar LJ 176 (Kar).

18. Procedure.—Cognizable—Warrant—Not bailable—Not compou-ndable—Triable by Magistrate of the first class.

19. Acquittal.—After accident the petitioner did not lend any helping hand in order to remove the injured from site of accident to hospital. Hence grant of probation under Section 4(1) of Act, 1958 is not considered fit. However considering the agony of trial of 3-1/2 years undergone by him the sentence is reduced. *Jagtar Singh* v. *State of Punjab*, (1994) 2 CC Cases 234 (P & H).

The accused—Petitioner took himself to police station after causing accident resulting to death of cyclist. The petitioner is only bread winner of the family and had already undergone custody for a week and facing agony of trial and appeal since June, 1988. In the circumstances it is a fit case to release petitioner, giving him benefit of Section 4 of Act, 1958. Fine enhanced. *Madan Lal* v. *State of Rajasthan*, (1995) 1 WLC 228 (Raj).

Allegation was of negligent and careless driving resulting in death. One petitioner was the only earning member of family. Compensation granted by M.A.C.T.—Petitioner was not a previous convict—No misuse of bail was held. Benefit of probation may be given—After paying Rs. 8,000/- to heirs entitled to be acquitted. *Bhola Dass* v. *State of Punjab*, (1994) 1 CC Cases 262 : (1994) 1 Recent Cr R 88 (P & H).

In absence of any evidence that deceased-wife was subjected to cruelty for demand of dowry soon before her death, conviction of accused under Section 304-B not proper, *Inder Raj* v. *State of Rajasthan*, 1996 Cr LJ 924 (Raj).

20. Charge.—I (*name and office of Magistrate, etc.)* hereby charge you (*name the accused*) as follows :—

That, on or about the..........day of............ at.......... you caused the death of..........by doing a rash or negligent act not amounting to culpable homicide, and thereby committed an offence punishable under Section 304-A of the Indian Penal Code, and within my cognizance. And I hereby direct that you be tried on the said charge. The charge would be defective if it uses the words 'rashness and negligence'. AIR 1960, Madh Pra 105 : 1960 Cri LJ 482 : 1956 Jab LJ 495.

21. Benefit of probation.—Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, Criminal Courts cannot treat the nature of the offence under Section 304-A, I.P.C. as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobilies one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident or even if any accident occurs it need not necessarily result in the death of any human being or even if such death ensues he might not be convicted of the offence and lastly that even if he is convicted he would be dealt with leniently by the Court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of vehicle he cannot escape from jail sentence. This is the role which the Courts can play particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles. *Dalbir Singh* v. *State of Haryana*, 2000 Cri LJ 2283 (SC) : AIR 2000 (SC) 1677 : 2000(5) JT 463 : 2000(4) Scale 323 : 2000(3) Supreme 749.

The applicant was prosecuted for the offence punishable under Section 304A of the Penal Code but actually the applicant had given dash to a Police Officer who was trying to stop the vehicle and therefore, ought to have been prosecuted and tried for an aggravated assault, if not murder. This is not a case where benefit of probation could be extended to the applicant. The contention of the learned Additional Public Prosecutor is unexceptionable and therefore, there is no question of considering the applicant for being dealt with under the Probation of Offenders Act or under Section 360 of the Code of Criminal Procedure in spite of his young age or absence of previous criminal history. It is true that the sentence imposed i.e. rigorous imprisonment for two years, was maximum prescribed for the offence punishable under Section 304A of the Penal Code. However, in the circumstances, recounted above, it cannot be said that the sentence calls for any interference. *Sanjay Rambhau Patil vs State of Maharashtra*, 2010 Cri LJ 1407 (Bombay).

Where accused was 30 years' youngman and litigation was continuing 9 years and accused provided medical help to deceased. Benefit of probation given to accused. *Gurmej Singh* v. *State of Punjab*, (1994) 1 Recent Cr R 162 (P & H).

Fatal accident due to rash and negligent driving of bus by petitioner—Two persons on Scooter died—Petitioner youngman having wife and four small children is only bread earner of his family. In case of his conviction he may lose his job—Motor Accident Claims Tribunal already awarded sufficient compensation to legal heirs of deceased. It was *held*, fit case to give benefit of probation of good conduct to petitioner. *Darsban Singh* v. *State of Punjab*, (1994) 1 Crimes 742 (P & H) : (1994) 2 CC Cases 102 : (1994) XXI Cr LT 147.

There was rash and negligent driving and did not render medical aid to deceased. Two persons were dead as a result of accident, benefit of probation was not given and sentence was reduced. *Krishan Singh* v. *State of Punjab*, (1994) 1 CC Cases 655 (P&H).

22. Witnesses/Evidence and proof.—*Interested witness.*—Having scrutinized the evidence on record, merely because two witnesses have turned hostile, would not by itself mean that either the identity or the rash and negligent driving by the petitioner has not been proved on record. All that witnesses are clear in their depositions that it was the petitioner who was driving the vehicle. They have been subjected to searching cross-examination and the veracity of their evidence in examination in chief has not been controverted. Learned Counsel submits that witness has to be treated as an interested witness and his evidence is to be scrutinized with greater care and caution. True, witness is an injured person and it is his daughter who died and his other family members received injuries, but that fact by itself does not render his evidence untrustworthy. This principle has been affirmed by the Supreme Court in *Kalegura Padma Rao vs. State of Andhra Pradesh*, represented by the Public Prosecutor, AIR 2007 SC 1299 = 2007 (12) SCC 48. holding :

> "We may also observe that the ground that the witness being a close relative and consequently, being a partisan witness, should not be relied upon has no substance. This theory was repelled by this Court as early as in *Dalip Singh's* case, AIR 1953 SC 364 = 1953 Cri LJ 1465, in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed (AIR Page 366, Para 25) :
>
> "We are unable to agree with the learned Judge of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in *'Rameshwar vs. State of Rajasthan'*, AIR 1952 SC 54 at Page 59 = 1952 Cri LJ 547. We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of Counsel".

The golden rule of assessing evidence of any witness is to see as to whether in the natural sequence of events, the person deposing as a witness is one who is naturally familiar with the facts stated under oath, his testimony stands the test of cross-examination and he has no motive to implicate the accused. These factors established on record and witnesses have no motive to falsely implicate the petitioner. *Krishan Sinh vs. State of HP*, 2010 (3) Cri LJ 3048 (HP).

Evidence of eye-witnesses of accident—Credibility. From eye-witness in the cross-examination, it is elicited that after hearing the sound, he turned and saw the accident. He has denied all other suggestions including the suggestion that he did not see the accident. In fact, when PW. 1 was cross-examined immediately after his examination-in-chief, nothing was suggested to him regarding the accident. However, he was recalled twice for the purpose of further cross-examination, at the request of the accused and during further cross-examination, certain suggestions relating to the accident were put to him, which, he denied. Nothing is elicited from eye-witness to indicate that he could not see the accident in question. The only material suggestion put to him in the cross-examination was since the bullock-cart was going ahead of the bus he could not see the bus, but he has denied this suggestion. This suggestion is incongruous, as the bullock-cart cannot cover the bus, as the bus is taller than the bullock-cart and the seat of the driver of the bus itself will be above the height of bullock-cart. In fact it is not suggested to eye-witness that he was not present near the tea stall and he did not see the accident. Thus, the presence of eye-witness near the tea stall is not seriously disputed in the cross-examination. There is no suggestion to eye-witness that he did not witness the actual collision between the two vehicles. In fact, from the tenor of cross-examination of eye-witness behalf of the accused indicates that the accused seriously did not dispute the fact that the collision took place on the extreme western side of the tar road while the bus driver was overtaking the bullock-cart which was going ahead of him.

The learned Magistrate has disbelieved the evidence of witness on the ground that in his cross-examination he has stated that after hearing the sound he turned round and came to the place of the accident; he disbelieved the evidence of eye-witness 2 on the ground that while drinking tea near the tea stall he could not concentrate as to what happens on the road and that he could not see the bus as a bullock-cart was proceeding ahead of the bus. He disbelieved the evidence of witness on the ground that he could not identify the driver of the bus though he saw the bus coming from a distance of 10 to 15 feet and he could not say the speed at which the bus was driven. I fail to understand as to how the evidence of these witnesses could be disbelieved for the above reasons. When it is shown that was the pillion rider of the motor cycle and when it was not disputed that the accused was the driver of the bus which was involved in the accident, the fact that the pillion rider did not identify the bus driver should not be a ground to reject his evidence. On the ground that pillion rider or could not say the speed with which the bus was driven, his evidence could not have been disbelieved, as, in a prosecution for the offence under Sections 279, 338 and 304-A, IPC, the question required to be considered is whether, they accused drove the vehicle in a rash and/or negligent manner so as to endanger human life. In my opinion, the reasons assigned by the learned Magistrate to reject the evidence of witnesses are not proper and are irrelevant reasons. The evidence of other witnesses clearly establish that they were present near the tea stall and they had seen the accident. The evidence of pillion rider who was the pillion rider is convincing and acceptable. For improper and irrelevant reasons, the learned Magistrate has disbelieved the evidence of PWs witnesses. Therefore, the finding of the learned Magistrate in this behalf is perverse and illegal. *State of Karnataka vs. Kumayian*, 2010 (3) CriLJ 3376 (A) (Karn).

Evidence of pillion rider. Collission between motor cycle and bus. In the cross-examination of Pillion rider there was no suggestion that he was not proceeding as pillion rider on the motor cycle. In fact, the evidence on record shows that he was injured in the accident and for several days he was treated as in-patient in the hospital. Therefore there is no difficulty in believing his evidence that he was proceeding as pillion rider on the motor cycle, as such he was the best witness to speak as to the manner in which the accident occurred. However, the learned Magistrate for strange and peculiar reasons has disbelieved the evidence of pillion rider. The learned Magistrate has disbelieved the evidence of witness on the ground that in his cross-examination he has stated that after hearing the sound he turned round and came to the place of the accident; he disbelieved the evidence of eye-witness 2 on the ground that while drinking tea near the tea stall he could not concentrate as to what happens on the road and that he could not see the bus as a bullock-cart was proceeding ahead of the bus. He disbelieved the evidence of pillion rider on the ground that he could not identify the driver of the bus though he saw the bus coming from a distance of 10 to 15 feet and he could not say the speed at which the bus was driven. I fail to understand as to how the evidence of these witnesses could be disbelieved for the above reasons. When it is shown that witness was the pillion rider of the motor cycle and when it was not disputed that the accused was the driver of the bus which was involved in the accident, the fact that the pillion rider did not identify the bus driver should not be a ground to reject his evidence. On the ground that pillion rider or could not say the speed with which the bus was driven, his evidence could not have been disbelieved, as, in a prosecution for the offence under Sections 279, 338 and 304-A, IPC, the question required to be considered is whether, the accused drove the vehicle in a rash and/or negligent manner so as to endanger human life. In my opinion, the reasons assigned by the learned Magistrate to reject the evidence of witnesses are not proper and are irrelevant reasons. The evidence of other witnesses clearly establish that they were present near the tea stall and they had seen the accident. The evidence of the pillion rider is convincing and acceptable. For improper and irrelevant reasons, the learned Magistrate has disbelieved the evidence of witnesses. Therefore, the finding of the learned Magistrate in this behalf is perverse and illegal. *State of Karnataka vs. Kumayian*, 2010 (3) CriLJ 3376 (A) (Karn).

Probation—Benefit not granted. Considering number of road accidents and devastating consequences thereof benevolent provisions of S. 4 of Probation of Offender's Act not to be applied to such cases and benefit of Probation of Offender's Act cannot be granted. *Zamir Khan vs State*, 2010 (4) CriLJ 4044 (Bom).

23. Intention and Knowledge.—This section obviously does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a 'rash' or negligent act. A negligent act is an act done without doing something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or act which a prudent or reasonable man would not do in the circumstances attending it. A rash act is a negligent act done precipitately. Negligence is the genus, of which rashness is the species. It has sometimes been observed that in rashness the action is done precipitately with the consciousness that the mischievous or illegal consequences may follow, but with a hope that they will not. But it is not necessary that there should always be this consciousness of the consequence. This is also untrue as the observations of Lord Atkin in *Andrews* v. *Director of Public Prosecution*, 2 All ER 552 : 1937 AC 576

In order to be encompassed by the protection under Sec. 304-A there should be neither intention nor knowledge to cause death. When any of these two elements is found to be present, Sec. 304-A has no application. When the background facts are considered in the light of the legal principles set out above, the inevitable conclusion is that stand of the appellant is clearly unsustainable. *Girish Singh v. State of Uttaranchal.*, AIR 2008 SC 3136 : 2008 (8) SCR 47 (SC) : 2008 (7) Scale 586 (SC) : 2008 (6) SLT 194 (SC) : 2008 (2) JCC 1417 (SC) : 2008 (3) RecentCR 58 (SC).

24. Professional negligence—Very high degree of negligence is required.—Charge of professional negligence on a medical person is a serious one as it affects his professional status and reputation and as such the burden of proof would be more onerous. A doctor cannot be held negligent only because something has gone wrong. He also cannot be held liable for mischance or misadventure or for an error of judgment in making a choice when two options are available. The mistake in diagnosis is not necessarily a negligent diagnosis. Even under the law of tort medical practitioner can only be held liable in respect of an erroneous diagnosis if his error is so palpably wrong as to prove by itself that it was negligently arrived at or it was the product of absence of reasonable skill and care on his part regard being held to the ordinary level of skill in the profession. For fastening criminal liability very high degree of such negligence is required to be proved. Death is the ultimate result of all serious ailments and the doctors are there to save the victims from such ailments. Experience and expertise of a doctor are utilised for the recovery. But it is not expected that in case of all ailments the doctor can give guarantee of cure. *Malay Kumar Ganguly vs Sukumar Mukherjee & Ors.*, 2010 AIR SCW 769 : AIR 2010 SC 1162

25. Road traffic fatalities.—The human toll in such accidents in tragic. Survivors and family members are affected not only by an immediate death or disability, but also lifetime psychological and physical suffering. Crashes often result in orphans, and some victims, as young as infants, spend the rest of their lives with medical facilities. *State of Karnataka vs. Muralidhar*, AIR 2009 SC 1621 : 2009 (4) SCC 463 : 2009 (4) JT 108 : 2009 (4) SCR 400 : 2009 (4) Scale 35.

Tools needed to combat this epidemic. We have the tools needed to combat this epidemic. In the developed nations, proven methods such as enforcement of laws regarding driving under the influence of alcohol or drugs, reducing speed limits, and requiring seat belts and restraints have shown significant reduction in traffic fatalities. Road design and road environment, vehicle design, and road safety standards are also strategies that successfully address traffic safety. For maximum impact of RTI's, a systems approach with multiple, scientifically proven prevention techniques must be employed. Education alone has been shown to be less effective, and often ineffective.

Proven interventions for developed countries require research, modification, and testing for developing countries. For example, developing countries face poorly designed and maintained roadways, unsafe vehicles, drivers under the influence of drugs or alcohol, lack of national policies, and inadequate enforcement. Success will require significant new resources supported by sustained political commitment. *State of Karnataka vs. Muralidhar*, AIR 2009 SC 1621 : 2009 (4) SCC 463 : 2009 (4) JT 108 : 2009 (4) SCR 400 : 2009 (4) Scale 35.

26. Sections 279 and 304A.—The only distinguishing feature is that in Section 279 the rash and negligent act made punishable relates to the manner of driving or riding on a public way, while the offence under Section 304A extends to any rash or negligent act falling short of culpable homicide. (1968) 34 Cut LT 500. In the absence of a definite finding as to whether the driving was negligent or not, the conviction under Sections 304A and 279, IPC, cannot be maintained. (1975) 2 Cr LJ 1402. Where two persons *viz.*, a driver of a motor car and driver of motor truck coming from different directions collided, it was held that they could not be tried in one trial for offences under Sections 279 and 304A, IPC. AIR 1973 Guj 275.

True that in the instant case the appellant has been found to be guilty of offences punishable under Secs. 279 and 304A, IPC for driving rashly and negligently on a public street and his act unfortunately resulted in the loss of a precious human life. But it is pertinent to note that there was no allegation against the appellant that at the time of accident, he was under the influence of liquor or any other substance impairing his driving skills. It was a rash and negligent act simplicities and not a case of driving in an inebriated condition which is, undoubtedly despicable aggravated offence warranting stricter and harsher punishment.

Having regard to all these facts and bearing in mind the fact that the mother of the victim has no grievance against the appellant and has prayed for some can be taken in the matter and the sentence of imprisonment can be reduced. We are of the opinion that the ends of justice would be met if the sentence of imprisonment is reduced to the period already undergone but in addition thereto, the appellant should be directed to pay an amount of Rs. 1,00,000/- to the mother of the deceased by way of compensation. Learned counsel for the appellant, in fact, indicated that his client was willing to pay that much amount. We order accordingly. *Manish Jalan v. State of Karnataka.*, AIR 2008 SC 3074 : 2008 (8) SCC 225 : 2008 (7) JT 643 (SC) : 2008 (9) Scale 814 (SC) : 2008 CrLJ 3941 (SC) : 2008 (3) SCC (Cr) 456 : 2008 (3) JCC 1846 (SC)

Sec. 279 deals rash driving or riding on a public way. A bare reading of the provision makes it clear that it must be established that the accused was driving any vehicle on a public way in a manner which endangered human life or was likely to cause hurt or injury to any other person.

Obviously the foundation in accusations under Sec. 279 IPC is not negligence. Similarly in Sec. 304 A the stress is on causing death by negligence or rashness. Therefore, for bringing in application of either Sec. 279 or 304 A it must be established that there was an element of rashness or negligence. Even if the prosecution version is accepted *in toto*, there was no evidence led to show that any negligence was involved. *Braham Dass vs. State of Himachal Pradesh*, AIR 2009 SC 3181 : 2009 CrLJ 4297 : 2009(8) SCR 908 : 2009(7) SCC 353 : 2009(9) Scale 43 : 2009(8) JT 615 : 2009(4) Crimes 70(SC) : 2009(6) Supreme 646.

Reduction of sentence. The appellant has been convicted under Secs. 279 and 304-A of the Indian Penal Code and has been sentenced to undergo simple imprisonment for a period of 6 months and to pay a fine of Rs. 2,000/- The sentence as far as conviction under Sec. 279 I.P.C is concerned has been set aside by the High Court. What remains after the judgment of the High Court is the conviction under Secs. 279 and 304-A. I.P.C. wherein the appellant was sentenced to undergo six months simple imprisonment alongwith a fine of Rs.2, 000/-. In out view, this is one of those cases where instead of confining the appellant in prison, the interest of justice will be better served if he is made to compensate the family of the deceased on account of the loss suffered by them.

Accordingly, while maintaining the appellant's conviction under Secs. 279 and 304-A IPC notwithstanding the agreement arrived at between the parties, we increase the amount of fine from 2,000/- to Rs. 20,000/- to be paid by the appellant to the parents of the deceased and reduce the sentenced to the period already undergone. subject to payment of the fine. The aforesaid amount is to be deposited by the appellant in the trial Court within three weeks from date, and on such deposit, the said amount shall be made over to the parents of the deceased and the appellant shall be released forthwith. In default of such deposit, this order shall remain in abeyance for a period of four weeks and if still no deposit is made within the said period the appeal will stand dismissed. *Puttaswamy vs. State of Karnataka*, 2008 (17) SCR 272 : 2009 (1) SCC 711 : 2008 (15) Scale 483 : 2008 (12) JT 561.

27. Overtaking prohibited in certain cases.—The Central Government in exercise of its power under Section 118 of the Motor Vehicles Act has framed the regulations called "Rules of Road Regulations, 1989" and the same has come into force from 1.7.1989. Regulation No.6 deals with over, taking prohibited in certain cases. According to this regulation, the driver of a motor vehicle shall not pass a vehicle travelling in the same direction as himself if his passing is likely to cause danger to other traffic proceeding in any direction. In the light of this, the accused as driver of the KSRTC bus before overtaking the bullock-cart going ahead of him should have seen as to whether his act would cause danger or inconvenience to the vehicle/s coming from opposite or any other direction. Without taking such care or caution, the respondent - accused proceeded to overtake the bullock-cart and unmindful of the fact that a motorcycle was coming from the opposite direction on the correct side of the road, the accused proceeded further and dashed against the motor-cycle. In the light of the above^ there is no substance in the argument that the rider of the motor-cycle ought to have stopped the vehicle after seeking the bus and avoided the collision. As the rider was moving on the correct side of the road, and he was not overtaking any vehicle, there was no duty cast on him to stop the vehicle. Thus the respondent - accused did not take such care and caution which a prudent and reasonable man was required to take in the circumstance of the case and in spite of the fact that two wheeler was coming from opposite direction, by keeping to its correct side, the respondent instead of stopping the bus and avoid overtaking the bullock-cart going ahead of him as it was likely to cause danger to the two wheeler coming from the opposite direction, proceeded further wantonly and ultimately caused injury to both the rider and pillion rider of the two wheeler. Thus the facts and circumstances of this case clearly indicate that there is culpable rashness and neglignece on the part of the accused. He did not act as a prudent and reasonable driver would have done in such circumstance.

Ex.P. 4 is the sketch prepared by the Investigating Officer during the investigation and Ex. P. 2 is the spot mahazar. If the contents of Exs.P. 2 and P. 4 are read together, it is clear that the actual collision took place at a distance of about 5 feet from the western edge of the tar road. The correctness of the contents of Exs.P.2 and P.4 is not disputed by the accused. Thus from the contents of Exs. P.2 and P.4, it is clear that the accident occurred almost at the western edge of the road, which was wrong side to the direction in which the bus was proceeding. The evidence on record indicates that the right front portion of the bus dashed against the motorcycle and the motor-cycle came under the right front wheel of the bus and ultimately the bus after dragging the motor-cycle to a distance of about 20 feet stopped on the foot path situated on the western side. From this, it is manifestly clear that the bus driver drove the bus in a rash and negligent manner and the vehicle was not under his control. He was not in a position to bring the bus to halt and in the absence of any tyre mark on the road, it appears the accused also did not make any effort to apply break to stop the bus. No doubt there is no clear evidence as to whether the driver of the bus drove the vehicle at a great speed. However, the speed by itself is not the sole factor to decide the culpability of the driver of the vehicle, and it is the rash and negligent act which is very much necessary to be considered. The question as to whether a person drove the vehicle in a rash and negligent manner depends upon the facts and circumstances of each case. The totality of the circumstances has to be taken to find out as to whether there was rash and negligent act on the part of the accused person. In the case on hand by taking the entire evidence on record as a whole and the silence on the part of the accused, it is clearly established that the respondent - accused drove the bus in a rash and negligent mannen and that was responsible for the accident which resulted in the death of one person and injury to another. Accused who was the driver of the bus which involved in the accident had the special knowledge as to how the accident occurred and as to whether or not he was responsible for the accident. Unfortunately, during the examination under Section 313 CrPC, the accused has not come out with any explanation. He has merely denied all the incriminating circumstances put to him. *State of Karnataka vs. Kumayian*, 2010 (3) CriLJ 3376 (A) (Karn).

Accused while overtake took his vehicle completely at wrong side of road at high speed and dashed against scooter coming from opposite direction. Due to wrong side and high speed witnesses proving his rash and negligent driving, held, conviction is proper. *Zamir Khan vs State*, 2010 (4) CriLJ 4044 (Bom).

28. Deceased herself a medical student.—When a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as 'criminal'. It can be termed 'criminal' only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.

Where the deceased herself was a medical student and she was aware of her disease and the gravity of it, and the delay in her treatment was not due to doctor's negligence but the deceased herself waited for her brother's arrival with necessary funds to meet the medical expenses, and the operation was performed by the doctor with the assistance of anesthetist and necessary antibiotics were also administered to her and the death occurred due to post operative complications though she was provided necessary treatment such as putting oxygen etc., it was held that the death of patient was not caused due to recklessness or negligence of accused doctor. *Katcherla Venkata Sunil v. Dr. Vanguri Seshumamba and Ors.*, 2008 CriLJ 853 (AP).

29. Separate sentence under Sec. 279.—When deceased a girl was about to board offending bus driven by accused-driver took bus speedily and made her to fall down whereby she sustained injuries and ultimately died. No material contradiction in evidence of prosecution witnesses.

Law is well settled that simply because the accused are found guilty under Section 304 (A) IPC and sentence imposed, there is no embargo for the Court to impose separate sentence under Section 279 IPC also. But in this case, both the Courts below fell into error on this aspect. This Court, being revisional Court, is not inclined to impose any sentence for the first time for the offence under Section 279 IPC Accordingly, this revision is partly allowed. *Rajaram & Anr. v. State*, 2010 Cri LJ 1644 (Madras).

30. Scene of offence Panchanama is not substantive evidence.—In accident cases it is too much to expect oral evidence to prove the rash and negligent driving as accidents take place within fraction of seconds and it may not be possible for any witness to speak about the exact manner in which the accident took place. Therefore, it is only the circumstantial evidence which is very very important to come to a conclusion as to how the accident took place and whether there was any rash and negligent driving on the part of the driver of the vehicle. Moreso, in accidents of head-on-collision involving two vehicles where it is to be decided as to which driver was responsible for the accident or both the drivers were responsible. But, in the present case the prosecution solely relied on the scene of offence panchanama which is not substantive evidence. Mere marking of panchanama is not sufficient and that the contents of panchanama are to be brought on record through the mediators or through the Investigating Officer through whom the panchanama is marked. Where the contents of panchanama were not brought on record and simply panchanamas were marked, the trial Courts must realize that mere marking of panchanama is not sufficient and that the contents of panchanama shall be spoken to by the witnesses in the presence of the accused to enable him to cross-examine and then only the Court can place reliance on the contents of panchanama. Therefore, the Courts must exhibit patience to record the contents of the panchanama on which the prosecution proposes to rely to prove the relevant circumstances required to establish the guilt of the accused. Here in the instant case, there is absolutely no legal evidence to prove any of the circumstances. Without there being evidence, the trial Court drew the inference that the bus went to right side of the road and hit the jeep and, therefore, the driver of the bus was rash and negligent. Ofcourse, so far as the damages to the vehicles are concerned, the Motor Vehicle Inspector stated about the damages in respect of both the vehicles. These damages noted by the Motor Vehicle Inspector shows that more damage was caused to the jeep. But, merely because more damage was caused to the jeep, it cannot be inferred from that circumstance that the bus driver went with high speed and hit the jeep. In fact the said damages indicate that the jeep driver went with high speed and hit the bus and, therefore, there was extensive damage to the jeep and not to the bus. There is another circumstance in support of such inference that none of the bus passengers received injuries. If really the bus was going with high speed at the time when it hit the jeep, the passengers in the bus should have necessarily received injuries on account of sudden jerk. Therefore, the inference drawn by the trial Court basing on the damage to the jeep as per scene of offence panchanama is not sound and correct. *Suruvu Parshaiah v. State of A.P.*, 2006 CriLJ 824 (AP).

* * * * *

[1][**Sec. 304-B. Dowry death**.—(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand or dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused her death.

Explanation.—For the purposes of this sub-section "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

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1. Scope.—Provision thereunder Section 304-B is not mutually exclusive—They deal with different offence. *Keshab Chandra Panda* v. *State* (1995) 1 CCR 427 (Ori).

While dealing with the expression "soon before the death", the Apex Court in the matter of *Prem Kanwar vs. State of Rajasthan*, AIR 2009 SC 1242 = 2009 Cri LJ 1123, has held that "soon before the death" means proximate and live-link must exist between effect of cruelty based on dowry demand and concerned death. Para 12 of the said judgment reads thus :

> "A conjoint reading of Section 113-B of the Evidence Act and Section 304-B, IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances'. The expression 'soon before' is very relevant where Section 113-B are pressed into service. (Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates.) Evidence in that regard has to be led by prosecution. 'Soon before' is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act. The expression 'soon before her death' used in the substantive Section 304-B, IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon before' used in Section 114, illustration (a) of the Evidence Act is relevant. It lays down that a Court may presume that a man who is in the possession of goods 'soon after' the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term 'soon before' left to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effect of cruelty

based on dowry demand the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence."

Sanjay Kumar Kesharwani vs. State of Chhattisgarh, 2010 (2) CrLJ 1844 (Chha).

It is a unique legal phenomenon in the Indian Penal Code that the only act, the attempt of which alone will become an offence. The person who attempts to commit suicide is guilty of the offence under Section 309 IPC whereas the person who commits suicide cannot be reached at all Section 306 renders the person who abets the commission of suicide punishable for which the condition precedent is that suicide should necessarily have been committed. It is possible to abet the commission of suicide. But nobody would abet a mere attempt to commit suicide. It would be preposterous if law could afford to penalise on abetment to the offence of mere attempt to commit suicide. It there is not abetment, there is no question of the offence under Section 306 coming into play. Hence there cannot be an offence under Section 116 read with Section 306, IPC. *Satveer Singh v. State of Punjab* 2001 Cri LJ 4625 (SC) : AIR 2001 (SC) 2828 : 2001(8) SCC 633 : 2001(8) JT 208 : 2001(6) Scale 513.

Essential ingredients for offence under Sectin 304-B of IPC and for raising presumption under Section 113-B of Evidence Act is that there must be materail to show that soon before her death, victim was subjected to cruelty/harassment. *Kunhiabdulla* v. *State of Kerala*, AIR 2004 (SC) 1731 : 2004(4) SCC 13 : 2004(3) JT 206 : 2004(3) Scale 57 : 2004(2) Supreme 354.

It is evident, upon perusal of the testimony of prosecution witnesses, that the appellant did harass the deceased with regard to the fact that the dowry, that she had got with her at the time of marriage, was both insufficient and of poor quality. The period between the death of Smt. Baby and the date of the marriage is only six months. One of the ingredients under the provisions of Section 304-B of the IPC for a person to be convicted under the said provision, is that, the prosecution should be able to prove that the deceased was subjected to cruelty and harassment by the husband or the relative of the husband for or in connection with demand for dowry soon before her death. However, soon before her death would mean in the *recent past* and not immediately before the death of the victim. There must be some "proximate and live link" between the "effect of cruelty based on dowry demand and concerned death" See also *Thakkan Jha & Ors v State of Bihar*, (2004) 13 SCC 348 and *Baldev Singh v. State of Punjab*, VII (2008) SLT 626. *Sanjay vs. State*, 2010 (3) Cri LJ 3214 (Del).

But even assuming that such an accident took place no injuries as found on the person of deceased can be caused in course of the fall into the water. The Investigating Officer described the well in question as a kuccha well, that is to say its inner walls were not brick lined. Deceased had suffered two injuries, one over her nose and the other in the parietal area of the head. The doctor was quite definite that the two injuries were the result of two separate blows by some hard and blunt substance. In cross examination he said that the two injuries could be caused by dashing against two different projections; those could not caused by a single projection. We are completely unable to see deceased falling down inside the well and getting her face and head smashed twice against two projections jutting out from the soft clay inner walls without any lining of bricks. We have no manner of doubt that deceased was first beaten and then her body was dumped into the well when she was dying or was already dead. *Deen Dayal vs. State of Uttar Pradesh*, AIR 2009 (SC) 1238 : 2009 CrLJ 1119 : 2009 (1) Crimes 243 (SC) : 2009 (11) SCC 157 : 2009 (1) JT 170 : 2009 (1) SCR 56 : 2009 (1) Scale 408 : 2009 (1) SLT 341 : 2009 (1) JCC 540.

The essential ingredients of the offence under Section 304-B of the Indian Penal Code is that, the prosecution must show that a woman, before her death, was subjected to cruelty or harassment by her husband in connection with any demand for dowry. Unless the harassment or cruelty, to which the woman/wife is stated to have been subjected to is in connection with a demand for dowry, the offence under Section 304-B of the Indian Penal Code, can not be made out at all *Elango* v. *State*, 2000 Cri LJ 4343 (Madras); *Gordhan Ram* v. *State of Rajasthan*, 1995 Cri LJ 273.

The evidence showed that grievances were referred to authorities of crime against women cell and settlement arrived therein did not relate to dowry demand. There was no definite evidence of ill treatment having immediate proximity to date of death of deceased. It was held that accused could not be convicted under Section 304B as ill treatment for dowry was not soon before the death. As to presumption under Section 113B the Court said that proximate test applied and expression soon "before death" occurring in Section 304B did not indicate any fixed period but it meant that there must be existence of a proximate and live link between the effect of cruelty based or dowry demand and the death. *Hira Lal* v. *State (NCT) of Delhi*, 2003 Cr LJ 3711 : 2003(4) SLT 594 (SC) : 2003(2) DMC 206 : 2003(2) JCC 1182 : 2003 SCC (Cri) 2016 (SC).

No specific mention during trial regarding demand of scooter etc, made by appellant. Trial Judge not relying upon this part of the prosecution-evidence in respect of co-accuseds, acquitted them. Same piece of evidence basis of the conviction of the appellant holding him to be duty-bound to ensure that wife was not subjected to such cruelty.—*Held*. approach of the Trial Judge palpably illegal and foreign to criminal jurisprudence. *Jairam* v. *State of Rajasthan*, (1995) 2 CCR 534 (Raj)

Where essential ingredients of the offence were not complete against the accused and there was absence of evidence of dowry death. Discharge of the accused—*Held*, sustainable. *Bhagwan Sahai* v. *Raju and Rajendra Kumar*, 1995 Cr LJ 806 (Raj) ; See also *Ganesh* v. *Bhutekar State*, 2005 Cr LJ 1221 (Bom) : 2005 All MR (CRI) 440 : 2005 Mat LR 326.

Section 304-B was inserted by Amendment Act of 1986 has no retrospective effect. No charge under Section 304-B can be framed where the alleged offence was stated to have been committed before 9.11.1986. *Pradeep Kumar Dhawan* v. *State of Madhya Pradesh*, 1995 MPLJ 112 (MP).

Suicide took place within 4 months of marriage—*Held*, at this stage the sufficiency of grounds for presuming the commission of offence only has to be seen. *Sanjev Prakash* v. *State*, 1995 Cr R 220 (MP|.

Provisions under Section 304-B is not a mere procedural change. They create a substantive offence. Not applicable retrospectively, *Shyama Singh* v. *State of Bihar*. (1995) 1 Crimes 164 (Pat).

Expression "soon before death" means reasonable time and quite close in proximity prior to death—*Held*, there being no such evidence charge framed under Section 304-B cannot be upheld. *Mishriya* v. *State of Rajasthan*, 1985 Cr LR (Raj). 542.

In the case of dowry death it is necessary for the prosecution to prove the following : (i) That the death of woman is caused either by burns or by any bodily injury or occurrence otherwise than under normal circumstances; (ii) That it is caused within 7 years of her marriage : and ; (iii) It is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relatives of her husband for or in connection with any demand for dowry. In these things are proved then it is provided in the section that the death shall be called 'dowry death' and such husband and relatives shall be deemed to have caused her death. Where there is no proof on record to hold the death as accidental because the death is caused by strangulation which cannot occur as an accident. It is either deliberately done by someone else and, therefore is homicidal or is done by the person dying and is suicidal. If either case it is not a death under normal circumstances and, therefore, the prosecution has proved the first requirement under section 304-B. The law presumes in such cases that the dowry death shall be deemed to have been caused by the husband or relatives. The offence is, therefore deemed to have been committed by the accused if the other two requirement of section 304-B are proved by the prosecution is put strict proof of both these ingredients before conviction under section 304-B is awarded. *Suresh* v. *State of Rajasthan*, 1999 Cri LJ 1787 (Raj).

Marriage must have been performed within seven years of death and secondly there must be demand of dowry. Date of marriage of parties not established with any specific evidence. Further there being no evidence of demand of dowry prior to death of deceased wife—*Held*, no presumption as to dowry death under Section 113-B of Evidence Act can be drawn and thus provisions of Section 304-B not attracted—Revision against acquittal dismissed—*Court on its own motion* v. *Jaspal Singh*, (1995) 2 CC Cases 300 (P&H).

It is a case of simple suicide not provoked guided or abetted by the appellant on account of demand of dowry and harassment meted out to the deceased on that count. That being so, agreeing with the contention of the defence counsel, the appellant is acquitted of the charges framed against him. Consequently, the order of conviction and sentence passed by the Additional Sessions Judge was set aside and the statement has stated appeal was allowed. *Baljit Stngh* v. *State*, 1996 Cr LJ 2574 (P & H).

The injuries as found on the person of deceased could not have caused her death, despite the demands being the offence worked does not attract the mischief of Section 304-B of the Penal Code. *State of H.P.* v. *Nikku Ram*, AIR 1996 SC 67 : 1995(5) Scale 94 : 1995(6) SCC 219 : 1995 Cr LJ 4184.

The demand made by the husband after four or five years of marriage for sending husband's brother abroad cannot be connected with dowry by any stretch of imagination. *State of Punjab* v. *Daljit Singh*, 1999 Cri LJ 2723 (P&H).

2. Section 304B does not conceive agreement.—Section 304B, IPC makes demand of dowry itself punishable. Demand neither conceives nor would conceive of any agreement. *State of AP* v. *Raj Gopal Alwa*, AIR 2004 (SC) 1933 : 2004 Cr LJ 179 (SC) : 2004(4) SCC 470 : 2004(2) Crimes 9 (SC) : 2004(2) Supreme 478.

The offence alleged against the accused is under Sec. 304-B IPC which makes 'demand of dowry" itself punishable. Demand neither conceives nor would conceive of any agreement. If for convicting any offender, agreement for dowry is to be proved.

hardly any offenders would come under the clutches of law. The word "agreement" referred to in Sec. 2 has to be inferred on the facts and circumstances of each case. The interpretation that the accused seek, that conviction can only be if there is agreement for dowry, is misconceived. This would be contrary to the mandate and object of the Act. *Prem Kanwar vs. State of Rajasthan*, AIR 2009 SC 1242 : 2009 CrLJ 1123 : 2009 (1) Crimes 270 (SC) : 2009 (3) SCC 726 : 2009 (1) JT 197 : 2009 (1) SCR 37 : 2009 (1) Scale 230 : 2009 (1) Supreme 85 : 2009 (1) SLT 222 : 2009 (1) JCC 482.

The deceased a deserted wife lived with spouse. Accused contracted marriage with deceased in Chimauna form of marriage. Deceased was bring in the house of accused living marital life for one year. It was held that the accused was "husband" for the purpose of Section 304B, IPC. *Rohit Das* v. *State of Bihar*, 2005 Cr LJ 4 (Jharkhand) : 2005 (1) DMC 420 : 2005 (1) Hindu LR 198 : AIR 2004 Jhar HCR 164.

Agreement for dowry not always necessary. The offence alleged against the accused is under Sec. 304-B, I.P.C. which makes "demand of dowry" itself punishable. Demand neither conceives nor would conceive of any agreement. If for convicting any offender, agreement for dowry is to be proved, hardly any offenders would come under the clutches of law. When Sec. 304-B refers to "demand of dowry," it refers to the demand of property or valuable security as referred to in the definition of "dowry" under the Act. In cases of dowry deaths and suicides, circumstantial evidence plays an important role and inferences can be drawn on the basis of such evidence. That could be either direct or indirect. It is significant that Sec. 4 of the 1961 Act, was also amended by means of Act 63 of 1984, under which it is an offence to demand dowry directly or indirectly from the parents or other relatives or guardian of a bride. The word "agreement" referred to in Sec. 2 of 1961 Act has to be inferred on the facts and circumstances of each case. The interpretation that the accused seek, that conviction can only be if there is agreement for dowry, is misconceived. This would be contrary to the mandate and object of the Act. "Dowry" definition is to be interpreted with the other provisions of the Act including Sec. 3, which refers to giving or taking dowry and Sec. 4 which deals with a penalty for demanding dowry, under the Act and the IPC. This makes it clear that even demand of dowry on other ingredients being satisfied is punishable. It is not always necessary that there be any agreement for dowry. *Prem Kanwar vs State of Rajasthan*, 2009 AIR SCW 536 : 2009 CriLJ 1123 (SC) : AIR 2009 SC 1242 : 2009 (1) SCR 37 (SC) : 2009 (3) SCC 726 : 2009 (1) JT 197 (SC) : 2009 (1) Scale 230 (SC) : 2009 (1) Supreme 85 : 2009 (1) SLT 222 (SC) : 2009 CrLJ 1123 (SC) : 2009 (1) Crimes 270 (SC) : 2009 (1) JCC 482 (SC).

3. Applicability of.—Offence committed prior to 10.11.1986—None of the provisions was *held*, applicable. *Lakhjit Singh* v. *State of Punjab*, 1994 SCC (Cri) 235 : 1994 Supp(1) SCC 173.

In order to attract the provision under Section 304-B, IPC, it must be shown *prima facie* that (a) if a married woman died otherwise than under normal circumstance, (b) such death was within seven years of marriage, and (c) that there was cruelty and harassment in connection with the demand of dowry soon before her death. (*Baljit Singh and Anr. vs. State of Haryana*, AIR 2004 SC 1714, is relied upon). In this case, the requirement (a) and (c) are satisfied, whereas it is the case of the prosecution that the death of the deceased was beyond seven years of her marriage. The offence under Section 304-B, IPC *prima facie* is not attracted in this case. Hence, the order of the learned SDJM taking cognizance of the offence under Section 304-B, IPC is illegal. *Hemanta Kumar Behera vs. State of Orissa*, 2010 (3) Cri LJ 3206 (Orissa).

Court had considered the rival contentions of the parties. Court is of the view that the victim died within 7 years of her marriage. Evidence of torture on account of dowry did not specifically come in evidence during trial. Hence, the presumption as provided under Section 113-B of the Indian Evidence Act, 1872 applicable for the offence punishable under Section 304-B of the Indian Penal Code would not be applicable. Similarly, since the Doctor opined that it was a case of homicidal death the provisions of Section 113-A of the said Act of 1872 would also not be applicable. *Nazirul SK vs. State of West Bengal*, 2010 (3) CrLJ 2519 (Cal).

Accused subjected his wife to cruelty and harassed her for additional dowry on account of which her health got deteriorated and ultimately she died.

As per the evidence of prosecution witnesses, the marriage between the deceased and the accused was performed on 30.11.1998 and the deceased left the company of the accused in the month of March 2000 and her death took place on 27.9.2001. From the above, it is evident that the death of the deceased had taken place within a span of 7 years. But as stated supra, the prosecution shall satisfy all the three requirements by way of cogent evidence to bring home the guilt of the accused for the offence punishable under Section 304-B, IPC. The doctor, who conducted autopsy over the dead body of the deceased and issued post-mortem certificate clearly stated that the death of the deceased was natural. The requirement as provided for under Section 304-B, IPC is that it should be an unnatural death. Of course, if the said death is solely on account of the alleged harassment, presumption can be drawn in view of Section 113-B of the Indian Evidence Act, But here, we have to look into the fact that the accused and the deceased lived together only up to March 2000 and the alleged death took place on 27.9.2001 i.e., after 1 ½. year. From that it cannot be inferred that there was harassment soon before her death. When once the doctor states that the death was natural and there is no cogent evidence to establish that soon before the death of the deceased, there was harassment, that the accused is guilty of the offence punishable under Sec. 304B, IPC.

Another aspect which is prompting this Court to come to the conclusion is the evidence. The alleged death took place on 27.09.2001 and as it was occurred in the hospital of father of the deceased, and it is a medico-legal case, PW 1 immediately reported the matter to the police only under Section 174, CrPC. If really the said harassment is in existence as on the date of the report, the same would have been mentioned in the report. It is not known as to why father of deceased has not stated all these facts in his report. *Dr. Madas Venkat Goud vs. State of Andhra Pradesh*, 2010 (3) CriLJ 3501 (AP).

Applicability of provisions to persons contracting marriage *ostensibly of.* It would be appropriate to construe the expression 'husband' to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerce her in any manner or for any of the purposes enumerated in the relevant provisions. Secs. 304-B/498-A, whatever be the legitimacy of the marriage itself for the limited purpose of Secs. 498-A and 304-B IPC. Such an interpretation, known and recognized as purposive construction has to come into play in a case of this nature. *Koppisetti Subbharao vs. State of Andhra Pradesh*, AIR 2009 SC 2684 : 2009 CrLJ 3480 : 2009 (12) SCC 331 : 2009 (6) JT 212 : 2009 (7) SCR 157 : 2009 (6) Scale 528 : 2009 (3) Supreme 688 : 2009 (4) SLT 687.

4. Offence.—Magistrate found the offence was murder and committed the case to sessions—Conviction under Section 302, I.P.C. and sentenced to life imprisonment—There was given no separate sentence under Section 498-A, I.P.C. which was challenged in appeal, hence it was held that the prosecution has not been able to bring home the charge under Section 498-A, I.P.C. against the accused. The conviction and sentence is set aside. *Babaji Charan Barik* v. *State*, (1994) 1 OLR 66 (Ori).

The word 'marriage' as used under the provisions of Section 304-B, IPC has to be given an independent meaning and thus should not be guided by the provisions of any other law. In the case of *Yatesh Kumar vs. State of Rajasthan*, 1999 (1) RRC 227 (Raj), learned Single Judge has rightly taken the view that real marriage takes place when "Gauna" is performed. It is the stage when girl comes to her husband's place and actual marriage takes place at that stage. A symbolic marriage cannot be considered to be a real marriage for attracting the provisions of Section 304-B, IPC otherwise very object of making amendment is frustrated. In the case of *Yatesh Kumar* (Supra), this Court has further taken note of the fact that sexual intercourse can take place only after "Gauna" and not on symbolic marriage. This is again an important aspect of the matter to give correct interpretation of the word 'marriage' as used under the provisions of Section 304-B, IPC, hence, period of 7 years for attracting Section 304-B, IPC is to be counted from the date of "Gauna". *Raju vs. State of Rajasthan*, 2010 (3) Cri LJ 3043 (Raj).

Wife dead at paternal home. Offence is made out. Since the place of occurrence is immaterial. *Rajinder Kumar* v. *State of Haryana*, (1994) 2 Recent CR 321 : (1994) 2 Recent CR 459 (P & HI) (DB).

After one year of marriage due to demand of dowry leading to 100% burn injuries, the death was held unnatural and offence of dowry death established. *Raj Kumar* v. *State*, 1994 All Cr C 481 (All) (DB).

Evidence of witnesses stating incidence of quarrel which took place about two months prior to incident between accused persons and complainant about adjusting loan amount paid to accused by complainant as dowry money. All the accused said that an amount of Rs. 50,000/- shall be adjusted against the demand of dowry money. Thus, relying upon the evidence of witnesses, the trial Court and the High Court came to the conclusion that the prosecution has proved beyond reasonable doubt that deceased was being constantly harassed and tortured by accused for the demand of dowry and a sum of Rs.50,000/- paid to them as loan amount was also adjusted by them as dowry money. Witnesses have been subjected to searching cross-examination by the defence, but nothing tangible material has been extracted from their evidence to create any shadow of doubt that they are not reliable and truthful witnesses.

Having regard to the entire evidence discussed above and having carefully and closely considered the judgments of the trial Court and the High Court, it appears that the view taken by both the courts was reasonable and plausible. We find no infirmity or perversity in the findings recorded by the learned Judges of the High Court to interfere with the well-reasoned judgment. *Kanti Lal v. State of Rajasthan*, AIR 2009 SC 2703 : 2009 (6) SCR 525 (SC) : 2009 (3) SLT 569 (SC) : 2009 (5) JT 635 (SC) : 2009 (6) Scale 116 (SC) : 2009 (12) SCC 498 (SC) : 2009 (3) Supreme 360 (SC) : 2009 (3) JCC 1604.

There is more probability that she died due to accidental burns caused from burning stove, when she was preparing her evening meals, hence accused are not found guilty for commission of offence punishable under Section 304-B I.P.C. *Ashok Podar* v. *State of Bihar*, (1995) 1 East Cr C 601 (Pat).

Considering the rival submissions, we find that the trial Court's judgment was full of surmises and conjectures. Reliance placed on Modi's Medical Jurisprudence to conclude that the injuries found on the neck of the deceased were possible due to elliptic fit is also not on a correct reading of the text. It is not stated any where that even a windpipe or sound box can be fractured as a result of elliptic fit. That being so, the trial Court's judgment was clearly vulnerable. The conviction as recorded by the High Court cannot be faulted. However, considering the background facts of the case, we reduce the sentence imposed in respect of Sec. 304-B IPC to seven years which is the minimum. *Madan Lal vs. State of Uttar Pradesh*, AIR 2009 (SC) 2175 : 2009 (11) SCC 527 : 2009 (7) JT 679 : 2009 (4) SCR 501 : 2009 (4) Scale 102.

Death caused by burning within a year of marriage. Cruelty or harassment 'soon before her death'. It can be put into rigid framework—It depends upon facts and circumstances of case. Contention of accused that only averment of cruelty was on basis of incident taking place 8 or 10 days after marriage, cannot be accepted—F.I.R. and case diary show that accused being dissatisfied with dowry brought by wife, treated her with cruelty. *Held*, charges framed justified. *Mangal Prasad* v. *State of M.P.*, (1995) 4 CCR 67 (MP).

So far as acquittal of brothers and sister-in-law is concerned, in our view, the learned counsel for the respondents is right in submitting that on re-appreciation of evidence, the High Court held that since they were staying separately, it could not be proved beyond reasonable doubt that they were also party to the act in question and hence benefit of doubt was given to them. We see no infirmity in the reasoning of the High Court as also the conclusion arrived at. We, therefore, see no ground to interfere with that part of the order of acquittal recorded by the High Court so far brothers and sister-in-law is concerned.

It is, therefore, clear that in case of dowry death, an offence punishable under Sec. 304B, IPC, the benefit of remission of Government Order does not apply. If it is so, in our opinion, the benefit could not be granted to husband. Hence, even if accused No. 1 or accused No. 2 had been released before completion of seven years, such action could not be said to be legal and lawful. *Dharam Chand v. State of Punjab and Ors.*, AIR 2009 SC 1304

Where marriage took place in 1987 and death took place in the year 1989. Death due to strangulation. Cruelty and harassment for non-fulfilment of the demand of dowry. *Held*, evidence adduced by the prosecution proves all the ingredients of Section 304-B. *Mohd. Nizamuddin* v. *State of Bihar:* (1995) 1 East Cr C 662 (Pat).

Offence was made under Section 304-B I.P.C.—Death within 7 years of marriage—Death was held unnatural—Prosecution could not prove the death within 7 years of marriage, offence under Section 304-B not made out. *D. Narsimloo* v. *State of A.P.*, (1994) 2 APLJ 455 (AP).

Conviction and sentence under Section 304-B I.P.C. which was challenged in revision petition. It was held that so far as appellant M.D.—Mother-in-law is concerned the prosecution has failed to prove the case under Section 498-A against her. Hence she deserves to be acquitted. But so far as other two appellants, *viz.* G.R. and A.R., *i.e.*

Father-in-law and husband of deceased are concerned the appeal filed by them deserves to be dismissed as prosecution has been able to prove the case against them beyond reasonable doubt. *Gordhan Ram* v. *State of Rajasthan*, 1994 RCC 491 (Raj).

When cordial relations between accused and deceased established and prosecution case remained unsubstantiated, inference of dowry death can not be drawn. *State of H.P.* v. *Jagroop Singh*. 1993 Cri LJ 2766 (HP).

Death of deceased wife was committed by use of poisonous insectide. But there was no evidence or basis to suspect that deceased consumed poison accidentaly as was pleaded by defence. Where deceased complained of maltreatment and demand and lust for money from beginning of marriage. If she was not allowed to meet or talk to her family member, it amounts to cruelty and therefore accused was held guilty of committing offence under Section 304. *Anand Kumar* v. *State of M.P.*, 1997 Cri LJ 1005 (MP).

If the material against some accused is not sufficient the charge against them of these offences can not be sustained. *Anita and others* v. *State of M.P. and another*, 1997 (2) East Cr C 388 (SC).

Alleged demand for dowry for house construction is not demand for dowry. Conviction was set aside. *Saro Rana* v. *State of Jharkhand*, 2005 Cr LJ 65 (Jhar) : 2005(2) DMC 827 : 2005(1) Hindu LR 222 : 2005(1) Rec Cri R 648.

5. Dowry death—*(a) What amounts to?*—In order to attract the provision under Section 304-B, IPC, it must be shown *prima facie* that (a) if a married woman died otherwise than under normal circumstance, (b) such death was within seven years of marriage, and (c) that there was cruelty and harassment in connection with the demand of dowry soon before her death. (*Baljit Singh and Anr. vs. State of Haryana*, AIR 2004 SC 1714, is relied upon). In this case, the requirement (a) and (c) are satisfied, whereas it is the case of the prosecution that the death of the deceased was beyond seven years of her marriage. The offence under Section 304-B, IPC *prima facie* is not attracted in this case. Hence, the order of the learned SDJM taking cognizance of the offence under Section 304-B, IPC is illegal. *Hemanta Kumar Behera vs. State of Orissa*. 2010 (3) Cri LJ 3206 (Orissa).

No evidence of dowry. In order to sustain conviction under Sec. 306, IPC, it must, therefore, be proved by the prosecution that there was abetment of suicide. According to the allegations of the complainant and the case of the prosecution, the deceased was instigated to commit suicide by constant harassment in connection with demand of Rs. one lac and motorcycle by the appellant and his mother. In the present case the prosecution has failed to prove that deceased was subjected to cruelty or harassment by the appellant in connection with the demand of dowry. The statements of prosecution witnesses are inconsistent, contradictory and unreliable. It would be pertinent to mention here that presumption under Sec. 113A of the Indian Evidence Act cannot be taken as the marriage of the deceased was not solemnized within a period of seven years before her death. Accused not liable to be convicted for offences under Ss. 304B. 306 and 498A. *Suresh Kumar alias Sushil and etc. v. State of Rajasthan*. 2006 CriLJ 116 (Raj).

For a dowry death the death should have been in connection with any demand of dowry as defined in Dowry Prohibition Act. If death occurred independent of demand of dowry it cannot be termed as dowry death. *State of Kerala* v. *Jose* alias *Saju.* (1994) 2 KLJ 787 (Ker).

Bride's death can be termed to be a 'dowry death' only if there is cogent evidence that cruelty or harassment to the lady in connection with the dowry demand has preceded her death. *State of Kerala* v. *Rajagyan,* (1995) 1 Crimes 596 (Ker).

Death of the wife even within 7 years of the marriage cannot be said to be by 'dowry death', unless proof of harassment or ill-treatment exists. *Narsoji Rao* v. *State,* (1995) 1 CCR 399 (AP).

Harassment to the bride prior to three days of death shall be presumed soon before the death. Such offence is the offence of dowry death. *Koshalya* v. *State of Punjab,* (1994) 2 Recent CR 48 (P&H) (DB).

PW 4 Bhanwarnath has been produced by the prosecution and he has stated in examination in chief that his daughter (deceased) was being treated fairly with love and affection by the accused respondents and there was no dowry demand of any kind by them. He has further stated that on 22.3.1993 when police and ADM came, he informed them the same thing. He has further made clear in cross examination that there was no demand of Rs. 40000/- from the side of accused respondents for the purpose of purchasing Taxi. The prosecution failed to prove necessary ingredients of the offence and therefore, the order of acquittal held to be proper. *The State of Rajasthan v. Gyaneshwar and Others* 2002 Cri. J. 1312 (Rajasthan).

On proper appreciation of the evidences of all those witnesses above mentioned, there is no evidence on record to prove the plea of demand of dowry by the appellants nor there is any direct evidence to prove the fact that cruel treatment was even meted out to the deceased. The prosecution tried to make out a case that deceased was compelled to commit suicide due to the telephonic call from the appellant No.1 mainly on the basis of the sucidal note. But interstingly no attempt was made by the prosecution to prove the Ext. 1 to make it admissible in the eye of law. The benefit of doubt, arising as a result of consideration of evidences, must accrue in favour of the appellant. Neither 'cruelty' nor 'willful conduct' to compel the deceased to commit sucide has been proved in the instant case beyond reasonable doubt. *Sambhu Paul and another v. State of Assam* , 2002 Cri LJ 3359.

Section 498 IPC provides punishment to the husband of a woman who was subjected to cruelty by them. What is meant by 'cruelty' as per this section as been explained in Explanation to the Section as "(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman, or (b), harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand." The deceased Geeta Devi after her marriage herself went to the parents house in March, 1993 and only came back to her in-laws house in July, 1994 where she died on August 6, 1994. The evidence that the court discussed hereinabove does not establish beyond doubt that Geeta Devi was treated with cruelty in a manner covered by Section 498-A, I.P.C. or that the cruel treatment with her was such as led her to commit suicide. The charge under Section 498-A, I.P.C. therefore remains not proved.

Smt. Chandra Devi and another v. State of Rajasthan, 2002 Cri LJ 1075 (Raj.) : 2002(1) Cur Cri R 213 : 2002 (1) Dme 104 : 2002 (1) East Cri C 418.

All the prosecution witnesses stated in one accord that husband of Sudama Devi demanded dowry a few months prior to her death. Even if the said period can be treated as falling within the proximity range of 'soon before death' the said acts can be attributed only to Ram Pukar - the husband of the deceased Sudama Devi. None of the witnesses said either directly or indirectly that the present appellants did anything during the said period as against Sudama Devi. Of course some of the witnesses said that soon after marriage these appellants asked for more dowry. But that demand was made at a time which was beyond the range of "soon before death" of the deceased. In the above circumstances it is difficult to sustain the conviction under Sections 304(B) and 498(A) of the IPC so far as the appellants are concerned. As section 201 of the IPC cannot be reported from the substantive offence, it is an idle exercise to consider whether conviction under Section 201, IPC can independently be fastened with the appellants. *Mungeshwar Prasad Chaurasia and another v. State of Bihar*, AIR 2002 SC 2531 : 2002(10) SCC 163 : 2001(10) JT 344 : 2002(2) Supreme 528 : 2002 Cr LJ 3505 : 2002(2) Crimes 38 (SC).

(b) 'Dowry'—Words and Phrases.—It is proved on record that father of deceased gifted to accused at the time of performing customary thread changing ceremony in connection with birth of girl child and such ceremony is prevalent in their society. Such gifts are not enveloped within the ambit of 'dowry'. *Narayanamurthy v. State of Karnataka and Anr.*, AIR 2008 SC 2377 : 2008 (8) SCR 403 (SC) : 2008 (6) JT 466 (SC) : 2008 (7) Scale 673 (SC) : 2008 (5) SLT 697 (SC) : 2008 (2) Crimes 365 (SC) : 2008 (2) JCC 1372 (SC) : 2008 (2) Recent CR 969 (SC).

(c) Ingredients of offence.—In order to attract Sec. 304-B IPC, the following ingredients are to be satisfied.

(i) The death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances;

(ii) Such death must have occurred within 7 years of the marriage;

(iii) Soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relative of her husband; and

(iv) Such cruelty or harassment must be in connection with the demand of dowry. *Tarsem Singh vs. State of Punjab*, AIR 2009 SC 1454 : 2009 (1) Crimes 168 (SC) : 2008 (13) JT 185 : 2008 (17) SCR 379 : 2008 (16) Scale 148 : 2009 (1) SLT 207;; [See also *Prem Kanwar vs. State of Rajasthan*, AIR 2009 SC 1242 : 2009 CrLJ 1123 : 2009 (1) Crimes 270 (SC) : 2009 (3) SCC 726 : 2009 (1) SCR 37 : 2009 (1) JT 197 : 2009 (1) Scale 230 : 2009 (1) Supreme 85 : 2009 (1) SLT 222 : 2009 (1) JCC 482;; *Kanti Lal vs. State of Rajasthan*, AIR 2009 SC 2703 : 2009 (12) SCC 498 : 2009 (6) SCR 525 : 2009 (5) JT 635 : 2009 (6) Scale 116 : 2009 (3) Supreme 360 : 2009 (3) SLT 569 : 2009 (3) JCC 1604.

6. Demand of dowry in respect of invalid marriage.—Absence of definition of husband to specifically include such persons who contract marriages ostensibly and cohabitate with such woman in purported exercise of his role and status as "husband" is no ground to exclude them from purview of Section 304 or 498A IPC viewed in the context of the very object and aim of the legislature intending Section 498A and 304B. *Rima Aggarwal* v. *Anupam*, 2004 Cr LJ 892 : AIR 2004 SC 1418 : 2004(1) Crimes 276 (SC) : 2004(3) SCC 199 : 2004(1) Supreme 355 : 2004(1) JT 177.

Word "husband" in Sec. 498-A is not limited to cover only those persons who have entered into legally valid marriage. The thrust of the offence under Sec. 498-A is subjecting of the woman to cruelty. Likewise, the thrust of the offence under Sec. 304-B is also the "Dowry Death". Consequently, the evil sought to be curbed are distinct and separate from the persons Committing the offending acts and there could be no impediment in law to liberally construe the words or expressions relating to the persons committing the offence so as to rope in not only those validly married but also any one who has undergone some or other form of marriage and thereby assumed for himself the position of husband to live, cohabitate and exercise authority as such husband over another woman.

The purpose for which Secs. 498-A and 304-B, I. P. C. and Sec. 113-B of the Evidence Act, 1872 were introduced cannot be lost sight of. Legislations enacted with some policy to curb and alleviate some public evil rampant in society and effectuate a definite public purpose or benefit positively requires to be interpreted with certain element of realism too and not merely pedantically or hyper-technically. The obvious objective was to prevent harassment to a woman who enters into a marital relationship with a person and later on, becomes a victim of the greed for money. Can a person who enters into a marital arrangement be allowed to take a shelter behind a smokescreen to contend that since there was no valid marriage the question of dowry does not arise. Such legalistic niceties would destroy the purpose of the provisions. Such hairsplitting legalistic approach would encourage harassment to a woman over demand or money. The nomenclature 'dowry' does not have any magic charm written over it. It is just a label given to demand of money in relation to marital relationship. The legislative intent is clear from the fact that it is not only the husband but also his relations who are covered by Sec. 498A. Legislature has taken care of children born from invalid marriages. Sec. 16 of the Marriage Act deals with legitimacy of children of void and voidable marriages. Can it be said that legislature which was conscious of the social stigma attached to children of void and voidable marriages closed eyes to plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship. If such restricted meaning is given, it would not further the legislative intent. On the contrary, it would be against the concern shown by the legislature for avoiding harassment to a woman over demand of money in relation to marriages. It would be appropriate to construe the expression 'husband' to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerce her in any-manner or for any of the purposes enumerated in the relevant provisions (Secs. 304-B/498-A), whatever be the legitimacy of the marriage itself for the limited purpose of Secs. 498-A and 304-B, I. P. C. Such an interpretation, known and recognized as purposive construction has to come into play in a case of this nature. *Koppisetti Subbharao alias Subramaniam v. State of A. P.*, AIR 2009 SC 2684 : 2009 (7) SCR 157 (SC) : 2009 (12) SCC 331 : 2009 (4) SLT 687 (SC) : 2009 (6) JT 212 (SC) : 2009 (6) Scale 528 (SC) : 2009 (3) Supreme 688 (SC) : 2009 CrLJ 3480 (SC) : 2009 (4) JCC 3061 (SC).

7. Presumption.—It is applicable that presumption under Section 113-B be drawn only when soon before death prosecution establishes by cogent evidence that lady deceased was subjected to cruelty or harassment for or in connection with any demand of dowry. *State of Kerala* v. *Rajayyan*, (1994) 2 KLT 700 : 1995 (1) ALT (Cr) 46 (Ker).

The necessity for insertion of the two provisions has been amply analyzed by the Law Commission of India in its Twenty-first Report dated 10.08.1988 on "Dowry Deaths and Law Reform". Keeping in view the impediment in the pre-existing law in securing evidence to prove dowry-related deaths, the legislature thought it wise to insert a provision relating to presumption of dowry death on proof of certain essentials. It is in this background that presumptive Sec. 113-B in the Evidence Act has been inserted. *Raman Kumar vs. State of Punjab*, 2009 CrLJ 3034 : 2009 (8) JT 422 : 2009 (6) SCR 933 : 2009 8 (6) Scale 335.

A reading of the evidence shows that it was the appellant who had, just a few days' before the incident, visited the house of his father-in-law and threatened Kamlesh Rani with dire consequences if his demand for a scooter and two gold rings was not fulfilled and the brother of the deceased had told him that his father Tej Ram was not in a position to meet the demands on account of financial difficulties. A few days later Ramji Das (PW. 2) too had visited Kamlesh Rani's in-law's home and had also informed Tej Ram thereafter that the appellant had been found beating his wife at that time and had once again threatened that if the demands were not satisfied Kamlesh Kaur would pay dearly for it. It is true, as contended by Mr. Sharan, that in a case where the peculiar evidence has been discarded with respect to four of the five accused, the presumption under Section 113-B could to some extent be said to be dispelled, but on an over view we find that the primary role and the weight of the evidence has been on the appellant herein. *Sudhir Kumar vs. State of Punjab*, 2010 (2) CrLJ 2052 (SC).

Legal presumption—Necessary ingredients. One of essential ingredients, amongst others, in both provisions is that woman concerned must have been "soon before her death" subjected to cruelty or harassment "for or in connection with demand for dowry". The expression "soon before" is very relevant where Sec. 113-B of the Evidence Act and Sec. 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led in by the prosecution. *Raman Kumar vs. State of Punjab*, 2009 CrLJ 3034 : 2009 (8) JT 422 : 2009 (6) SCR 933 : 2009 (6) Scale 335 : 2009 (3) JCC 1840.

As per the definition of 'dowry death' in Sec. 304-B IPC and the wording in the presumptive Sec. 113-B of the Evidence Act, one of the essential ingredients, amongst others, in both the provisions is that the concerned woman must have been "soon before her death" subjected to cruelty or harassment "for or in connection with the demand of dowry". *Prem Kanwar vs. State of Rajasthan*, AIR 2009 (SC) 1242 : 2009 CrLJ 1123 : 2009 (1) Crimes 270 (SC) : 2009 (3) SCC 726 : 2009 (1) JT 197 : 2009 (1) SCR 37 : 2009 (1) Scale 230 : 2009 (1) Supreme 85 : 2009 (1) SLT 222 : 2009 (1) JCC 482.

Presumption—Unnatural death. It is to be noted that the deceased breathed her last within about one year and three months from the date of marriage while living in the house of her in-laws. She was not suffering from any ailment prior to marriage and even after the marriage she continued to be hale and hearty. The evidence of PW-3, the father of the deceased is very significant. According to him the deceased came to his house. She informed him that the accused was torturing her as they had to purchase a new house they were demanding Rupees one lac from her. To the similar effect is the evidence of PW-4 the brother of the deceased. Prosecution had pressed into service the agreement deed for the purchase of house by Gurmukh Singh from one Sapan Dass (PW-2). Said agreement reveals that it was executed on 8.2.1995 and the sale deed was to be executed on 8.5.1995. The High Court noted that this document amply established that the family required money for purchase of plot from Sapan Dass. The High Court further noted that there was no material brought on record to show that the agreement was performed by the accused persons. The High Court found that the presumptuous conclusion of the trial Court that there was no link of the demand for dowry with the said agreement. The High Court also noted that the trial Court had erroneously concluded that the accused persons were rich persons and, therefore, there was no need for asking any dowry.

The High Court has analysed the evidence of the witnesses clearly keeping in view the parameters relating to the scope of interference with the judgment of acquittal. The analysis does not suffer from any infirmity to warrant interference. Since the minimum sentence has been awarded we find no scope to interfere in this appeal. Jagjit Singh v. State of Punjab., AIR 2009 SC 2133 : 2009 (4) SCR 75 (SC) : 2009 (4) SCC 759 : 2009 (3) JT 382 (SC) : 2009 (3) Scale 680 (SC) : 2009 (2) Supreme 422 (SC) : 2009 CrLJ 2440 (SC) : 2009 (2) Crimes 134 (SC)

Presumption—When can be raised? The presumption shall be raised only on proof of the following essentials : (1) The question before the Court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Sec. 304-B IPC). (2) The woman was subjected to cruelty or harassment by her husband or his relatives. (3) Such cruelty or harassment was for, or in connection with any demand for dowry. (4) Such cruelty or harassment was soon before her death. Prem Kanwar vs. State of Rajasthan, AIR 2009 SC 1242 : 2009 CrLJ 1123 : 2009 (1) Crimes 270 (SC) : 2009 (3) SCC 726 : 2009 (1) JT 197 : 2009 (1) SCR 37 : 2009 (1) Scale 230 : 2009 (1) Supreme 85 : 2009 (1) SLT 222 : 2009 (1) JCC 482.

In *Keshab Chandra Pande* v. *State*, 1995 Cri LJ 174 the Orissa High Court has observed that in order to prove offence under Section 304-B of I.P.C., with the aid of presumption under Section 113-B of the Evidence Act, the prosecution must show that soon before the death there was cruelty or harassment and only in that case presumption would operate. It is further observed that 'soon before' is a relative term and it would depend upon circumstances of each case and no straight jacket formula can be laid down as to what would constitute a period soon before the occurrence. The expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence. *See* also *Mangal Ram* v. *State of M.P.*, 1999 Cri LJ 4342 (M.P).

In a case there was reliable evidence that the deceased was subjected to cruelty, mal-treatment or harassment for or in connection with demand for dowry. The wife died an unnatural death. Therefore, presumption under Section 113B of the Evidence Act was drawn against the accused. *Mohan Lal* v. *State of MP*, 2005 Cr LJ 16 (MP) : 2005(1) Hindu LR 207 : 2004(4) MPLJ 143.

Court had considered the rival contentions of the parties. Court is of the view that the victim died within 7 years of her marriage. Evidence of torture on account of dowry did not specifically come in evidence during trial. Hence, the presumption as provided under Section 113-B of the Indian Evidence Act, 1872 applicable for the offence punishable under Section 304-B of the Indian Penal Code would not be applicable. Similarly, since the Doctor opined that it was a case of homicidal death the provisions of Section 113-A of the said Act of 1872 would also not be applicable. *Nazirul SK vs. State of West Bengal*, 2010 (3) CrLJ 2519 (Cal).

Presumption regarding dowry death—Elements explained—(i) death to take place within 7 years of marriage, (ii) unnatural death due to burns, bodily injuries under abnormal circumstances, (iii) deceased subjected to cruelty soon before her death, in connection with any demand for dowry. *Jairam* v. *State of Rajasthan*, (1995) 2 CCR 534 (Raj).

In view of the presumption not being available under Section 113-A of the Evidence Act and Section 304-B, I.P.C. case remains to be a case simpliciter under Sections 302/34, I.P.C, as such prosecution bound to prove the case independently without having any presumption except that is mentioned under Section 114, Evidence Act. *Raj Kishore Pandey* v. *State of Bihar*, (1995) 1 East Cr C 684 (Pat) (Ranchi Bench).

In absence of any evidence that deceased was treated with cruelty or harassed with demand of dowry during period after returning of deceased to marital home from her parent's residence, presumption of dowry death can not be raised under Section 304-B, IPC but can be convicted under Section 498-A. IPC, *Shamlal* v. *State of Haryana*, 1997 (2) Scale 328 : 1997 (3) JT 91 AIR 197 SCW 1614.

8. Non-Examination of doctor conducting post-mortem.—In the instant case where the post-mortem report was proved by the Court witness who was posted with the doctor who held the post-mortem and who claimed to have identified the writing and signature of the doctor, non-examination of doctor cannot be held to be ground for not taking post-mortem report into account. *Jageshwar Mahto v. State of Bihar*, 2001 Cri LJ 4589 (Jharkhand).

9. "Soon before death"—Interpretation.—It is evident, upon perusal of the testimony of prosecution witnesses, that the appellant did harass the deceased with regard to the fact that the dowry, that she had got with her at the time of marriage, was both insufficient and of poor quality. The period between the death of Smt. Baby and the date of the marriage is only six months. One of the ingredients under the provisions of Section 304-B of the IPC for a person to be convicted under the said provision, is that, the prosecution should be able to prove that the deceased was subjected to cruelty and harassment by the husband or the relative of the husband for or in connection with demand for dowry soon before her death. However, soon before her death would mean in the *recent past* and not immediately before the death of the victim. There must be some "proximate and live link" between the "effect of cruelty based on dowry demand

and concerned death" See also *Thakkan Jha & Ors v. State of Bihar,* (2004) 13 SCC 348 at page 251-352 at para 7 and *Baldev Singh v. State of Punjab,* VII (2008) SLT 626. *Sanjay vs. State,* 2010 (3) Cri LJ 3214 (Del).

"Soon before" is a relative term and it would depend upon the circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Sec. 113-B of the Evidence Act. The expression "soon before her death" used in the substantive Sec. 304-B IPC and Sec. 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. A reference to the expression "soon before" used in Sec. 114 Illustration (a) of the Evidence Act is relevant. It lays down that a Court may presume that a man who is in the possession of goods soon after the theft, is either the thief who has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term "soon before" is left to be determined by the Courts, depending upon facts and circumstances of each case. *Raman Kumar vs. State of Punjab,* 2009 CrLJ 3034 : 2009 (6) SCR 933 : 2009 (8) JT 422 : 2009 (6) SCR 933 : 2009 (6) Scale 335.

The term "soon before death" as found in Section 304-B, I.P.C as interpreted by the apex Court in *"Kans Raj* v. *State of Punjab,* 2000 Cri LJ 2993 (SC) : AIR 2000 (SC) 2324 : 2000(5) SCC 207 : 2000(5) JT 223 : 2000(3) Scale 429 an under:—

> "Soon before" is a relative term which is required to be considered under specific circumstances of each case and no straight-jacket formula can be laid down by fixing any time limit. This expression is pregnant with the idea of proximity text. The term "soon before" is not synonymous with the term "immediately before" and is opposite of the expression "soon after" as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be "soon before death" if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before the alleged such treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which under the circumstances, be treated as having become stale enough. No presumption under Section 113-B of the Evidence Act would be drawn against the accused if it is shown that after the alleged demand, cruelty or harassment the dispute stood resolved and there was

> no evidence of cruelty, and harassment thereafter. Mere lapse of some time by itself would not provide to an accused a defence, if the cause of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not too stale before the date of death of the woman. It is not enough that harassment or cruelty was caused to the woman with demand for dowry at some time, if Section 304B is to be invoked. But it should have happened "soon before her death".
>
> The said phrase, no doubt is an elastic expression and can refer to a period either immediately before her death or within few days or even a few weeks before it. But the proximity to her death is the pivot indicated by the expression. The legislative object in providing such a radius of time by employing the words "soon before her death" is to emphasise the idea that her death should, in all probabilities, have been the aftermath of such cruelty or harassment. In other words, there should be a perceptible nexus between her death and the dowry related harassment or cruelty inflicted on her. If the interval elapsed between the infliction of such harassment or cruelty and her death is wide the Court would be in a position to gauge that in all probabilities the death would not have been the immediate cause of her death. It is hence for the Court to decide, on the facts and circumstances of each case, whether the said interval in that particular case was sufficient to snuff its cord form the concept "soon before her death"
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> *Satvir Singh v. State of Punjab* 2001 cri LJ 4625 (SC) ; *See* also *State of A.P.* v. *Raj Gopal Aswa*, AIR 2004 (S) 1933 ; *Mummidi Udaya Bhaskar* v. *State of A.P.*, 2004 Cr LJ (NOC) 244 (AP) : 2003(2) ALD (CRL) 891 : 2004(1) DMC 524 : 2004(1) Hindu LR 257 ; *State of U.P.* v. *Satya Narain*, 2005 Cu LJ 3684.

The expression 'soon before her death' used in the substantive Sec. 304-B, I.P.C. and Sec. 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon before'used in Sec. 114, Illustration (a) of the Evidence Act is relevant. The expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence. *Prem Kanwar vs State of Rajasthan.*, 2009 AIR SCW 536 : 2009 CriLJ 1123 (SC) : AIR 2009 SC 1242 : 2009 (1) SCR 37 (SC) : 2009 (3) SCC 726 : 2009 (1) JT 197 (SC) : 2009 (1) Scale 230 (SC) : 2009 (1) Supreme 85 (SC) : 2009 (1) SLT 222 (SC) : 2009 CrLJ 1123 (SC) : 2009 (1) Crimes 270 (SC) : 2009 (1) JCC 482 (SC).

Dowry death cruelty/harassment "soon before death". Absence of evidence to prove that deceased subjected to cruelty/ill-treatment "soon before death". No offence under Section 304B, IPC made out. Conviction of accused under Section 304B not sustainable. *Hiralal* v. *State Govt. of NCT of Delhi*, 2003 (3) GCD 134 (NOC).

While dealing with the expression "soon before the death", the Apex Court in the matter of *Prem Kanwar vs. State of Rajasthan*, AIR 2009 SC 1242 = 2009 Cri LJ 1123, has held that "soon before the death" means proximate and live-link must exist between effect of cruelty based on dowry demand and concerned death. Para 12 of the said judgment reads thus :

> "A conjoint reading of Section 113-B of the Evidence Act and Section 304-B, IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances'. The expression 'soon before' is very relevant where Section 113-B are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. 'Soon before' is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act. The expression 'soon before her death' used in the substantive Section 304-B, IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon before' used in Section 114, illustration (a) of the Evidence Act is relevant. It lays down that a Court may presume that a man who is in the possession of goods 'soon after' the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term 'soon before' left to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effect of cruelty based on dowry demand the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence."
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> *Sanjay Kumar Kesharwani vs. State of Chhattisgarh*, 2010 (2) CrLJ 1844 (Chha).

Where evidence of witnesses established demand of dowry and ill-treatment of deceased soon before her death then commission of offence by accused clearly established. *Kamesh Panjiyar* v. *State of Bihar*, 2005 Cr LJ 1418 (SC) : 2004(3) SCC 609 : 2004(2) Supreme 213 : 2004(2) JT 299 : 2004(2) Crimes 197 (SC).

In *Rohit Das* v. *State of Bihar*, 2005 Cr LJ 4 (Jharkhand) : 2005(1) DMC 420 : 2005(1) Hindu LR 198 the Hon'ble high Court interpreted "Soon before death" in the following words:—

> "The expression "soon before" is very relevant where Section 113B of the Evidence Act and Section 304B of the Indian Penal Code are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in the case presumption operates. Evidence in that regard has to be led by prosecution. "Soon before" is a relative term and it would depend

> upon circumstances of each case and no strait jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113B of the Evidence Act. The expression "soon before her death" used in the substantive Section 304B of the Indian Penal Code and Section 113B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence. *Rohit Das* v. *State of Bihar*, 2005 Cr LJ 4 (Jharkhand); *See also Nand Kishore Singh* v. *State of Jharkhand*, 2005 Cr LJ 389 (Jhar) : 2005(1) DMC 666 : 2004(4) JLJR 686.

The expression 'soon before' is very relevant where Sec. 113-B of the Evidence Act and Sec. 304-B IPC are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. 'Soon before' is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Sec. 113-B of the Evidence Act. The expression 'soon before her death' used in the substantive Sec. 304-B IPC and Sec. 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon before' used in Sec. 114. Illustration (a) of the Evidence Act is relevant. It lays down that a Court may presume that a man who is in the possession of goods 'soon before' the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term 'soon before' is left to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence. *Prem Kanwar vs. State of Rajasthan*, AIR 2009 SC 1242 : 2009 CrLJ 1123 : 2009 (1) Crimes 270 (SC) : 2009 (3) SCC 726 : 2009 (1) JT 197 : 2009 (1) SCR 37 : 2009 (1) Scale 230 : 2009 (1) Supreme 85 : 2009 (1) SLT 222 : 2009 (1) JCC 482.

The words 'soon before her death' occurring in Sec. 304-B of the Penal Code are to be understood in a relative and flexible sense. Those words cannot be construed as laying down a rigid period of time to be mechanically applied in each case. Whether or not the cruelty or harassment meted out to the victim for or in connection with the demand of dowry was soon before her death and the proximate cause of her death, under abnormal circumstances, would depend upon the facts of each case. There can be no fixed period of time in this regard. *Deen Dayal vs. State of U.P.*, AIR 2009 SC 1238 : 2009 CrLJ 1119 : 2009 (1) Crimes 243 (SC) : 2009 (11) SCC 157 : 2009 (1) JT 170 (SC) : 2009 (1) SCR 56 : 2009 (1) Scale 408 (SC) : 2009 (1) SLT 341 : 2009 (1) JCC 540 (SC).

Act which may *constitute negligence or even rashness* may not amount to same under Sec. 304-A. The standard of proof as also culpability requirements under Sec. 304-A stands on an altogether different footing. On comparison of the provisions of Penal Code with the thresholds under the Tort Law or the Consumer Protection Act, a foundational principle that the attributes of care and negligence are not similar under Civil and Criminal branches of Medical Negligence law is borne out. An act which may constitute negligence or even rashness under torts may not amount to same under Sec. 304-A. *Malay Kumar Ganguly vs Sukumar Mukherjee & Ors.*, 2010 AIR SCW 769 : AIR 2010 SC 1162

Availability of protection under Sec. 304A—There should be neither intention nor knowledge to cause death. It carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Sec. 299 or murder in Sec. 300 IPC. Doing an act with the intent to kill a person or knowledge that doing an act was likely to cause a person's death is culpable homicide. When the intent or knowledge is the direct motivating force of the act, Sec. 304-A IPC has to make room for the graver and more serious charge of culpable homicide.

In order to be encompassed by the protection under Sec. 304-A there should be neither intention nor knowledge to cause death. When any of these two elements is found to be present, Sec. 304-A has no application. *Girish Singh v. State of Uttaranchal.*, AIR 2008 SC 3136 : 2008 (8) SCR 47 (SC) : 2008 (7) Scale 586 (SC) : 2008 (6) SLT 194 (SC) : 2008 (2) JCC 1417 (SC) : 2008 (3) RecentCR 58 (SC).

Distinction with civil law—Jurisprudential concept of negligence differs in civil and criminal law. For negligence to amount to an offence the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much high degree. A negligence which is not of such a high degree may provide a ground for action in civil law but cannot form the basis for prosecution. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. *Malay Kumar Ganguly vs. Sukumar Mukherjee*, 2009 (9) SCC 221 : 2009 (10) JT 256 : 2009 (13) SCR 1 : 2009 (10) Scale 675 : 2009 (6) SLT 164.

Section 304-A speaks of causing death by negligence. This Section applies to rash and negligence acts and does not apply to cases where death has been voluntarily caused. This Section obviously does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a rash and negligent act. *State of Karnataka vs. Muralidhar*, AIR 2009 SC 1621 : 2009 (4) SCC 463 : 2009 (4) SCR 400 : 2009 (4) JT 108 : 2009 (4) Scale 35.

10. Culpable Homicide.—With regard to causing murder of Poonam there was no eyewitness to the occurrence. PW-5 Phusarma happened to be present near about and saw the dead body lying in the dhani. Had there been foul play, being a close relative it was his duty to have informed the police or the parents immediately after the occurrence. He took the mater very casually, went to his work and on third day of occurrence when he was at Jaisalmer he per chance met PW-23 Manakaram whom he disclosed the death of Poonam and one day thereafter Ex P/1 FIR was lodged by Hemaram. PW-23 Manakaram has also been declared hostile. He too has not supported the prosecution case. According to this witness Phusaram met him at Jaisalmer and told that Poonam died due to fall in the water tank, therefore, inform Hemaram. He has further stated that upon this he went to Hemaram and informed him accordingly. The offence will be of culpable homicide not amounting to murder. *Deshraj Yadav v. State of M.P.*, 2002 Cri LJ 467 M.P. : 2002(1) Jab LJ 47 : 2002(1) MPLT 520.

Dealing with the distinction between part I and part II of Section 304, Indian Penal Code. It has been held in *Dayal v. Union of India*, AIR 1963 Him Pra 18: (1963 (1) Cri LJ 762) that if such bodily injury as is likely to cause death is intentionally caused and results in the death of the victim the case would fall under Part I and not under Part II. Stated differently, Part II comes into play when death is caused by doing an act with the knowledge that it is likely to cause death and when such act is the infliction of bodily injury and such infliction is not intentional. A person who intentionally causes bodily injury with knowledge that such act is likely to cause death must necessarily be a person who does an act with the intent to cause bodily injury likely to result in death. *Adman Dung Dung v. State of H.P.*, 2002 Cri LJ 2882 (H.P.).

11. Normal Circumstances.—The term "normal circumstances" apparently means not the natural death. The Apex Court in *Smt. Shanti* v. *State of Haryana*, AIR 1991 SC 1226 : (1990) Cri LJ 1713) held that ".....Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before the death of the woman she was subjected to cruelty or harassment by her husband or his relations for or in connection with any demand for dowry, such death shall be called, "dowry death" and the husband or relatives shall be deemed to have caused her death and shall be punishable with imprisonment for a minimum of seven years but which may extend to life imprisonment." The expression "otherwise than under normal circumstances" would mean the death not in usual course but apparently under suspicious circumstances, if not caused by burns or bodily injury. *Kans Raj* v. *State of Punjab*, 2000 CriLJ 2993 (SC) : AIR 2000 SC 2324 : 2000 (5) SCC 207 : 2000 (5) JT 223 : 2000 (2) Crimes 213 (SC).

12. Evidence and Proof.—Where deceased died due to falling into well and evidence as regards harassment of the deceased on account of dowry by the accused was lacking. Evidence as to deceased being a mental patient and the accused taking care of her and providing her treatment—*Held*, conviction of the accused untenable. *Sunkoji Laxmana Chary* v. *State of Andhra Pradesh*, 1995 Cr LJ 2652 (AP).

To allow the benefit of doubt to the Appellants having particular regard to the fact that except for certain bald statements made by mother and brother of deceased alleging that the victim had been subjected to cruelty and harassment prior to her death, there is no other evidence to prove that the victim committed suicide on account of cruelty and harassment to which she was subjected just .prior to her death, which.

in fact, are the ingredients of the evidence to be led in respect of Section 113-B of the Indian Evidence Act, 1872, in order to bring home the guilt against an accused under Section 304-B, IPC.

In order to hold an accused guilty of an offence under Section 304-B, IPC, it has to be shown that apart from the fact that the woman died on account of burn or bodily injury, otherwise than under normal circumstances, within 7 years of her marriage, it has also to be shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Only then would such death be called "dowry death" and such husband or relative shall be deemed to have caused the death of the woman concerned.

In this case, one other aspect has to be kept in mind, namely, that no charges were framed against the Appellants under the provisions of the Dowry Prohibition Act, 1961 and the evidence led in order to prove the same for the purposes of Section 304-B, IPC was related to a demand for a fan only.

In *Biswajit Halder's @ Babu Halder vs. State of W.B.*, 2008 (1) SCC 202 = 2007 AIR SCW 2189, was rendered in almost similar circumstances. In order to bring home a conviction under Section 304-B, IPC, it will not be sufficient to only, lead evidence showing that cruelty or harassment had been meted out to the victim, but that such treatment was in connection with the demand for dowry. In our view, the prosecution in this case has failed to fully satisfy the requirements of both Section 113-B of the Evidence Act, 1872 and Section 304-B of the Indian Penal Code. *Durga Prasad & Anr. vs. State of M.P.*, 2010 (3) CrLJ 3419 (SC).

An independent witness who is neighbour of the accused. His evidence is of considerable importance. According to him, while he was standing at the place where the deceased was burning the witness told Ramdev for extinguishing the fire upon which the appellant said that the deceased has been burnt and let her burn and it is no use extinguishing the fire. This statement has been rightly highlighted by the High Court to show that her role as alleged by the prosecution has been established.

The evidence of witnesses clearly shows the greed of the accused who was persistently taunting and harassing the deceased for not having brought sufficient dowry. Therefore, the High Court was justified in upsetting the order of acquittal passed by the trial Court and directing her conviction. *Prem Kanwar vs. State of Rajasthan*, AIR 2009 SC 1242 : 2009 CrLJ 1123 : 2009 (1) Crimes 270 (SC) : 2009 (3) SCC 726 : 2009 (1) JT 197 : 2009 (1) SCR 37 : 2009 (1) Scale 230 : 2009 (1) Supreme 85 : 2009 (1) SLT 222 : 2009 (1) JCC 482.

Once evidence is admissible, i.e., statements made by the deceased to her relatives for the purposes of Section 304-B of the IPC, then surely, it could be used for the purposes of Section 498-A of the IPC. *Sanjay vs. State*, 2010 (3) Cri LJ 3214 (Del).

Not a single witness in his police statement has stated that *S* was subjected to cruelty or harassment by her husband or has any relative for or in connection with any demand for dowry soon before her death. There does not exist any valid reason to proceed against the accused respondent for the offence under Section 304-B. *Bhagwan Sahai* v. *Raju*, 1996 Cr LJ 2290 (Raj).

The deceased and her husband had consummated their married lives for about six and half years and they were blessed with two sons and a daughter. They were residing separately in rented house, but had returned to the house of the accused persons about five months prior to the death of the deceased. There was no evidence on record that during these five months the appellants and their co-fulfilment of any dowry demand. None of the prosecution witnesses whispered a word relating to harassment or torture to the deceased by the appellants during the period of said five months of her stay in the house of the appellants although they made a general statement regarding complaints of the deceased to them of harassment by the appellants after her marriage. Therefore, the death of the deceased was not held to be a "dowry death" punishable under Section 304-B of the Penal Code. *Bananbar Misra* v. *State of Orrissa*, 2000 Cri LJ 3260 (Orissa) : 2000(1) Cri LR 670 : 2000(18) OCR 720 : 2000(90) Cut LT 630 (Ori).

In the instant case, there was no evidence on record to show that the accused demanded additional dowry soon before death of deceased and that he harassed deceased on that score. State of the sister-in-law of deceased that she advised accused not to beat her was not made before police and it was a major improvement over his false statement and liable to be excluded from consideration, conviction of accused was held not proper. *Mummidi Udaya Bhaskar* v. *State of AP*, 2004 Cr LJ (NOC) 244 (AP) : 2003(1) DMC 524 : 2004(1) Hindu LR 257.

In a Jharkhand case the victim initially stated that she had sustained burn injuries herself. Fardebeyan was recorded after 4 hours of her initial oral statement. Victim had sufficient time to change her version under the pressure of the people. Fardebeyan reached the police station after 11 days. The delay was not explained. Neither witness certificate of fitness was taken from the doctor nor any witness was examined to state that the fardebeyan was recorded in his presence. It was held that fardebeyan was a suspicious document and therefore, the same could not be treated as dying declaration. *Imtiyaz Khan* v. *State of Jharkhand*, 2004 Cr LJ 2560 : AIR 2004 Jhar HCR 1395 : 2004(2) DMC 202.

A lawfully wedded wife in no case tolerates extra-marital relationship of her husband. Therefore, where the deceased wife had a melancholic and pensively sad conjugal life in her matrimonial home which had compelled her to end her life by committing suicide and there was neither evidence co-relating demand of money with dowry nor any proof of cruelty soon before death, conviction of husband for dowry death was not sustainable. *Anup Kumar Verma* v. *State of Jharkhand*, 2004 Cr LJ 1712 : AIR 2004 Jhar HCR 933 : 2004(1) DMC 192 : 2003(4) JCR Jha 473.

Black stained rough skin on both sides of neck was found. It was also noticed by the doctor who conducted the post-mortem examination that blood-stained fluid was trickling from the side of mouth and brain matters were found conjested. The doctor unfortunately did not consider the effect of the marks on the neck and trickling of blood-stained fluid from the mouth. The I.O. had seized a blood-stained pillow. There was no evidence that the death was due to normal reason. The evidence amply established demand of dowry and ill-treatment of the deceased shortly before the date of occurrence. Conviction of accused was held proper. *Kamesh Panjiyar* v. *State of Bihar*, 2005 Cr LJ 1418 (SC) : AIR 2005 (SC) 785 : 2005(2) SCC 388 : 2005(1) Supreme 748 : 2005(1) Crimes 277 (SC).

In the instant case the deceased was used to be harassed and tortured for dowry.

The deceased ultimately died and the information of her death was not given to her parents. The conduct of in laws of deceased and the circumstances led to the presumption that the deceased died an unnatural death only within two years of her marriage and her body was disposed of hurriedly and stealthily. Accused failed to give any probable explanation for death of deceased. Delay in lodging FIR was explained. Conviction of accused and in laws was held proper. *Gulab Chand Mehra v. State of Bihar*, 2001 Cri LJ 3802 (Pat).

In absence of evidence that accused husband and parents in-law ill-treated or harassed deceased on account of dowry, no offence under Section 304-B, IPC made out. *State of Karnataka* v. *Dr. H.A. Ramaswamy*, 1996 Cri LJ 2628 (Kant).

Father and mother of the accused were made parties to the harassment and cruelty alongwith husband of deceased but specific event act was, attributed to them. The evidence disclosed that only husband was present in house at the time of incident. It was held that in view of the doubtful circumstance it was not safe to come to the conclusion that the parents of accused were also parties in harassing the deceased. *Kante Venkata Rao v. State*, 2001 CriLJ 3445.

In the case of death in a well under mysterious circumstances, except evidence of interested witness, there was no other evidence showing that even after marriage there had been consistent demand of articles by accused to the father of deceased. In a letter written by deceased to her father it was indicated that she was happy at her matrimonial house. It was held that the finding of guilt of accused was liable to be set aside. *Prabhakar K. Ghate* v. *State of Maharashtra*, 2004 Cr LJ 5074 (Bom) : 2004 All MR (Cri) 405.

The statement of parent of deceased regarding demand of dowry were not supported by any other independent evidence and their statements did not stand the test of scrutiny. A letter sent to the father of deceased by the accused indicated that the accused had complained about affection of accused for someone before her marriage. He also mentioned therein that in the interest of deceased and in his own interest, he did not wish to send her to her material home alone. The letter was clearly an expression of sincere and genuine feelings of the accused for the welfare of the deceased and positively and unmistakeably indicated that the accused wished to live happily and cordially with his wife. Therefore, the above evidence and material record highly on probabilised the defence of the accused that deceased had relations with some other person prior to her marriage with the accused. It was, therefore, natural that accused did not want to send the deceased to her parents. The circumstances as above also indicated that the deceased may have committed suicide on account of frustration due to some other cause, and not because the accused subject her to cruelty. It was held that the conviction of the accused was not justified either under Section 498A or 304-B, IPC. *Rakesh* v. *State of M.P.*, 1999 Cri LJ 4915 (MP).

The observations in *Sharad Budachand* v. *State of Maharashtra*, AIR 1984 SC 1622 : 1984 Cri. LJ 1378 on the point of evidence of relation may be usefully noted as under:

> "In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that this is done consciously but even unconsciously the love and affection for the deceased would create a psychological

hatred against the supposed murderer and, therefore, the Court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or nemisis against the accused person and in the process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it".

In the absence of clear cut evidence indicating dowry related cruelty of sufficient gravity which has a definite nexus to the suicide which really are the legal ingredients where by the prosecution has to establish that it was the grave misconduct of the accused husband that virtually drove the wife over the brink and triggered of the suicide a conviction under section 304-B, IPC is not permissible. The passing reference to dowry in this case are insufficient to sustain the charges under the Dowry Prohibition Act in the absence again of clear cut evidence.—*State of Karnataka* v. *Balu*, 2000 Cri LJ 2165 (Karn).

In the instant case the prosecution proved beyond reasonable doubt that "soon before" her death there was both demand of dowry and torture for the same. Even if the deceased wife committed suicide there was a presumption under Section 113-B of the Indian Evidence Act that the *suicide* had been abetted by the husband. The accused (husband) had not been able to rebut this presumption. There was also cogent and *reliable* evidence that the deceased was *treated* with *cruelty* on account of dowry demand. The husband was held liable to be convicted under Section 304 and 264. *Bhuneshwar Prasad Chaurasia v. State of Bihar*, 2001 Cri LJ 3541.

13. Circumstantial evidence.—In a case based in circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and these circumstances must be conclusive in nature. *State of Kerala* v. *Rajayyan*, (1995) 1 ALT (Cr) 46 (Ker).

14. Burden of Proof.—Prosecution in a case of offence under Section 304B, IPC cannot escape from the burden of proof that the harassment or cruelty was related to the demand for dowry and also that such cruelty or harassment was caused soon before her death. The word "dowry" in Section 304B has to be understood as it is defined in Section 2 of the Dowry Prohibition Act 1961. Thus there are three occasions related to dowry. One is before the marriage, second is at the time of marriage and the third is at any time after the marriage. The third occasion may appear to be an unending period. But the crucial words are in connection with the marriage of the said parties. This means that giving or agreeing to give any property or valuable security on any of the above three stages should have been in connection with the marriage of the parties. There can be many other instances for payment of money or giving property as between the spouses. For example, some customary payments in connection with birth of a child or other ceremonies are prevalent in different societies. Such payments are not enveloped within the ambit of dowry. Hence the dowry mentioned in Section 304B should be any property or valuable security given or agreed to be given in connection with the marriage. *Satvir Singh v. State of Punjab* 2001 Cri LJ 4625 (SC) : AIR 2001 (SC) 2828 : 2001(8) JT 208 : 2001(6) Scale 513 : 2001(7) Supreme 267.

15. Procedure.—The subsequent complaint is not barred under the law and Magistrate also not barred for taking cognizance thereon. *Subhash* v. *State of Rajasthan*, (1995) 2 RCD 485 (Raj).

16. Dying Declaration.—Where Executive Magistrate record the dying declaration and deceased was mentally fit to make a declaration. Conviction held sustainable. *State of M.P.* v. *Manmohan Choubey*, 1995 Cr R 76 (MP).

When letters written by deceased to her parents corroborated case that cruelty was being practiced on deceased, dying declaration that deceased received burns while preparing tea recorded by Magistrate did not appear to be correct. *Nallam Veera Satyanandam* v. *State of A.P*, 1997 (1) Crimes 245 (AP).

When dying declaration was recorded by doctor and Executive Magistrate in fit state of mind conviction can be based on such dying declaration. *Mustt. Sajida Begum* v. *State of Assam*, 1996 Cri LJ 4352 (Gau).

When dying declaration stated that deceased wife committed suicide due to harassment and cruelty to her for bringing more dowry and same is corroborated by documentary and other evidence, offence under Sections 304-B and 498-A, IPC is made out. *Nallam Veera Satyanandam* v. *State of A.P.*, 1996 Cri LJ 4034 (AP).

When the oral evidence as to cruelty and harassment for dowry is supported by suicide note and dying declaration of deceased conviction is sustained. *Surinder Kumar and another* v. *State of Haryana*, 1997 (2) East Cr C 231 (P&H).

On plain reading of Section 173(5) it emerges that when a report by the police officer on completion of investigation under Section 170 is forwarded to the Court concerned, the police concerned shall forward with the report all such documents or relevant extract thereof on which the prosecution proposes to rely other than those already sent to a Magistrate during investigation as also the statements of all persons whom the prosecution proposes to examine as its witnesses. Where the dying declaration of the deceased recorded during investigations had not been filed or relied on by the prosecution in the report submitted under Section 173, Cr. P.C. it is not necessary for the trial Court to consider the charge in the light of the aforesaid statement of the deceased even if it is favourable to the defence. As the alleged dying declaration of the deceased recorded during investigations is not relied on by the prosecution it cannot be considered for any purpose, unless proved in accordance with law. "*Arun Kumar* v. *State Madhya Pradesh* 1999 Cri LJ 717 (M.P).

Though the prosecution had alleged that the accused had ill-treated the deceased and were responsible for the incident, the mother and brother of the deceased who were the most important witnesses turned hostile and the court was left with nothing other than the dying declaration. Normally, a court would have relied on this document and it could have also formed the sole basis of a conviction but the difficulty that arose was that the condition of the deceased was bad, she was not in position to make any statement on the date of the incident and there was no certificate from the doctor that on the next day when the dying declaration was recorded, the deceased was in a fit condition mentally and physically to understand and answer questions. The SPP submitted that the doctor had in his evidence indicated that the statement was made before him and that the deceased was in a fit condition. This was not considered good enough in so far as the law requires a contemporaneous certificate from the doctor which must be endorsed on the dying declaration itself. More so when there was no other evidence and the conviction was sought to be based on the dying declaration alone it would be unsafe to record a conviction in the absence of the certificate in question. Having regard to this position, the Court refused to interfere with the order of the trial Court. *State of Karnataka* v. *Shanker*, 2000 Cri LJ 1917(Kant).

17. Bail.—Conviction of offence held under Section 304-B. Accused sentenced to 10 years' R.I.—Appeal was filed accused already undergone about 16 months of sentence. It was hence held that sentence suspended during pendency of appeal and accused to be released on bail. *Devinder Singh* v. *State of Punjab*, (1994) 3 Recent Cr R 525 (P & H).

With regard to the case of appellant, it has been contended that she is an 80 years old lady and is suffering from various age related ailments. This factual assertion is not disputed by the respondents. Looking at the age of the appellant it does not seem fair to hold her back in jail during the pendency of appeal even if she had been convicted for the alleged serious offence, against which she has come before this Court. Furthermore, in the peculiar circumstances of this case and in view of the fact, that the Appellant is an old lady of 80 years of age and she had already been in jail for more than one year, in our view, she is entitled for the relief prayed in the application. Accordingly, we grant interim bail to the second appellant, subject to the appellant furnishing the bail bond as well as surety to the satisfaction of the Additional Sessions Judge. *Bakshish Ram vs. State of Punjab*, 2009 (6) SCC 561 : 2009 (2) Crimes 351 (SC) : 2009 (6) JT 431 : 2009 (7) Scale 231 : 2009 (3) Supreme 757 : 2009 (4) SLT 366.

It is clear from the various decisions of this Court as stated above that, cases where a serious offence had been committed and the accused had been held guilty for the said offence, then his application for grant of bail should not be decided leniently during the pendency of the appeal. The seriousness and gravity of the offence must be looked into before granting the bail. In the instant case, accused are convicted by the trial Court for harassing, torturing and compelling the deceased to end her life by committing suicide, and the said conviction is confirmed by the High Court. *Bakshish Ram vs. State of Punjab*, 2009 (6) SCC 561 : 2009 (2) Crimes 351 (SC) : 2009 (6) JT 431 : 2009 (7) Scale 231 : 2009 (3) Supreme 757 : 2009 (4) SLT 366.

18. Conviction.—Allegations were of harassment and torture. First dying declaration was made against mother-in-law, husband and other relatives—Subsequently the statement was made against husband only. Suicide accepted by deceased only husband was held liable—Others acquitted. *Rajinder Kumar* v. *State of Haryana*, (1994) 2 Recent CR 459 (P&H).

Accused person in-laws of deceased ill-treated her on account of non-fulfillment of dowry demand due to which deceased committed suicide. Evidence of prosecution witnesses viz., brother, parents and aunt was consistent.

The victim committed suicide. Such fact was proved by medical evidence. Inquest report proved that she committed suicide in her in-laws' place. In our considered view, the appellants being her in-laws were duty-bound to unfold the narrative, which was within their special knowledge. The appellants did not do so while being examined under Section 313. They did not even adduce any evidence. The Appellant No. 1 on the other hand tried to make aspertion on the victim that she had extra marital affair.

although the defence did not lead any evidence on that score. The other accused Urmila could not check her grievance and categorically stated that they did not get any gold out of dowry.

The learned Judge held the appellants' guilty under Section 304-B/498-A of Indian Penal Code. Taking a sum total of the facts, followed by consistent evidence of witnesses being corroborated by each other, we do not find any scope to hold it otherwise, specially in case of appellants. We, however, find that the evidence on record which is held reliable to convict the appellants for the offence under Section 498-A of Indian Penal Code clearly makes out a case for offence of abetting suicide under Section 306 of Indian Penal Code with the aid of Section 113-A of the Evidence Act, 1872. The facts of this case do not support the conviction of the appellants under Section 304-B of Indian Penal Code. *Jhantu Sardar and Ors. vs. State of West Bengal*, 2010 (3) Cri LJ 3012 (Cal).

Accused subjected his wife to cruelty and harassed her for additional dowry on account of which her health got deteriorated and ultimately she died.

As per the evidence of prosecution witnesses, the marriage between the deceased and the accused was performed on 30.11.1998 and the deceased left the company of the accused in the month of March 2000 and her death took place on 27.9.2001. From the above, it is evident that the death of the deceased had taken place within a span of 7 years. But as stated supra, the prosecution shall satisfy all the three requirements by way of cogent evidence to bring home the guilt of the accused for the offence punishable under Section 304-B, IPC. The doctor, who conducted autopsy over the dead body of the deceased and issued post-mortem certificate clearly stated that the death of the deceased was natural. The requirement as provided for under Section 304-B, IPC is that it should be an unnatural death. Of course, if the said death is solely on account of the alleged harassment, presumption can be drawn in view of Section 113-B of the Indian Evidence Act, But here, we have to look into the fact that the accused and the deceased lived together only up to March 2000 and the alleged death took place on 27.9.2001 i.e., after 1 ½. year. From that it cannot be inferred that there was harassment soon before her death. When once the doctor states that the death was natural and there is no cogent evidence to establish that soon before the death of the deceased, there was harassment, that the accused is guilty of the offence punishable under Section 304B, IPC.

Another aspect which is prompting this Court to come to the conclusion is the evidence. The alleged death took place on 27.09.2001 and as it was occurred in the hospital of father of the deceased, and it is a medico-legal case, PW 1 immediately reported the matter to the police only under Section 174, CrPC. If really the said harassment is in existence as on the date of the report, the same would have been mentioned in the report. It is not known as to why father of deceased has not stated all these facts in his report. *Dr. Madas Venkat Goud vs. State of Andhra Pradesh*, 2010 (3) CriLJ 3501 (AP).

Demand of dowry by appellant's husband and father-in-law of deceased. Demand of scooter continued hardly ten days prior to occurrence, conduct of appellants in absconding just after occurrence showing strong presumption of guilt against them. Conviction was hence confirmed. *Manohar Lal* v. *State of Haryana*, (1994) 3 Crimes 147 (P & H).

There were two injuries on the neck of the deceased. The windpipe and the sound box of the deceased were fractured. It was submitted that such injuries cannot be caused by epileptic fits. In addition it was submitted that the plea of the accused persons that the deceased was suffering from epilepsy was also not established by any cogent evidence. The version given by witnesses was doubted and it was categorically observed by the High Court that their evidence was far from credible. It is also pointed out that there was clear evidence for demand of dowry.

Reliance placed on Modi's Medical Jurisprudence to conclude that the injuries found on the neck of the deceased were possible due to epileptic fit is also not on a correct reading of the text. It is not stated any where that even a windpipe or sound box can be fractured as a result of epileptic fit. That being so, the trial Court's judgment was clearly vulnerable. The conviction as recorded by the High Court cannot be faulted. However, considering the background facts of the case, we reduce the sentence imposed in respect of Sec. 304-B IPC to seven years which is the minimum. *Madan Lal and Anr. v. State of U. P.*, AIR 2009 SC 2175 : 2009 (4) SCR 501 (SC) : 2009 (11) SCC 527 : 2009 (7) JT 679 (SC) : 2009 (4) Scale 102 (SC).

Appeal against conviction was filed. Charged for offence under Section 304-B. IPC Conviction under Section 498-A. Suicide committed due to torture by appellants. Statement in dying declaration. Hence conviction under Sec. 498-A was fully justified. *Deepak Kumar* v. *State of A.P.*, (1994) 2 ALT 6 (NRC) : (1994) 1 ALT (Cr) 601 (AP).

The deceased breathed her last within about one year and three months from the date of marriage while living in the house of her in laws. She was not suffering from any ailment prior to marriage and even after the marriage she continued to be hale and hearty. The evidence of PW-3, the father of the deceased is very significant. According to him on 17.03.1995 the deceased came to his house. She informed him that the accused was torturing her as they had to purchase a new house they were demanding Rupees one lac from her. To the similar effect is the evidence of PW-4 the brother of the deceased. Prosecution had pressed into service the agreement deed Exh. PB for the purchase of house by Gurmukh Singh from one Sapan Dass (PW-2). Said agreement reveals that it was executed on 08.02.1995 and the sale deed was to be executed on 08.05.1995. The High Court noted that this document amply established that the family required money for purchase of plot from Sapan Dass. The High Court further noted that there was no material brought on record to show that the agreement was performed by the accused persons. The High Court found that the presumptuous conclusion of the trial Court that there was no link of the demand for dowry with the said agreement. The High Court also noted that the trial Court had erroneously concluded that the accused persons were rich persons and, therefore, there was no need for asking any dowry. *Jagjit Singh vs. State of Punjab*, AIR 2009 SC 2133 : 2009 CrLJ 2440 : 2009 (2) Crimes 134 (SC) : 2009 (4) SCR 75 : 2009 (4) SCC 759 : 2009 (3) JT 382 : 2009 (3) Scale 680 : 2009 (2) Supreme 422.

In a Jharkhand case, the evidence showed with certainty that there was demand of dowry and due to non-fulfilment of demand the deceased was subjected to torture and sometimes even food was not supplied to her. She ultimately committed suicide by hanging herself. The incident occurred within seven years of age. The conviction of accused was held justified but the sentence was reduced to period already undergone as accused was in jail for a period of six and half years. *Khairu Ravidas* v. *State*, 2003 Cr LJ 3658 (Jhar) : AIR 2003 Jhar HCR 1016 : 2003(3) East Cri C 21.

In a case it was established that the accused had subjected his wife to harassment and cruelty for non-fulfilment of demand of dowry and that led to her death within six months of marriage. The conviction of accused under Section 304B was held proper. *State of Karnataka* v. *M.V. Manjunathagowda*, 2003 Cr LJ 900 (SC) : AIR 2003 (SC) 809 : 2003(2) SCC 188 : 2003(1) Supreme 133 : 2003(1) Crimes 289 (SC).

Deceased wife committed suicide by administering person to her son and herself as husband and in laws had subjected deceased to cruelty in connection with demand of dowry. There was no evidence that deceased was suffering from mental depression and presumption under Section 114 Evidence Act was arising that accused persons have caused death of deceased. The conviction of accused persons was held proper. *Sukhadeep Singh* v. *State*, 2004 Cr LJ 1308 (P&H) : 2003(3) All Cri LR 750 : 2004(2) DMC 870 : 2003(3) Rec Cri R 740.

Accused husband and in-laws allegedly tortured deceased to bring more dowry and caused her death by poisoning. The accused was engaged in manufacturing medicines and had knowledge about potentiality and effectiveness of poison responsible for death of deceased. The accused was undoubtedly with deceased at mid of fateful night. Held, presumption under Section 113B of the Evidence Act was attracted and inference could be drawn that the accused-husband had administered person to deceased, and that there was no evidence showing that other accused persons subjected deceased to cruelty in connection with demand of dowry. Their acquittal was held proper. *State of UP* v. *Ajai Kumar*, 2004 Cr LJ 3925.

Appeal against conviction was filed where there was dowry death within 15 days of marriage. Dispute before incident was established. Death was due to taking phosphorous compound—Medical evidence showed nothing except that. Conviction was fully justified. *Inder Singh* v. *State of Haryana*, (1994) 2 CC Cases 59 (P&H).

The agreements to pay valuables at the time of marriage must be established. The said ingredients are totally absent in the evidence of P.Ws. 1 to 3. It is clear from record that she was not able to bear the harassment done to her by A-1 and therefore, she was driven to suicide. The accused abetted the commission of suicide by the deceased by constant torture and cruelty. Hence the accused is liable for punishment under Sections 498-A and 306, IPC. *Nanna Venkateswarlu* alias *Venkateswara Rao* v. *State of Andhra Pradesh represented by the Public Prosecutor High Court of A.P.*, (1995) 2 ALT (Cr) 573 (AP).

Conviction of accused mother-in-law cannot be set aside merely on ground that she could bring up child left by deceased. *Surinder Kumar* v. *State of Punjab*, 1996 Cri LJ 4240 (P & H).

The deceased who was married five years back died under abnormal circumstances. There was no evidence to show by the accused in support of their specific plea that marriage had taken place seven years back. No medical certificate was produced to show that deceased was suffering from serious illness. Not only deceased had died under abnormal circumstances but also appellants were found to be in hurry to destroy the evidence and that is dead body was created and last rites were performed in the night itself. Since demand of dowry was constant and was cause of death, conviction of accused under Section 304B/201 was held proper. *L. Baljeet* v. *State*, 2003 CrLJ 2951 (P&H) : 2003 (2) DMC 825 : 2003 (2) MarriLJ 12 : 2003(2) RecCriR 66.

In a Jharkhand case the accused was strangulated for non-fulfillment of demand of colour T.V. and there was evidence to show that she was severely assaulted before strangulation and this was not done by one person. The conviction under Section 304B/498A was held proper. *Sarju Modi* v. *State*, 2003 Cr JL 631 (Jhar) : AIR 2003 Jhar HCR 70 : 2003(1) JC RJHA 236 : 2003 Mat LR 299.

Where harassment of deceased by accused persons for not bringing further dowry sufficiently established and involvement of accused and respective role played by them firmly substantiated, proving existence of proximate and live link between effect of cruelty related to dowry demand and concerned death then accused liable to be convicted under Section 304B of IPC. *Vidhya Devi* v. *State of Haryana*, AIR 2004 SC 1757 : 2000(1) JT 609 : 2004(1) Supreme 513 : 2004(1) Crimes 320 (SC).

Where demand of dowry by husband is proved and testimony of witness as to incident corroborated by medical evidence establishing unnatural death of deceased within 7 years of her marriage, accused was rightly held guilty of offence. *Nand Kishore Yadav* v. *State of Bihar*, 2005 (3) East Cr C 190 (Jhar).

Where harassment of deceased/wife, who committed suicide, by husband for non payment of entire dowry amount agreed was proved by evidence of neighbours and other witnesses husband was held liable to be convicted. *Kunhiabdulla* v. *State of Kerala*, AIR 2004 SC 1731 : 2004(4) SCC 13 : 2004(3) JT 206 : 2004(2) Crimes 302 (SC) : 2004(2) Supreme 354.

Wife committed suicide out of frustration due to assault and torture for demand of dowry, Prohibition Act was held proper. *Munna* v. *State*, 2004 Cr LJ (NOC) 114 (Jhar) : AIR 2004 Jhar HCR 879 : 2004(1) Crimes 479 : 2004(1) DMC 554. Where death occurred within three years of marriage and she was being tortured for non-fulfilment of dowry demand, it was held that prosecution case was proved doubt and conviction was justified. *Khatoon Bibi* v. *State of Bihar*, 2004 Cr LJ 301(Jhar).

Deceased died due to consuming poison. Soon before her death, she had complained against her husband and in-law to her mother and brother. The evidence showed that the deceased was being subjected to torture and cruelty for non-fulfilment of demand of dowry conviction of accused was held proper. *Tayab Khan* v. *State of Bihar*, 2004 Cr LJ (NOC) 180 : AIR 2004 Jhar HCR 1079 : 2004(1) East Cri C 149 : 2003(4) JLJR 34.

The demand of 25% of land in a dowry death case attracted the provisions of Section 304B, IPC. *Nazar* v. *State of Kerala*, 2005 Cr LJ 974 (Ker) : 2004(2) CCR 458 : 2005(1) Hindu LR 227.

In a case death of deceased occurred within seven years of marriage under unnatural circumstances. The dead body was recovered from the well but cause of death was by the strangulation as per postmortem report. No eye-witness was available but other evidence showed that she was being tortured and assaulted for not bringing the enough dowry. It was held that the conviction of accused under Section 304B/498A was justified. *Jethar Maheta* v. *State*, 2003 Cr LJ (NOC) 6 (Jha) : AIR 2003 Jhar HCR 61 : 2002(2) DMC 733 : 2003 Hindu LR 74 : 2002(3) JCR Jha 348.

At the time of marriage deceased's parents failed to give dowry which was agreed to at the time of settlement of marriage—for that she was tortured, insulted and humiliated ultimately there was tragic death of lady in her in-laws' house. The Sessions Court convicted both the appellant under Section 304B/498A and conviction was confirmed by High Court but sentence was reduced. The matter by way of appeal reached Supreme Court where it was found that inevitable conclusion was that the appellant, Kaliaperumal had been rightly convicted and sentenced under Section 304B/498A but another appellant was acquitted of charge under Section 304B as there was inadequate material to attract her culpability. However her conviction under Section 498A was held proper. *Kaliaperumal* v. *State of T.N.*, 2003 Cr LJ 4321 (SC) : AIR 2003 (SC) 3828 : 2003(7) JT 392 : 2003(3) Crimes 374 (SC) : 2003(6) Supreme 101.

In the present case there is ample evidence on record that soon before the death the deceased was subjected to physical and mental cruelty and torture because of non-fulfilment of demand of dowry. It has come in evidence that the deceased had disclosed to her parent and witnesses regarding demand of dowry and torture on her by the appellants. Only after a month of the return to her 'Sasural' she was done to death. Therefore, it can very well be said that the demand of dowry and torture meted out to the deceased by the appellants, were soon before her death. In this situation, the presumption as envisaged under Section 113B of the Evidence Act, 1872 for commission of the offence under Section 304B of the Indian Penal Code would certainly be raised against the appellants. *Premchand Mahto* v. *State of Jharkhand*, 2005 Cr LJ 3672 (Jhar) : 2005(2) DMC 624 : 2005(3) East Cri C 237 : 2006(1) Hindu LR 117 : 2005(3) JCR Jha 253.

In an Allahabad case, persistent demand of Maruti Car in dowry by accused persons was proved. The harassment of deceased over score of non-fulfilment of the said demand was also established. The evidence showed that there was struggle between deceased and accused. The allegation of manipulation of post-mortem report was rejected. Theory of suicide was also proved. Accused was held liable to be convicted under Section 304B. *State of UP* v. *Satya Narain Tewari*, 2005 Cr LJ 3684 (All) : 2005(53) All Cri C 274 : 2005(3) All Cri R 2738 : 2006(1) Hindu LR 277.

19. Acquittal.—Where prosecution failed to establish that deceased died homicidal death held that dowry harassment not proved. False case established by prosecution witnesses to extract money from accused. Accused not given fair opportunity to defend himself. *Held*, conviction not proper. *Attuluri Krishna Murthy* v. *State of Andhra Pradesh*, 1995 Cr LJ 1653 (AP).

Revision against acquittal.—The accused respondents were charged for causing death of the deceased for dowry and subjecting her to cruelty and harassment, but there is no evidence to evince such cruelty and harassment. In the facts and circumstances of the instant case, no presumption can be drawn about the dowry death and thus, the prosecution is found to have failed to bring home the accusation so far as they relate to offences punishable under Sections 304-B and 498-A of IPC.

There is no direct evidence with regard to cruelty or demand for dowry on record. Prosecution has miserably failed to furnish satisfactory and reasonable explanation of delay in filing FIR. Acquittal of accused respondents is proper. *Krishan Lal Sharma vs. The State of Rajasthan*, 2010 (2) CrLJ 2316 (Raj).

What the High Court failed to notice in arriving at the said findings is that no evidence was brought on record to show that the cruelty or harassment was meted out to her for bringing insufficient dowry, in absence whereof the ingredients of Sec. 304-B of the Indian Penal Code cannot be said to have been proved. The legal fiction sought to be created must be raised only on fulfillment of the conditions precedent therefor. All the requisite ingredients of the offence must be brought home before the presumptive evidence is put to use by the Court for holding the accused guilty of an offence under Sec. 304-B of the Indian Penal Code.

It is true that two injuries were noticed on the person of the deceased by the Autopsy Surgeon, but we could have considered this aspect of the matter had the appellant been not the only accused. The FIR was lodged against others also. Three more persons being sisters and cousin of the appellant were also charged for commission of the said offence. If the deceased was forced to take poison, they must have some hand in it. As they have been acquitted, it is difficult for us to come to the conclusion that it was the appellant and the appellant alone who was responsible for her death.

For the aforementioned reasons, the impugned judgment cannot be sustained and it is set aside accordingly. The appeal is allowed. The appellant who is in custody is directed to be set at liberty and released forthwith unless wanted in connection with any other case. *Tarsem Singh vs. State of Punjab*, AIR 2009 (SC) 1454 : 2008 (17) SCR 379 : 2008 (13) JT 185 : 2008 (16) Scale 148 : 2009 (1) SLT 207 : 2009 (1) Crimes 168 (SC) : 2009 (1) JCC 372.

No witness of area or village produced showing cruelty or harassment by husband for dowry. *Held*, offence under Section 304-B not proved. *Chhanga Ram* v. *State*, (1995) 1 RCD 112 (Raj).

It was brought out by evidence on record that deceased was not liking A-1. She was interested in getting married with some other boy, ultimately it led her to commit suicide. This is not a case of dowry death within meaning of Section 304-B(1), I.P.C. as no harassment or ill-treatment is proved against the appellant, accused in connection with demand of dowry. Hence A-1 acquitted and acquittal of A-2 upheld. *Public Prosecutor, High Court A.P., Hyderabad* v. *Narsu*, (1995) 1 ALT (Cr) 88 (AP).

There was no co-relation of the demand of money from parents of wife for starting business and marriage. There was nothing to show that seen before the incident deceased was subjected to cruelty or harassment in connection with dowry. It was held that unnatural death of the deceased in the facts and circumstances of the case could not be said to be dowry death and, therefore, conviction of accused was liable to be set aside. *Tilak Bedia* v. *State of Bihar (Now Jharkhand)*, 2004 Cr LJ (NOC) 180 : AIR 2004 Jhar HCR 1079 : 2004(1) East Cri C 149 : 2003(4) JLJR 34.

In another Jharkhand case, door was bolted from inside and the dead body of the deceased was lying in the house. Accused was not present in the house. No one had seen him running away from place of occurrence. The contention that the deceased was being tortured and even driven away from the matrimonial house was not supported by reliable evidence, defence plea of commission of suicide by deceased was probable. The accused was acquitted giving benefit of doubt. *Hari Ram Bhagat* v. *State of Bihar (Now Jharkhand)*, 2004 Cr LJ (NOC) 71 : AIR 2004 Jhar HCR 489 : 2003(2) JCR Jha 533.

The accused persons allegedly administered poison to deceased due to non-payment of dowry. According to prosecution witness the troth was coming from month of deceased. But the statement was not supported neither by inquest report nor by medical evidence conviction of accused was held improper. 2004 Cr LJ (NOC) 68 : AIR 2004 Jhar HCR 338 : 2004(1) DMC 779 : 2003(3) JCR Jha 113 : 2003(3) JLJR 265.

According to one of the prosecution witnesses, in the absence of the father of the deceased and the deceased, the accused came to the village and behaved in a rude manner and created a scene and shouted. He was advised not to behave in such a manner and he left the place. He further stated that he learnt that the couple was not living cordially as the accused was ill-treating and harassing the deceased for getting more amount of dowry. This statement was also not substantiated as to wherefrom he got this knowledge. This is merely a hearsay evidence and even he has not stated from whom he had heard. Therefore, we agree with the learned senior counsel for the appellant that there is no evidence on record to show that there was harassment on account of demand of dowry immediately prior to the death. Therefore, the important ingredient of Section 304B, IPC was not satisfied. Therefore, in our view, the appellant could have not been convicted under Section 304B, IPC. *Bijjanki Kishan* v. *State of AP*, 2005 Cr LJ 3780 (AP) : 2005(2) LAD (CRL) 185. *See also Mahendra Sahu* v. *State of MP*, 2005 Cr LJ 873 (MP) : 2005(2) DMC 90 : 2004(4) MPLJ 130.

Where harassment for dowry was related back to November 1999 and the deceased committed suicide in July 2000, it was held that dowry related harassment was not proximate to date of commission of suicide. The conviction under Section 304B was set aside. *Salvaran* v. *State*, 2003 Cr LJ 2831 (Bom) : 2003(4) All Cri LR 397 : 2003(2) Hindu LR 589.

In an AP case the deceased died due to poisoning and the prosecution could not establish whether death was a homicide or suicide. No external injuries were found on dead body. It was held that the conviction of accused under Section 304B was not proper. *Penchala Sadaiah* v. *The State*, 2003 Cr LJ 3827 (AP) : 2003(2) ALD (Crl) 382.

Where harassment to deceased by accused/sister-in-laws aged 16 and 18 years respectively was not proximate to death which was 2-1/2 years after marriage therefore accused cannot be convicted. *Surinder Kaur* v. *State of Haryana*, AIR 2004 SC 1747 : 2004(4) SCC 109 : 2004(3) JT 61 : 2004(2) Supreme 255 : 2004(2) Crimes 276 (SC).

Since allegation of cruelty or harassment in respect of demand of dowry was neither specific nor established by evidence, conviction and sentence imposed by trial court was not sustainable. *Vishwanath* v. *State of MP*, 2005 (3) East Cr C 140 (MP).

The accused was acquitted where the husband enjoyed cordial relations with deceased wife and evidence of dowry and torture was not available. *Nehal Aagar* v. *State*, 2004 Cr LJ (NOC) 84 (Jhar) : AIR 2004 Jhar HCR 411 : 2003(2) JCR Jha 526.

Death of woman occurred within 3 years of marriage but charges were framed and proved under Section 498/34. Since no charge under Section 304B was framed it was held that conviction under Section 304B could not be sustained. *Rajendran* v. *State*, 2004 Cr LJ 4156 (Mad) : 2004(2) Hindu LR 720 : 2004 Mad LJ (Cri) 992.

No proper explanation for the delay in F.I.R. cruelty and harassment not established—Deceased pregnant while died—Allegation was of kick blow, offence not proved hence—Acquittal order passed. *Vinod Kumar* v. *State of Haryana*, (1994) 3 CCC 505 (P & H).

There were no eye-witness of incident and there were no cogent evidence to connect the appellant with the offence. Hence conviction under Section 304-B not sustainable. *Ram Mal* v. *State of Rajasthan*, 1995 Cr LR 250 (Raj).

Where delay in filing F.I.R. was not explained and alleged cruelty to deceased quite vague, inconsistent not believable in respect of demand of dowry and no presumption as to 'dowry death'—Circumstances as to cruelty and burning of deceased not proved and conviction set aside. *Bhakhar Ram* v. *State of Rajasthan*, 1995 Cr LJ 1345 (Raj).

Husband-petitioner a Military Officer posted in Cochin. Wife died due to poison. There was no evidence to prove hand of petitioner in death of wife, hence F.I.R. quashed. *Lt. Arvind Kumar Tomar* v. *State of U.P.*, (1995) 2 CCR 230 (Alld).

When the evidence is completely wanting in this case for demand of dowry, the Courts below were not right in convicting the revision-petitioner under Section 304-B, I.P.C. Hence conviction for said offence has to be set aside. *Bhaskaran* v. *State*, (1995) 1 LW (Cr) 57 (2) (Mad).

There was no evidence of unlawful demand of dowry or cruelty to wife. Wife died suicidal death within seven years of marriage—By mere this fact it cannot be inferred that she was subjected to cruelty.—*Held*, accused not held guilty of charges framed and acquitted. *Onkar Prasad* v. *State of M.P.*, (1995) 3 CCR 70 (MP).

Inordinate delay of nine days in lodging report. Indicative of deliberation and embellishment. No evidence of her being subjected to cruelty or torture for demand of dowry. No evidence of burning on the place of occurrence. Appellants immediately taking the victim/deceased to government hospital for treatment.—*Held, a* case of gross-illegality in convicting the appellants under Section 304-B and 304-II by way of introducing new facts. Appellants acquitted. *Bhakhar Ram* v. *State of Rajasthan*, (1995) 2 Crimes 539 (Raj).

When incident and death took place before Section 304-B came into force, accused liable to be acquitted under Sec. 304-B. *Bhoora Singh* v. *State*, 1993 Cri LJ 2636 (Alld).

Deceased died unnatural death by falling into well. Conflicting evidence as to whether it was a case of suicide or an accidental death. No inference from evidence that death occurred within seven years of her marriage. Prosecution fails to establish charge under Section 304-B, I.P.C. Evidence as to harassment and cruelty on account of dowry demand. *Held*, accused guilty of offence under Section 498-A. For the purpose sentence of imprisonment already undergone for two years, acquitted of charge of 304-B, I.P.C. *Baswapuram* alias *Dontaraboina Narsimloo* v. *State of A.P.*, (1995) 2 Crimes 455 (AP).

See also *Satbir Singh* v. *State of Haryana*, 2005 Cr LJ 4137 ; *Devndar Singh* v. *State of Punjab*, 2005 Cr LJ 4160 (SC) : AIR 2005 (SC) 3501 : 2005(53) All Cri C 787 : 2005(4) All Cri LR 559 : 2005(6) Supreme 478 ; *Nazar* v. *State of Kerala*, 2005 Cr LJ 974 (Ker) : 2005(1) Hindu LR 227 : 2005(1) Ker LJ 1 : 2005(28) All Ind Cas 346 ; *Raj Kumar* v. *State of M.P.*, 2005 Cr LJ 1072 ; *Jahpam Ramesh* v. *State of A.P.*, 2006 Cr LJ (NOC) 111 (AP).

In a case of dowry death the husband and the in-laws killed the deceased wife by squeezing her neck and pouring pesticide into her mouth. In post-mortem report it was established that deceased died due to poisoning as no external injury was found on the body of the deceased. The prosecutor could not establish whether it was homicide or suicide. The conviction of accused persons was held not proper. *Penchala Sadaiah* v. *The State*, 2003 Cr LJ 3827 (AP): 2003(2) ALD (CRL) 332 : 2003(2) Andh LT (Cri) AP **562**.

In *Ravinder Kumar* v. *State of Haryana*, 2005 Cr LJ 84 (P&H) : 2004(4) Crimes 481 : 2005(1) DMC 209 : 2004(4) Rec Cri R 234 it was observed as under:—

> "If there was, indeed, a demand of dowry before or after the marriage, some mention of the same ought to have been made in the FIR. In fact, it is clearly mentioned by PW1, when he lodged an FIR before the police, that his daughter was being taunted on small issues. If these issues were related to demand of dowry, it could not have assumed the character of small issue and some mention of either cash or some particular articles, it appears to this Court, must have been made. Both the witnesses *i.e.*, father and brother of Amita, appear to have improved upon the prosecution version with regard to demand of dowry, perhaps being conscious of the fact that narration of events given in the FIR may not bring home the offence against the appellant under Section 304B of Indian Penal Code. The mention in the FIR that it remained in the minds of the accused that they were given less dowry, as said earlier, appears to be only an imagination or a thought process of the first informant. Surely, he could not be a witness to the feelings of the appellant and his co-accused. In any case, impression of a person that the accused had a mind of demand of dowry or that they were not properly behaving with Amita on account of less dowry having been given, cannot be termed as demand of dowry as such by the appellant or his co-accused."

Acquittal of husband of deceased-wife—When valid. The prosecution examined six witnesses including Shrirang, the father of the deceased, Vimal, the mother of the deceased and Smt. Nirmala, the elder sister of the deceased. The trial Court found that demand of gold ring by mother-in-law and cruelty to deceased on account of non satisfaction of the demand was proved only against mother-in-law. It was found that Anita had committed suicide. Accordingly, mother-in-law was convicted as afore-noted and rest of the accused persons were acquitted. As noted above, Suman challenged the conviction whereas the State challenged the acquittal of rest of the accused persons.

Learned Counsel for the appellant submitted that the trial Court had rightly held that in letter there was nothing to implicate the present appellant. Therefore, his acquittal was correct, but the High Court on erroneous reading of the document has directed conviction.

Learned Counsel for the State on the other hand supported the order. In the letter on which both the trial Court and the High Court have relied upon to conclude one way or the other, reference is made to several earlier letters. It specifically refers to the demand by mother-in-law of a gold ring. There is no reference to the present appellant in the letter.

The evidence of father, mother and sister is also relevant. Father has stated that except above letter he had not received any letter and the statement in the letter to the effect that the deceased had earlier sent 2/3 letters is correct. If on one hand he says that he had not received any letter, the question of not replying to them does not arise. Similarly, mother has stated that she cannot say whether there was any demand of Rs.

10,000/- in letter. Elder sister has accepted that deceased had written to her father that mother-in-law Suman was demanding gold ring in the letter.

Learned Counsel for the State submitted that there is some reference to money in the letter. The sentence is being read out of context. The deceased had written in the letter that she may have to get a gold ring but wherefrom will she get the money for buying it. Therefore, there is no reference to any demand of money by the present appellant. That being so, the High Court was not justified in upsetting the judgment of the trial Court. The impugned judgment of the High Court is set aside and that of the trial Court is restored. *Vijay vs. State of Maharashtra*, AIR 2009 (SC) 1217 : 2009 (2) SCC 87 : 2009 (1) Crimes 178 (SC) : 2008 (15) Scale 362 : 2009 (16) SCR 890 : 2009 (1) SLT 313 : 2009 (1) JCC 113.

Insufficient material for Dowry death.—It is of significance that Dr. Balbir Singh Randhawa in the cross examination had categorically stated that the history sheet of the patient Exh. DA was written by Dr. Bhupinderjit Kaur in Ex. PA. He also stated that the treatment was prescribed by him. It was entered in the bed head ticket made by doctor Bhupinderjit Kaur who was on duty on that day. He also stated that though the patient was in shock but she was not unconscious. He stated that he identified the signatures of Dr. Bhupinderjit Kaur and handwriting in the bed head ticket. In the FIR, reference was made to a letter purportedly to have been written by the deceased. This letter has been marked as an exhibit.

A bare reading of the letter clearly shows that there is not even a whisper about demand but the deceased had categorically stated that she had asked for the money and the articles on her own. The trial Court erroneously held that in the letter there was reference to demand of dowry. Strangely, the High Court held that even though the letter was inconsequential but the evidence of the relatives about the harassment for dowry cannot be brushed aside. As rightly submitted by learned Counsel for the appellant there were improvements in the statements recorded in Court. The two new witnesses introduced certain aspects for the first time. Significant statement in this regard is that of Sham Lal (PW-6). In Court he stated that the deceased told him in the hospital that kerosene oil was poured on her by the accused. He accepted during his examination that no such allegation was made in his statement recorded in terms of Sec. 161 of CrPC. Similarly, Surinder Kanta in Court stated that the deceased informed her about the demand of Rs. 1,00,000/- by her-in-laws and about her giving Rs. 20,000/-. This was not stated during investigation under Sec. 161 of Code as is evident from Exh. DA. In Court Surinder Kanta stated that the deceased was beaten and mistreated but no such statement was made during investigation. Additionally, no such allegation was made by PW-8 the complainant about this aspect in the FIR.

In the statement in Court Surinder Kanta stated that the deceased had told him that A-1 and A-2 caught hold of her and A-1 poured oil over her body and set her on fire by throwing match stick. No such statement was made during investigation. Similarly, that is not also the version of Sham Lal. In Court Surinder Kanta stated that all the accused persons *i.e.* the present appellant and the acquitted accused persons maltreated her. No such allegation was made while the witness was examined.

The High Court's judgment is not only sketchy but also devoid of reasons. Various factors highlighted above would go to show that the prosecution has squarely failed to establish the accusations so far as the appellant is concerned. Therefore, the appeal deserves to be allowed which we direct. The appellant is to be set at liberty forthwith unless to be required in connection with any other case. *Raman Kumar vs. State of Punjab*, 2009 CrLJ 3034 : 2009 (6) SCR 933 : 2009 (8) JT 422 : 2009 (6) Scale 335 : 2009 (3) JCC 1840.

Shoddy investigation cannot be a foundation for the accused persons to take advantage of shoddiness. But in the instant case, there was no material brought on record by the prosecution to establish the accusations so far as the present appellant is concerned. It is to be noted that there was a dying declaration recorded by the Executive Magistrate, Chandigarh who was present at PGI Hospital. The authenticity of the dying declaration has not been questioned. It is the stand of the prosecution that police officer should have recorded it. But that cannot be a ground to discard the dying declaration recorded by the Executive Magistrate. Additionally, the prosecution laid great emphasis on the letters purported to have been written by the deceased to her relatives. Here again, handwriting expert's report clearly shows that the letters were not in the handwriting of the deceased.

Above being the position, there is no evidence brought on record by the prosecution to establish the accusations. That being so, the appeal deserves to be allowed which we direct. *Rakesh Kumar vs. State of Haryana*, 2009 CrLJ 1895 : 2009 (2) Crimes 119 (SC) : 2009 (11) SCC 81 : 2009 (3) JT 377 : 2009 (3) SCR 1190 : 2009 (3) Scale 567 : 2009 (2) Supreme 459 : 2009 (3) SLT 153.

No evidence towards claim regarding any demand of dowry. Bare reading of Sec. 378 of the Code (appeal in case of acquittal) quoted above, makes it clear that no restrictions have been imposed by the legislature on the powers of the appellate Court in dealing with appeals against acquittal. When such an appeal is filed, the High Court has full power to reappreciate, review and reconsider the evidence at large, the material on which the order of acquittal is founded and to reach its own conclusions on such evidence. Both questions of fact and of law are open to determination by the High Court in an appeal against an order of acquittal.

During cross-examination he accepted that all this was not stated during investigation. He also accepted that it was not mentioned in the FIR that gifts and other articles were given as dowry. He accepted that his father in law Udai Singh had settled the marriage between the accused and the deceased. Interestingly Udai Singh (DW. 1) has stated that there was no demand from the side of the accused at the time of marriage. The deceased and her parents had never complained to him that the accused or any member of his family was raising any demand of any kind when confronted with the statement made during investigation, PW. 5 accepted that he had not stated many vital things during investigation which for the first time he was speaking in Court. Similar is the position with PW. 7 the brother of the deceased. He also accepted on being confronted with the statement made during investigation that he had not stated particularly certain relevant aspects. Similar is the position with the evidence of mother of deceased (PW. 6).

As was rightly noted by the trial Court there was no evidence towards the claim regarding any demand of dowry. That being so the High Court ought not to have interfered with the well reasoned judgment of the trial Court directing acquittal. The reasoning of the High Court that something must have happened and otherwise deceased would not have committed suicide is clearly indefensible. That certainly could not have been a reason to set aside the trial Court's judgment of acquittal. *Nepal Singh vs. State of Haryana*, AIR 2009 (SC) 2913 : 2009 (12) SCC 351 : 2009 (7) JT 172 : 2009 (6) SCR 982 : 2009 (6) Scale 555 : 2009 (4) SLT 2.

20. Sentence.—Sentence of life imprisonment should be awarded only in rare cases. Sentence reduced to 10 years. *Hem Chand* v. *State of Haryana*, 1995 SCC (Cr) 36 : (1994) 3 Recent CR 625 (SC) : AIR 1995 (SC) 120 : 1994(6) SCC 727 : 1994(6) JT 475 : 1994(3) Crimes 608 : 1994(4) Scale 401.

Offence under Section 304-B and 306 not made out—Evidence showing accused mother-in-law caused injuries to the deceased who committed suicide.—*Held*, thus offence under Section 324 only established since accused is aged 80 years. Sentence of fine of Rs. 3,000/- imposed. *State of H.P.* v. *Nikku Ram*, 1995 AIR SCW 3721 (SC) : 1996(1) Dme 131 : AIR 1996 (SC) 67 : 1995(5) Scale 94.

Where appellant was only bread earner and deceased left a child of one year and there were old parents. Life-imprisonment reduced to 10 years rigorous imprisonment. *Mohd. Nizamuddin* v. *State of Bihar* (1995) 1 East Cr C 662 (Pat).

The interest of justice would be met if the sentence of life awarded to the accused is reduced to the one already undergone by them. The accused have already undergone actual substantive sentence of 7 years and 5 months by now. Insofar as husband of deceased is concerned, he was only 17 years of age at the time of commission of the crime. The other two accused are by now of ripe old age and they belong to lower strata of society. May be the allegations with regard to demand of dowry had been exaggerated in this case in as much as complainant as also the accused were not affluent enough to give and take dowry disproportionate to their financial status. *Gurcharan Singh* v. *State of Punjab*, 1999 Cri LJ 1616 (P&H).

There was no charge under Section 302 IPC and there was no direct evidence and the case was "based on circumstancial evidence as well as presumption under Section 113-B of the Indian Evidence Act. Moreover, the accused was aged about 22 years at the time of occurrence. In view of the above circumstances and facts of the case, the sentence of life imprisonment under Section 304-B was reduced to 10 years' R.I. *Mahesh Kumar v. State*, 2001 Cri LJ 4417 (All.).

In *State of UP v. Satya Narain Tiwari*, the case was the most horrendous crime committed by the two accused respondents (mother-in-law and husband of the deceased) cutting short the life of the young lady, in a very cruel manner for the greed of dowry. It is a fit case where maximum sentence of life imprisonment provided under Section 304B IPC should be awarded to them. For the offence of Section 498A IPC the two accused persons deserve to be punished with rigorous imprisonment for three years. For having committed the offence under Section 4 of the Dowry Prohibition Act, the sentence of six months rigorous imprisonment would meet the ends of justice. *State of UP* v. *Satyanarayana Tiwari*, 2005 Cr LJ 3684 (All) : 2005 All LJ 2941 : 2005(53) All Cri C 274 : 2006(1) Hindu LR 277.

21. Cruelty.—When deceased was tortured and assaulted on refusal to fulfill demand of money and she was not allowed to meet or talk to her family members, it amounts to cruelty. *Anand Kumar* v. *State of M.P.*, 1997 Cri LJ 1005 (MP).

Accused person in-laws of deceased ill-treated her on account of non-fulfillment of dowry demand due to which deceased committed suicide. Evidence of prosecution witnesses viz., brother, parents and aunt was consistent.

The victim committed suicide. Such fact was proved by medical evidence. Inquest report proved that she committed suicide in her in-laws' place. In our considered view, the appellants being her in-laws were duty-bound to unfold the narrative, which was within their special knowledge. The appellants did not do so while being examined under Section 313. They did not even adduce any evidence. The Appellant No. 1 on the other hand tried to make aspertion on the victim that she had extra marital affair, although the defence did not lead any evidence on that score. The other accused Urmila could not check her grievance and categorically stated that they did not get any gold out of dowry.

The learned Judge held the appellants' guilty under Section 304-B/498-A of Indian Penal Code. Taking a sum total of the facts, followed by consistent evidence of witnesses being corroborated by each other, we do not find any scope to hold it otherwise, specially in case of appellants. We, however, find that the evidence on record which is held reliable to convict the appellants for the offence under Section 498-A of Indian Penal Code clearly makes out a case for offence of abetting suicide under Section 306 of Indian Penal Code with the aid of Section 113-A of the Evidence Act, 1872. The facts of this case do not support the conviction of the appellants under Section 304-B of Indian Penal Code. *Jhantu Sardar and Ors. vs. State of West Bengal*, 2010 (3) Cri LJ 3012 (Cal).

So far as the offence under Sections 498A and 304B, IPC is concerned, throughout it has come on record that accused 2 (brother in law) was staying elsewhere whereas accused 1 and deceased were staying first at Bettadapura and later at K.R. Nagar. It is also the evidence of the neighbouring witnesses staying near the house of the accused and deceased that the couple were cordial and some of the women who were talking with the deceased also have specifically stated that there was no dowry demand much less payment of additional dowry. Even the deceased had not complained of the harassment to bring additional dowry.

Of course, the defense of the accused is that the deceased was suffering from stomach-ache and also pain in the left lower limb as such, she being frustrated, committed suicide. It is seen, on some occasions the deceased had been treated at the hospital for which some documents are produced. Further, it is the specific case of the father of the deceased and other witnesses i.e. mother and sister that accused was never allowing the deceased to attend any of the ceremonies in their family. Even as per the prosecution, the deceased requested the 1st accused to take her to the house warming ceremony of one of her relatives and he refused to take her on which much thrust has been given in the evidence of witnesses. Of course, due to such an indifferent attitude on the part of 1st accused, the deceased must have felt humiliated or got annoyed. In the usual course, family bickering between spouses by itself, cannot be said to be a reason for her to commit suicide and it may not be a ground to hold against the accused that there was abetment to commit suicide and also that the accused is guilty of the offence under Section 498A, IPC.

From the evidence on record that of father, mother and sister and PW 15, it is seen, they have spoken about the deceased complaining of harassment to her whenever she used to meet them. In this regard, however, no complaint has been filed by the family of the deceased against the accused. Apart from that, what is noticed is, the deceased was residing along with her husband and after marriage, for three years she lead marital life and also gave birth to a child. It is also noticed, the 1st accused was demanding Rs. 20,000/- as per the evidence of some of the witnesses and also they made arrangement to pay Rs. 15,000/-. In this regard father has not stated or whispered anything before the Taluka Executive Magistrate. So, it appears to be an afterthought to make out a dowry harassment case to implicate the accused. Even with regard to the evidence as to collecting dowry is concerned, the statement of father is that the 2nd accused has collected dowry amount whereas in the further statement it is stated that 1st accused has collected the dowry amount and that itself shows that there is much contradictions and Ex. D5 also depicts the contradiction version. Moreover, in the absence of any such complaint being filed by father and mother on coming to know of the deat of the deceased except the suspicion they have expressed at the time of recording the inquest statement by the Tahsildar, no other steps have been taken by father to file the complaint. Even the FIR is registered for the alleged offences only after ten days. Certain of the contradictions marked at Ex.D. 4 to 6 show that there is no such demand by the accused for dowry. May be some misunderstanding between the husband and wife regarding not allowing the deceased to attend the function of her relative but, that itself cannot be treated as a cruelty harassment. In order to prove the offence under Sec. 304B, IPC, death must have occurred within seven years of marriage in unnatural circumstances in connection with dowry harassment. The evidence of the neighbouring witnesses is consistent and contradicts the version of the relatives of the deceased and also, apart from that, the boy witness who was residing along with the deceased and the accused has not whispered anything about any untoward incident that has occurred to hold the accused guilty of the offences under Secs. 498A and 304B, IPC. Even if some amount is given or taken, it appears to be in the form of customary practice having regard to the status of the family and, even for having made payment, there is no record made available. Believing the version of the relatives of the deceased as gospel truth the trial Court has convicted and sentenced the accused without looking into the various contradictions and admissions and also the delay in filing the complaint. The complaint is lodged, that too by the police, after ten days. Ex.D. 1 to D 3 are the prescriptions of the deceased who was treated for ailments. The statement of PW 5 is recorded by the police only after 9 to 10 days after the death of the deceased and nothing has been stated by him in the Inquest Report regarding alleged demand for additional dowry by the accused. It appears to be an afterthought and improvement made by the prosecution witnesses, especially by father, mother and sister.

In view of the above discussion, having noticed that deceased committed suicide within seven years of her marriage, it appears her death would have probably been due to misunderstanding between the deceased and the 1st accused in not sending her to attend the ceremony of her relative in the family of her parents. Although several wild allegations are made, there is no cogent evidence to hold the accused guilty of the alleged offences. The order of conviction and sentence rendered by the trial Court is without looking into the contradictions and also without considering the material evidence of the independent witnesses who got to speak about the attitude of the accused with the deceased. *Dr. Seetharamaiah and Anr vs. State of Karnataka*, 2010 (3) CriLJ 3389 (Karn).

There was an unrelenting demand for dowry and Asha Devi-deceased persistently subjected to cruelty and harassment for and in connection with demand. Both her parents and her brother deposed before the Court that Appellant once again raised his demand when he had gone to their house to bring deceased to place. Their inability to meet his demand had caused him annoyance and anger. A Devi was naturally apprehensive and was very reluctant to go with him. But t somehow prevailed upon her and made her depart with him. There is thus direct a positive evidence of her being subjected to harassment. There is nothing to show t after she was brought to the appellants' place and till her death merely about months later the situation had radically changed, the demand of dowry had ceased a relations had become cordial between the deceased and three appellants. In the fa and circumstances of the case, we are satisfied that in connection with the appellar demand for dowry deceased was subjected to cruelty and that was the proximate cau of her homicidal death. *Deen Dayal vs. State of Uttar Pradesh*, AIR 2009 SC 1238 : 20 CrLJ 1119 : 2009 (1) Crimes 243 (SC) : 2009 (11) SCC 157 : 2009 (1) JT 170 : 2009 SCR 56 : 2009 (1) Scale 408 : 2009 (1) SLT 341 : 2009 (1) JCC 540.

22. Framing of Charge.—Accused cannot be convicted under Section 30 without a charge being framed specifically. *Mohd. Dowlath* v. *State of AP*, 2004 Cr 760 (AP) : 2004(1) ALD (CRL) 822 : 2004(1) DMC 447 : 2004 MATLR 261.

23. Death of wife in her matrimonial home.—From the facts, it goes withou saying that the posecution in a case of this nature must rule out that the death of th deceased was not natural. Death of a person by disease process has also been held no to be death otherwise than the normal circumstances in a case under Section 304- IPC. As it appears in this case none of the witnesses including the report of th chemical examination could throw any light that the death of the deceased was due t any burn or bodily injury or otherwise than the normal circumstances or not natural. I such premises, even if the defence version that the death of the deceased was due t any stomach trouble has not been proved, but the same cannot prove the case of th prosecution that the death of the deceased was due to any burn, bodily injury o otherwise than the normal circumstances. *Khetramohan Panda and Ors. vs. State o Orissa*, 2010 (1) Cri LJ 498 (Orissa).

24. Symbolic marriage—Scope.—The word 'marriage' as used under the provisions of Section 304-B, IPC has to be given an independent meaning and thus should not be guided by the provisions of any other law. In the case of *Yatesh Kumar vs State of Rajasthan*, 1999 (1) RRC 227 (Raj), learned Single Judge has rightly taken the view that real marriage takes place when "Gauna" is performed. It is the stage when girl comes to her husband's place and actual marriage takes place at that stage. A symbolic marriage cannot be considered to be a real marriage for attracting the provisions of Section 304-B, IPC otherwise very object of making amendment is frustrated. In the case of *Yatesh Kumar* (Supra), this Court has further taken note of the fact that sexual intercourse can take place only after "Gauna" and not on symbolic marriage. This is again an important aspect of the matter to give correct interpretation of the word 'marriage' as used under the provisions of Section 304-B, IPC, hence, period of 7 years for attracting Section 304-B, IPC is to be counted from the date of "Gauna". *Raju vs. State of Rajasthan*, 2010 (3) Cri LJ 3043 (Raj).

25. Unnatural death.—A reading of the evidence shows that it was the appellant who had, just a few days' before the incident, visited the house of his father-in-law and threatened Kamlesh Rani with dire consequences if his demand for a scooter and two gold rings was not fulfilled and the brother of the deceased had told him that his father Tej Ram was not in a position to meet the demands on account of financial difficulties. A few days later Ramji Das (PW. 2) too had visited Kamlesh Rani's in-law's home and had also informed Tej Ram thereafter that the appellant had been found beating his wife at that time and had once again threatened that if the demands were not satisfied Kamlesh Kaur would pay dearly for it. It is true, as contended by Mr. Sharan, that in a case where the peculiar evidence has been discarded with respect to four of the five accused, the presumption under Section 113-B could to some extent be said to be dispelled, but on an over view we find that the primary role and the weight of the evidence has been on the appellant herein. *Sudhir Kumar vs. State of Punjab*. 2010 (2) CrLJ 2052 (SC).

26. FIR.—FIR lodged by mother of deceased emphasizes on two reasons of harassment, namely, (1) previously on the pretext of bringing in insufficient dowry, and (2) thereafter for not bearing a child.

There is, thus, nothing on record to show that any demand of dowry was made soon before her death. The cause of action for committing the offence appears to be an ego problem on the part of the appellant, namely, the deceased had not been coming to her matrimonial home on her own, while he had been coming to his home on leave.

What the High Court failed to notice in arriving at the said findings is that no evidence was brought on record to show that the cruelty or harassment was meted out to her for bringing insufficient dowry, in absence whereof the ingredients of Sec. 304B of the Indian Penal Code cannot be said to have been proved. The legal fiction sought to be created must be raised only on fulfilment of the conditions precedent therefor. All the requisite ingredients of the offence must be brought home before the presumptive evidence is put to use by the Court for holding the accused guilty of an offence under Sec. 304B of the Indian Penal Code. *Tarsem Singh v. State of Punjab.*, AIR 2008 SC 1454 : 2009 (17) SCR 379 : 2008 (13) JT 185 (SC) : 2008 (16) Scale 148 (SC) : 2009 (1) SLT 207 (SC) : 2009 (1) Crimes 168 (SC) : 2009 (1) JCC 372 (SC).

27. Murder or suicide—Determination of—Post mortem report.—The Medical evidence is found in the statement of doctor. He stated that for conducting the postmortem of the dead body of the deceased, a Medical Board was constituted. Dead body of the deceased was received and on examination, following aspects were noticed :-

1. That whole body was burnt.
2. That hairs of head of the deceased were totally burnt.
3. That outer portion of the skull had come out.
4. That there were nine bangles and one kada in the Left forearm of the deceased.
5. That bones of skull of the deceased were broken.

The doctors opined that cause of death of the deceased was Asphyxia due to ante mortem burns. He has proved the post mortem report.

Thus, from the post mortem report and by the statement of doctor, the fact t deceased died because of burns is very well established and at the time of post mor of the dead body of the deceased, her skull bones were found broken.

In the case of burning the fracture of skull is not a necessary corollary but in present case the skull bones were broken. Therefore, the fact remains that she killed before death. Therefore, the High Court was justified in holding that the Sessi Judge erroneously concluded that it was a case of suicide. *Prem Kanwar vs. Stat Rajasthan*, AIR 2009 SC 1242 : 2009 CrLJ 1123 : 2009 (1) Crimes 270 (SC) : 2009 SCC 726 : 2009 (1) JT 197 : 2009 (1) SCR 37 : 2009 (1) Scale 230 : 2009 (1) Supre 85 : 2009 (1) SLT 222 : 2009 (1) JCC 482.

28. Cruelty and dowry death—Distinction between.—Secs. 304-B and 498 IPC cannot be held to be mutually inclusive. These provisions deal with two disti offences. It is true that cruelty is a common essential to both the Secs. and that has be proved. The Explanation to Sec. 498-A gives the meaning of 'cruelty'. In Sec. 30 there is no such explanation about the meaning of 'cruelty'. But having regard common background to these offences it has to be taken that the meaning of 'cruelty 'harassment' is the same as prescribed in the Explanation to Sec. 498-A under wh 'cruelty' by itself amounts to an offence. Under Sec. 304-B it is 'dowry death' tha punishable and such death should have occurred within seven years of marriage. such period is mentioned in Sec. 498-A. *Rajendra vs. State*, AIR 2009 SC 855 : 20 (15) Scale 371 : 2009 (16) SCR 1005 : 2008 (1) SLT 283.

Consequences of cruelty which are likely to drive a woman to commit suicide or cause grave injury or danger to life, limb or health, whether mental or physical of woman are required to be established in order to bring home the application of S 498-A, IPC. Cruelty has been defined in the Explanation for the purpose of Sec. 498 It is to be noted that Secs. 304-B and 498-A, IPC cannot be held to be mutua inclusive. These provisions deal with two distinct offences. It is true that cruelty i common essential to both the Secs. and that has to be proved. The Explanation to S 498-A gives the meaning of "cruelty". In Sec. 304-B there is no such explanation abo the meaning of "cruelty". But having regard to common background to these offence has to be taken that the meaning of "cruelty" or "harassment" is the same as prescrib in the Explanation to Sec. 498-A under which "cruelty" by itself amounts to an offen *Satish Kumar Batra and Ors. v. State of Haryana.*, AIR 2009 SC 2180 : 2009 (5) S 451 (SC) : 2009 (12) SCC 491 : 2009 (5) JT 403 (SC) : 2009 (5) Scale 280 (SC) : 2009 SLT 379 (SC) : 2009 CrLJ 2447 (SC) : 2009 (2) JCC 1341 (SC).

Consequences of cruelty which are likely to drive a woman to commit suicide or cause grave injury or danger to life, limb or health, whether mental or physical of t woman are required to be established in order to bring home the application of S 498A IPC. Cruelty has been defined in the Explanation for the purpose of Sec. 498 Substantive Sec. 498A IPC and presumptive Sec. 113B of the Evidence Act have be inserted in the respective statutes by Criminal Law (Second Amendment) Act, 1983. It to be noted that Secs. 304B and 498A, IPC cannot be held to be mutually inclusi These provisions deal with two distinct offences. It is true that cruelty is a comm essential to both the Secs. and that has to be proved. The Explanation to Sec. 49 gives the meaning of 'cruelty'. In Sec. 304B there is no such explanation about t meaning of 'cruelty'. But having regard to common background to these offences it h to be taken that the meaning of 'cruelty' or 'harassment' is the same as prescribed in the Explanation to Sec. 498A under which 'cruelty' by itself amounts to an offence. Under Sec. 304B it is 'dowry death' that is punishable and such death should have occurred within seven years of marriage. No such period is mentioned in Sec. 498A.

A person charged and acquitted under Sec. 304B can be convicted under Sec. 498A without that charge being there, if such a case is made out. If the case is established, there can be a conviction under both the Sections. See *Akula Ravinder and others v. The State of Andhra Pradesh*, AIR 1991 SC 1142, Sec. 498A IPC and Sec. 113B of the Evidence Act include in their amplitude past events of cruelty. Period of operation of Sec. 113B of the Evidence Act is seven years, presumption arises when a woman committed suicide within a period of seven years from the date of marriage. *Gopal v. State of Rajasthan*, AIR 2009 SC 1928. : 2009 (2) SCR 423 (SC) : 2009 (11) SCC 314 : 2009 (2) JT 419 (SC) : 2009 (2) Scale 704 (SC) : 2009 (2) SLT 193 (SC) : 2009 (2) JCC 920 (SC).

29. Investigation—Slip-shod investigation.—Under Sec. 157 Criminal Procedure Code, the copy of the FIR has to be sent to the Magistrate. This never happened. However, seen from the records, this FIR reached the Magistrate only on 22.06.1994. This is extremely suspicious. In his deposition, the Investigating Officer proved that the FIR was chalked out in writing by Maheshwari Mandal, the SHO. Very significantly, this SHO or any other officer never examined the house thoroughly nor have they examined the inner rooms for ascertaining as to whether the doors and the latches were intact or not. This was a typical dumb investigation. Investigating Officer has not even bothered to draw a spot Panchnama. Though he stated that the accused were not present, he did not suggest any efforts having been made for their arrest. In his cross-examination, he admitted that in the case diary, he had not recorded as to which officer received information in the police station or was it mentioned in the case diary as to which lady was referred to in the telephonic information. Even the name of the informer was admittedly not there in the case diary. Specific questions were put as to whether he inspected the rooms at the place of occurrence or not. He admitted that it was not so recorded in the case diary. Even the time of sending the dead body for post-mortem was not mentioned. He admitted that when he reached the spot, neither the accused nor his parents were present. Then he asserted that their luggage was there. It is very significant to note that he admitted that Anil Kumar had not stated about the time of occurrence nor did he state the fact of beating Sushma with fists and slaps. Very significantly, he admitted that Anil Kumar had not stated about this meeting with Om Prakash Vidyalankar on the way. He had also not stated that his sister was murdered on account of not giving the colour television and motor cycle. He further admitted that Anil Kumar (PW-1) had not stated that his father had told him while he went for tuition that some articles were to be delivered to his sister. The witness admits "on enquiry by us, he remained silent".

The investigating agency would have done well in examining at least the neighbours but that does not seem to have been done. DW-2 was also a neighbour in the sense that she stayed very near to the house of the deceased. It is not known as to why the Investigating Officer did not examine neighbours, one of whom was the relative of the deceased. The apathy on the part of the Investigating Officer to examine the house closely creates suspicion. This is an unfortunate case where due to the slip-shod investigation the death of a young woman has to go unpunished.

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30. Dowry death or Abetment of suicide.—Deceased was harassed by accus husband and mother-in-law for demand of dowry, died by consuming poison with seven years of her marriage. Accused husband sought financial assistance from h father-in-law for going abroad. Deceased was pressurized that her father should rend financial help to accused husband who was in the need of money. Held, accuse husband guilty of offence under S. 306 IPC and not under S. 304B. *Amarjit Singh alic Mintu and Anr vs State of Punjab*, 2010 (4) CriLJ 4134 (P&H).

It is a unique legal phenomenon in the Indian Penal Code that the only act, th attempt of which alone will become an offence. The person who attempts to comm suicide is guilty of the offence under Section 309 IPC whereas the person who commit suicide cannot be reached at all Section 306 renders the person who abets th commission of suicide punishable for which the condition precedent is that suicid should necessarily have been committed. It is possible to abet the commission c suicide. But nobody would abet a mere attempt to commit suicide. It would b preposterous if law could afford to penalise on abetment to the offence of mere attemp to commit suicide. It there is not abetment, there is no question of the offence unde Section 306 coming into play. Hence there cannot be an offence under Section 116 rea with Section 306, IPC. *Satveer Singh v. State of Punjab* 2001 Cri LJ 4625 (SC) : AI 2001 (SC) 2828 : 2001(8) SCC 633 : 2001(8) JT 208 : 2001 (6) Scale 513.

* * * * *

Sec. 305. Abetment of suicide of child or insane person.—If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication commits suicide whoever abets the commission of such suicide shall be punished with death or *imprisonment for life*, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

Synopsis

1. Amendment 1880
2. Scope 1881
3. Procedure 1881
4. Charge 1881

1. Amendment.—The words *"imprisonment for life"* were substituted for the words "transportation for life" by Act 26 of 1955, Section 117 and Sch. (with effect from 1.1.1956).

2. Scope.—Insanity, idiocy, or deliriousness of a person takes away the criminality of the suicide. *Bishop's Cr Law*, Vol. II, P. 877. But a person who abets the commission of suicide of such person is guilty of an offence which is equal in magnitude to murder. A person abets the doing of a thing, who intentionally aids, by any act or illegal omission the doing of that thing (Section 107). "It seems to us", say the Law Commissioners, "that the rule would fail to be applied under these clauses chiefly in such a case as this, where a person legally bound to take care of the person of another has, by an illegal omission of his duty, intentionally given him the opportunity or permitted him to obtain the means of killing himself. It would apply also, we conceive, in the case of a person seeing another to destroy himself, say by hanging and allowing him to accomplish his purpose without any attempt to prevent him, if as may be expected, the law of procedure makes it a common duty incumbent upon all men to assist in preventing offence about to be committed in their presence. The intention here would be inferable from the circumstances. In the former case collateral proof of the intention would be requisite. But we apprehend that it is active aid which is principally intended in these clauses, and to which the higher penalty is meant to be applied".—*First Report*, Section 322, 323. "Upon a charge of abetting suicide, under Section 305. It will be incumbent on the prosecution, in addition to the ordinary evidence of abetment by instigating or aiding, etc., to show to the satisfaction of the Court the incapacity—Whether it arises from infancy, or insanity, or intoxication of the person who has committed suicide—In the same manner as incapacity has to be proved by the accused when, upon an ordinary trial, it is relied on by way of defence".—*Morgan and Macpherson.*

Commission of offence was held under Section 305, I.P.C. Conviction was made and revision petition was filed as regard alleged demand of dowry by father of accused he was not examined as witness. Hence it would be unsafe to convict accused person. The prayer for revision is accepted. *Krushanahari Debath* v. *State*, (1995) 8 OCR 568 (Ori).

3. Procedure.—Cognizable–Warrant—Not bailable—Not compoun-dable—Triable by Court of Session.

4. Charge.—I (*name and office of Sessions Judge, etc.*), hereby charge you *(name of the accused)* as follows—

That on or about the.......day of......at......you, abetted the commission of suicide by A. B, a person under eighteen years of age (or an insane person, etc.) and thereby committed an offence punishable under Section 305 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 306. Abetment of suicide.—It any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Scope 1882
2. Sentence 1887
3. Procedure 1888
4. Absence of charge 1888
5. Charge 1889
6. Abetment of suicide....................1889
7 Husband Committing suicide: Instigation by wife....................1893
8. Conviction....................1894
9. Evidence 1897
10. Wife subjected to harassment in connection with demand to give consent for husbands' second marriage—Abetment of suicide....................1900
11. Acquittal 1901
12. Summoning order—Validity of....................1907
13. Bail 1907
14. Suicide by newly married women 1907
15. Suicide by Wife....................1907
16. Bride burning....................1908
17. Cruelty and abetment of suicide....................1909
18. Essential to constitute offence....................1912
19. Mental imbalance....................1912
20. Mental torture....................1912
21. "Abetment"—Meaning of....................1914
22. Dowry Demand 1914
23. Difference between Sec. 306 and 498-A 1915
24. Intention and *mens rea* for offence 1916
25. Conversion of offence under Sec. 302 to Sec. 306—Permissibility 1916
26. Mention of names of persons responsible in suicide note 1917
27. Abetment of unsuccessful attempt to commit suicide....................1917

1. Scope.—The committing of suicide in itself is not and cannot be regarded as a crime in India. AIR 1938 Lah 561 : ILR 1938 Lah 542. "This and the proceeding section contain express provisions for the punishment of abetting suicide when that offence is actually committed. The ordinary law of abetment is inapplicable here. Suicide or self-murder may be the act of a person who is by law incapable of committing an offence (*see* Sections 82, 83) ; or it may be committed by a person who is criminally responsible for his actions. In the former case Section 305 makes the abetment of suicide an offence may be punished as severely as murder".—*Morgan and Macpherson.* Actively assisting a Hindu widow to become a *Sati* is an offence under this section. 36 All 26 : 11 ALJ 997 : *see* also 148 Ind Cas 880 : 1931 ALJ 7 : 34 Cr LJ 1069 : AIR 1933 All 160. According to English law a suicide is a felony, and not a misdemeanour, so if it is committed in the adviser's absence, the latter at the common law goes free of punishment ; because the principal being dead cannot be first convicted. *Reg* v. *Ledington*. 6 Car & p. 69 : *Reg.* v. *Jessop*, 16 Cox CC 204. *Bishop's Cr Law p.* 876. But when one advises another to kill himself, and he does it in the presence of the adviser, the latter becomes guilty of murder, probably as principal of the second degree but at all events as principal. *Ibid.* Accused were charged under Sections 149 and 306 with being member of unlawful assembly whose common object was to abet the suicide of a woman and with abetting the woman's suicide. It was found that they induced her to get her burnt along with the body of her deceased husband. With that object, they made her sit on the pyre with the husband on her lap and instantly a fire broke out from her hand. She tried to escape and leapt in the adjoining river where from she was rescued by the police but she died ultimately. The accused foiled the attempts of the police to save her at an earlier stage. *Held*, that the accused were guilty and the method of destruction resolved on for the suicide was fire and the method of ignition of the fire whether miraculous, whether self applied or whether applied by other is totally immaterial. 9 Pat LT 683 : 112 Ind Cas 363 : 29 Cr LJ 1035 : AIR 1928 Pat 497 ; 1983 Cr LJ 706 : (1983) 85 Punj LR 268 (the accused was held not guilty of illegal omission contemplated by clause 3 of Section 107 on the facts of the case).

In the absence of any evidence as to intentional aiding against accused the act or omission resulting in faecbtating commission of offence would not amount establish offence under Section 306, IPC. *Rameshbhai Punjamji Keji Ram Bhail v. State of Gujarat*, 2005(2) Crimes 552 (Guj).

The present appellant filed a complaint to the Superintendent of Police and after about two and a half months of the alleged incident. Allegation was that the police did not register a complaint. Ultimately, the complaint was filed on 26.08.2004. Initially on the basis of information lodged, enquiry in terms of Sec. 174 of the Code, was conducted and the police started the proceedings. It is to be noted that at different points of time, different version have been given. In the first stage during investigation under Sec. 174 of the Code it was stated that the accused had come to the village with the deceased. Interestingly, there was no suicide note. Admittedly, marriage was an arranged one. If that is so, it is not believable that the deceased and the accused had not met. The alleged grievance of the accused that the deceased was an ugly man could not have been noticed after marriage, for the first time on 03.06.2004.

Additionally, there was no suicide note in the present case. As noted earlier different versions of death were given. At the earlier stage, during investigation, under Sec. 174 of Code, the version was that the accused had accompanied the deceased to the native home, but subsequently stand was that the accused did not accompany the deceased because the latter was bad and ugly looking.

Though, normally threshold interference should not be made under Sec. 482, in the aforesaid background, this is not a case where any interference is called for with the order, by the High Court. The appeal is dismissed. *Sonti Rama Krishna vs. Sonti Shanti Sree*, AIR 2009 SC 923 : 2009(1) SCC 554 : 2008(15) Scale 108 : 2008(12) JT 449.

Common object—Determination of. The High Court has noted that from the side of the complainant which includes deceased also, five persons have received in total as many as 15 injuries. The main injury on the head of the deceased has been attributed to A1. Similarly, Gulam Rasul, Jan Mohammad son of Sultan and another Jan

Mohammad, have also received wounds on the head. Injury on the head of Gulam Rasul was an incised wound caused by a Farsa. Jan Mohammad son of Sultan had received an incised wound on the head. The other Jan Mohammed had received lacerated wound on the head. The other injuries on the persons of all the other injured persons are in the shape of bruises or lacerated injuries most of which have been caused by lathies.

The prosecution evidence clearly shows that the common object of the unlawful assembly was to commit the murder of Habib and it was not just an assembly at a particular point of time where the accused persons had assembled with Frasa and lathis in order to cause injury on the complainant including Habib-deceased who had gone for filing nomination papers for the Panchayat election.

The High Court found that the purpose of the unlawful assembly was to stop Habib, his brother Gulam Rasul and their supporter from either contesting the election or supporting the persons who filed the nomination. They were all present near the gate of the school where the nomination papers were to be filed. Both the trial Court and High Court have on analyses of the evidence come to hold that all the accused persons had formed an unlawful assembly armed with weapons which were likely to cause death and, therefore, conviction under Sec. 148 IPC and application of Sec. 149, IPC does not suffer from any infirmity. In the background facts, it is clear that the conviction as done is appropriate. *Siri Kishan vs. State of Haryana*, 2009 (12) SCC 757 : 2009 (8) JT 305 : 2009 (6) SCR 1184 : 2009 (6) Scale 438.

Deceased being fed up by illicit relationship between accused persons viz., her husband and her mother committed suicide. The evidence of witnesses would have been a strong supporting evidence to dying declaration, if it was made, by the deceased as per the accepted procedure or manner. A dying declaration attaches evidentiary value provided it is corroborated not only by the eyewitness but also by circumstantial evidence *vis-a-vis* the medical evidence.

The evidence on record is enough for the purpose of coming to any conclusion that the deceased received burn injuries and succumbed to the same injury. It is not an answer to the allegation that the deceased committed or attempted to commit suicide being abetted by the accused petitioner and the co-accused.

The Investigating Officer himself did not visit the hospital to record the statement of the injured person under Section 161, Criminal Procedure Code. He rather sent the SI (PW. 11) and that too after 19 days. There is no explanation from the Investigating Officer as to why he could not personally go to the hospital to record the statement of injured person and why he deputed PW. 11 after a long gap of 19 days from the date of occurrence. Nothing has been stated by the Investigating Officer why he did not make any requisition for dying statement of the injured person, if it was so required to be done in the interest of proper investigation, although, he got sufficient time for doing so. The manner in which dying statement of the injured/deceased was recorded without observing the bare minimum requirements, casts a shadow of doubt on the fact of recording the statement and genuineness of the same.

Is the Court expected to believe in, rely on and act upon such statement of the deceased recorded so casually and improperly without any supporting evidence worth gaining the confidence of the Court? The summit Court in *Arvind Singh vs. State of Bihar*, AIR 2001 SC 2124 = 2001 (6) SCC 407 = 2001 Cri LJ 2556, aptly held that the dying declaration should be dealt with care and caution and corroboration, though not essential as such, but is otherwise expedient to have the same in order to strengthen the evidentiary value of the declaration. Independent witnesses may not be available but there should be proper care and caution in the matter of acceptance of such a statement as trustworthy evidence. Little step further, the Apex Court in *Panchdeo Singh vs. State of Bihar*, AIR 2002 SC 526 = 2002 (1) SCC 577 = 2002 Cri LJ 973, observed thus, "confidence of the Court is the summum bonum and in the event of there being any affirmation thereto in the judicial mind, question of any disbelief or distrust would not arise. In the event however of there being some infirmity, howsoever negligible it be, the Court unless otherwise satisfied about the credibility thereof, ought to look for some corroboration, if however it is otherwise, question of requirement of a corroboration would not arise; dying declaration alluring confidence of the Court would be a sufficient piece of evidence to sustain conviction.

Further to note from the evidence of above witnesses is that, although they are neighbours and close to the victim, they have not deposed that they ever personally saw her being tortured physically by the accused persons. They have deposed merely on the basis of what was allegedly disclosed by the victim before the incident. Such evidence not being based on their personally acquired knowledge, in my considered view, is not an admissible evidence. *Swapna Saha Bhowmik vs. State of Tripura*, 2010 (2) CrLJ 1893 (Gau).

It is a unique legal phenomenon in the Indian Penal Code that the only act the attempt of which alone will become an offence. The person who attempts to commit suicide is guilty of the offence under Section 309, IPC whereas, the person who committed suicide cannot be reached at all. Section 306 renders the person who abets the commission of suicide punishable for which the condition precedent is that, suicide should necessarily have been committed. It is possible to abet the commission of sucide. But nobody would abet a mere attempt to commit suicide. It would be preposterous if law could afford to penalise an abetment to the offence of mere attempt to commit suicide. The accused can not be convicted, under Section 116 linked with Section 306, IPC. The former is abetment of offence punishable with imprisonment, if the offence be not committed. But the crux of the offence under Section 306 itself is abetment. In other words, if there is no abetment there is no question, the offence under Section 306 coming into play. It is inconceivable to have abetment of an abetment. Hence there cannot be an offence under Section 116 read with Section 306 IPC. *Satvir Singh v. State of Punjab* 2001 Cri LJ 3625 (SC).

Second Marriage—Scope.—Accused treated wife with cruelty for bringing insufficient dowry and also performed another marriage. Statement of witnesses showed that bigamy was in vogue in that place and was recognized as custom.

The proceeding under Section 125 Cr.P.C was compromised between the accused and Sangya Devi wife and at their instance consent order was passed by learned Chief Judicial Magistrate. The learned Sessions Judge has also observed that in view of second marriage of appellant with Sumitra Devi the accused has abetted the suicide of Sangya Devi. Sangya Devi was aware of the marriage of Sumitra Devi with accused and the fact that the accused had married second time with Sumitra Devi has been pleaded in the maintenance application. The maintenance application was prepared on 25.5.1999 and Sangya Devi had committed suicide in the intervening night of

26/27.08.1999. Therefore, it cannot be said that second marriage of accused with Sumitra Devi is the immediate cause of committing suicide by Sangya Devi and in other words by second marriage the accused had abetted suicide of Sangya Devi.

It has come on record that in the area to which the accused and Sangya Devi belong, it is not uncommon for a male to solemnize more than one marriage. Psyche of individual is influenced by the culture of the society in which he or she lives. PW-2 Shyama Nand aged 82 years who remained member of Gram Panchayat has stated that bigamy is prevalent in Kinnaur District and is recognized by custom as well. It is thus clear that for a male to have more than one wife was a part of custom and culture of the society of accused and deceased. In these circumstances, it cannot be said that the second marriage of the accused was the cause for Sangya Devi to commit suicide and for this reason appellant cannot be blamed to have abetted the suicide of Sangya Devi. The prosecution has not brought on record evidence so as to bring the case within the ambit of abetment as provided in Section 107 IPC. *Surendra Kumar vs. State of HP*, 2010 (2) CriLJ 1356 (HP).

Section 306, I.P.C is indeed against the person abetting the commission of suicide by another person. The conduct of appellant as is depicted by the witnesses and dying declaration of deceased would constitute a species of abetment in that he by his uncivilized behaviour guided the deceased to take her own life. Section 306, I.P.C. is thus attracted and offence under Section 306, I.P.C. would be constituted. *Jeevan Babu Desai* v. *State of Maharashtra*, (1994) 2 Bom CR 325 (Bom).

This Court even accepting the allegation that appellants had thrown pebbles on the deceased a day before the incident while she was taking her bath, the same does not amount to abetting her to commit suicide. Hence appellants not guilty of offence under Section 306, I.P.C. *Halloo* v. *State of M.P.*, 1994 Cr LR 9 (MP).

Death was within 10 months of marriage, there were two complaints—One on the same day by brother-in-law of the deceased—Other on the 2nd day by mother-in-law—F.I.R. was not delayed and was fully held justified. *State of West Bengal* v. *Orilal Jaiswal*, 1994 Mad LJ (Cr) 187 (SC) : 1994 LIC 22 : 1994 SCC (Cr) 107 : (1994) 1 SCC 73 : (1994) 3 Recent Cr R 186 : (1994) 2 East Cr C 262 : 1994 Cr LJ 2104 : AIR 1994 SC 1418.

Offence under Section 306 of the I.P.C. which makes abetment, of suicide an offence is Constitutional and does not suffer from any vice. It is not violation of Articles 14 and 21 of the Constitution of India. *N.M. Sakhre* v. *Union of India*, 1995 Cr LJ 96 (Bom).

The accused is alleged to have demanded money from the in law through his wife for building a house. The letter written by her to her father contained no reference to such a demand or even harassment. Her brother had deposed that the victim was being beaten when he visited her but F.I.R. was not brought on record. His statement against mother-in-law of the victim was disbelieved and the accused acquitted of abetment to commit suicide. 1986 Cr LJ 816.

Where husband insist to take his wife from her parental home, wife pouring kerosene and died, it was held that husband cannot be convicted for instigating or aiding in commission of offence. Order of acquittal is not amenable to interference. 1987 Cr (MP) 90.

The only allegation apart the accused was that he used to come to the house in a drunk state, used to beat her and abuse her and that when she asked to stop drinking he did not stop drinking. These acts attracted to the accused did not being his acts within the meaning of abetting an offence to commit suicide as contemplated under Section 306, IPC. *Bommidi Rajamallu* v. *State of H.P.*, 2001 Cri LJ 1318 (A.P.)

There was no evidence on record to support the prosecution case of abetment by husband to his wife to commit suicide. *Held*, evidence of harassment and maltreatment for insufficiency of dowry is not such an abetment. There was nothing omitted to do something which the accused was required to do undertake. (1986) 3 Crimes 399.

There was no dependable evidence to convict the accused. *Held*, she is entitled to acquittal. 1986 Cr LJ 816.

When suicide not shows that main reason for suicide was suspicion of husband about fidelity of wife, order of framing of charges against sister-in-law of deceased and her husband under Section 498-A is liable to be quashed. *Smt. Rani* v. *State*, 1996 Cri LJ 1026 [Del).

The accused was charged for the offence of abetment of suicide committed by his wife. There was evidence of ill-treatment and cruelty in the past. It is permissible for a Court enquiring a case to look into the past conduct prior to commencement date of amended provision. The drawing of the past instances of cruelty prior to 25.12.1983 would not render the penal provision under Section 498, I.P.C. retrospective. 1987 Cri LJ 901 (Bom).

The accused was charged for the offence of abetment of suicide committed by his wife. It was observed that sufferings which deceased faced were disclosed by her to her father, mother, brother and her friend. Conduct of deceased in disclosing her sufferings to her nearest and dearest ones, was most natural. Therefore those witnesses could not be interested. No element of false involvement of the accused by the witnesses could be found. 1987 Cri LJ 901 (Bom).

When out of frustration and instigation deceased committed suicide, cognizance of offence under Section 306, IPC was rightly taken. *Prahlod Das Chela* v. *State of M.P.*, 1996 Cri LJ 3659 (MP).

When deceased though had time did not disclose cause of her committing suicide nor connected accused with it, ingredients of offence of cruelty and abetment of suicide not established. *Prem Dass* v. *State of H.P.*, 1996 Cr LJ 951 (HP).

Once the accused is acquitted of a charge under Section 498-A, IPC, the requisite ingredients whereof are such which may impel a woman to cause physical or mental injury to herself including suicide, the conviction under Section 306, IPC, in the absence of evidence of any other type of abetment as in this case, will not be sustainable in law of factually. *Khem Singh* v. *State of H.P.*, 2000 Cri LJ 4326 (H.P.)

2. Sentence.—A sentence of six month's rigorous imprisonment for barbarous act or abetment of *sati* is ludicrous. It is essential that the people should respect the law and as the custom of sati is forbidden by law a deterrent punishment is called for. AIR 1958 Raj 169 : ILR (1958) 8 Raj 143 : 1958 Cr LJ 967.

Girl committing suicide on being threatened by her erstwhile lover that as she refused to marry him he would destroy her and her family. Her lover having in his possession photographs of deceased with him.

The first question, which is required to be decided is, whether there is *prima facie* case against parents of the petitioner. The prosecution case shows that the parents made phone calls to the complainant and sought his appointment. They obviously were trying to push forward the marriage proposal of their son with deceased Rani. But, their attempt got scuttled at the very inception. Rani promptly made her mind clear to them, telling them that she would not marry their son. Making an attempt to push a marriage proposal of their son to the bride's parents is not a criminal activity. There is nothing on record to show that the parents met Rani to pressurize for agreeing to marry their son. Even the suicide note does not blame them. Rani in her suicide note did not utter a single word against the parents. The petitioners parents as discussed earlier, met two prosecution witnesses namely More and Dalvi for requesting them to act as mediators for pushing their proposal with the complainant and his family. There is nothing on record even to suggest that the petitioners parents tried to misuse the photographs for pressurizing Rani or her parents. *Devesh Dattabhau Pathrikar & Ors. vs. State of Maharashtra*, 2010 (3) CriLJ 3560 (Bombay) (Aurangabad).

Married woman died of burning—High Court reversed acquittal order—Cruel treatment of woman by her husband and mother-in-law appellants. Cogent and convincing reasons available for ruling out theory of accident pleaded by appellants—Husband not present at time of incident and mother-in-law immediately took deceased to hospital for treatment. Hence conviction by High Court upheld and sentence reduced from 5 years R.I. to 2-1/2 years R.I. *Naresh Kumar.* v. *State of Haryana*, 1994 SCC (Cri) 502.

Composite sentence for conviction under both Sections 306 and 498-A should not be passed. *Samir Samanta* v. *State*, 1993 Cri LJ 134 (Cal).

In the instant case, a father who was required to protect his daughter had cast his lustful eyes on her and was trying to force her to have sexual intercourse with him. As modest girl, though the daughter tried to resist, ultimately she could not do so and committed suicide by setting on fire by pouring Kerosene on herself. It was held that the conduct of the accused ultimately resulting in maximum punishment. *State* v. *Anthony Nikolas*, 2006 Cr LJ 1582 (Kant).

Where there was offence of abetment of suicide—Victim-wife committed suicide on account of torture and maltreatment by accused-husband and others. Offence was fully established. Conviction was upheld but sentence reduced to two years as accused have aged old mother and maltreatment started only after birth of a son. *Baldev Raj* v. *State of Punjab*, (1995) 2 CC Cases 101 (P & H).

Provisions of Section 306 do not violate against any of the constitutional mandate. *Naresh Marotrao Sakhre* v. *Union of India*, (1995) 1 Crimes 212 (Bom).

3. Procedure—Cognizable—Warrant—Not bailable—Not compound-able—Triable by Court of Session.

4. Absence of charge.—In a case the accused was charged under Section 304B but no charge under Section 306 IPC was framed. The charge under Section 304B was not proved. It was held that even if no charges under Section 306 was framed, the accused could be convicted under Section 306/498A as cruelty is common essential to both Section 304 and 498A. *Hira Lal* v. *State (NCT of Delhi)*, 2003 Cr LJ 3711 (SC) : AIR 2003 (SC) 2865 : 2003(8) SCC 80 : 2003(3) Crimes 186 (SC) : 2003(5) Supreme 112.

In view of Section 464, Cr PC, it is possible for the appellate or sessional Court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasioned. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established 'against him were explained to him' clearly and whether he got a fair chance to defend himself. In the instant case, the basic ingredients of the offence under Section 306 IPC had been established. The features of the prosecution case were sought to be established by the prosecution in order to substantiate the charge under Section 498A, IPC and also for showing that the accused had a motive to commit the crime of murder for which he was actually charged. There was no aspect of the prosecution which may not had been put to him. In view of the material on record it was held that the conviction under Section 306, IPC could safely be recorded and the same would not result in failure of justice in any manner. *Sangarabonia Sreenu* v. *State of AP*, 1997 Cr LJ 3955 : AIR 1997 SC 3233 : 1997 (5) SCC 348 overruled. *Dalbir Singh* v. *State of U.P.*, 2004 Cr LJ 2025 : AIR 2004 SC 1990 : 2004 (5) SCC 334 : 2004 (3) Supreme 506 : 2004 (2) Crimes 471 (SC) : 2004(4) JT 455.

Where the accused was charged for offence under Section 489A and 304B of the Penal Code, but evidence proved him guilty under Section 306, it was held that accused could be convicted under Section 306, though no charge under Section 306 was framed. *Vinod Kumar* v. *State*, 2005 Cr LJ (NOC) 222 (Uttaranchal).

5. Charge.—I (*name of office of Session Judge, etc.)* hereby charge you (*name of the accused*) as followed :—

That on or about the......day of.......... at.........one A. B. committed suicide, and that you-abetted its commission by *state in what way*), and thereby committed an offence punishable under Section 306 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

6. Abetment of suicide.—Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. In cases of conspiracy also it would involve that mental process of entering into conspiracy for the doing of that thing. It cannot be said that by publication of the articles which are said to be of defamatory character, in a daily newspaper, the editor or the other respondents intentionally aid the commission of suicide by victim. The reaction against an article published can be different from different people who read it. A person may get enraged and retaliate or read it and commit suicide. The possible reaction would not be known before a defamatory statement is published as it will depend upon the nature and sensitivity of a person. Therefore, the reaction to a defamatory article which cannot be predicted will not be attributable as an intention to illegally aiding or instigating the suicide by the person concerned. More active role which can be described as instigating or aiding the doing of a thing it required before a person can be said to be abetting the commission of offence under Sec. 306 of the Indian Penal Code. *State of Gujarat* v. *Pradyuman Ramanlal Mehta*, 1999 Cri LJ 736 (Gujarat)

In the present case, the charge against the appellant is that he along with ot two accused "in furtherance of common intention", mentally tortured Jitendra Shar (the deceased) and abetted him to commit suicide by the said act of mental torture. I trite that words uttered on the spur of the moment or in a quarrel, without someth more cannot be taken to have been uttered with mens rea. The onus is on prosecution to show the circumstances which compelled the deceased to take extreme step to bring an end to his life. In the present case, apart from the suicide n extracted above, statements recorded by the police during the course of investigati tend to show that on account of business transactions with the accused, including appellant herein, the deceased was put under tremendous pressure to do someth which he was perhaps not willing to do. Prima facie, it appears that the conduct of appellant and his accomplices was such that the deceased was left with no other opt except to end his life and, therefore, clause firstly of Sec. 107 of the IPC was attractec

In the light of the material on record, in our judgment, it cannot be said that trial Court was in error in drawing an inference that the appellant had "instigated" deceased to commit suicide and, therefore, there was ground for presuming that appellant has committed an offence punishable under Sec. 306 read with Sec. 34, I It is trite that at the stage of framing of charge, the Court is required to evaluate material and documents on record with a view to finding out if the facts emerg therefrom, taken at their face value, disclose the existence of all the ingredie constituting the alleged offence or offences. For this limited purpose, the Court may the evidence as it cannot be expected even at the initial stage to accept as gospel tr all that the prosecution states. At this stage, the Court has to consider the material with a view to find out if there is ground for "presuming" that the accused committed an offence and not for the purpose of arriving at the conclusion that it is likely to lead to a conviction. See *Niranjan Singh Karam Singh Punjabi & Ors. v. Jite Bhimraj Bijja & Ors.*, AIR 1990 SC 1962.

In view of the settled legal position, noted above, we are convinced that the Court was correct in law in coming to the conclusion that a case for framing ch against the appellant had been made out. Similarly, the scope of revisional powe the High Court under Sec. 401 of the Code being limited, the High Court was jus in dismissing the Revision Petition, preferred by the appellant. *Chitresh Kumar Ch vs State (Govt. of NCT of Delhi).*, 2010 AIR SCW 645 : AIR 2010 SC 1446.

The deceased committed suicide at the house of her parents but not in the h of the accused. The question of abetting that thing of committing suicide b husband did not arise as he had not aided or abetted for setting herself for su pouring Kerosene and putting on fire. Therefore, the accused was entitled f acquittal for the offence punishable under Section 306, IPC. *Vanamala Ameran State of A.P.* 2001 Cr LJ 4498(AP).

Deceased was married in Phagun 1984 and she died in October, 1984 and it disputed that she died by hanging. If she was not maltreated, then there was no why a young newly married girl would commit suicide. The circumstance appellants were sitting outside the house on cots while she was hanging inside, suggestive of the fact that they were in differs as to what she does and they did unhappy on her committing suicide. 1988 (1) Crimes 211 (P & H).

Where there was commission or suicide out of fear that if caught, the deceased ay be punished by the accused—It does not amount to abetment. *Mangla* v. *State of aryana*, 1995 (XXII) Cr LT 270 (P & H).

Accused person intimidating and gooding deceased for repayment of loan. ommitting of suicide whether amounts to abetment to commit suicide. There was held o question of abetment. No aid was provided by accused to commit suicide, hence no ase under Section 306, read with Section 34, I.P.C. is made out. *Vedprakash Bhai* v. *tate of Madhya Pradesh*, 1995 Cr LJ 893 (MP).

The accused were alleged to have demanded dowry and treated deceased with ruelty leading her to suicide. No evidence could be produced showing that the eceased was harassed within the meaning of explanation (b) of Section 498-A. herefore, offence under Section 306, IPC had not been made out. *State of H.P.* v. *Nikku Ram*, AIR 1996 SC 67 : 1995(5) Scale 94 : 1995(6) SCC 219 : 1995 Cr LJ 4184.

Where there was offence of instigation, incitement or advice to commit suicide. Cognizance under Section 193, Cr. P.C. taken by trial court. It had quashing of cognizance. Quarrel which took place between petitioner and deceased over keeping other lady accused—Petitioner and lady suggested deceased to commit suicide. On frustration and incitement deceased committed suicide and mere use of some words being sufficient to constitute offence of incitement. Hence, there being no infirmity in order of taking cognizance, revision is dismissed. *Prahlad Das Chale* v. *State of M.P.*, 1995 Cr LR (MP) 195.

Where officers were intimidating the deceased to commit suicide and was omitting to prevent the commission of suicide despite being under a duty to prevent. It was exhibiting indifference and insensitiveness. Hence can be said to have incited the suicide. *Ramanathan* v. *State*, 1995 MLJ (Cr) 579 (Mad).

Even if it be taken that the petitioner had demanded the sum of Rs. 15,000/- from the deceased and on his refusal to pay the same, the petitioner had got the deceased declared until for recruitment to the army. It cannot be said that the petitioner in doing so, had instigated the deceased for committing suicide or had engaged with anyone in any conspiracy for doing any such things or had added the deceased in committing suicide. *J.S. Ghura* v. *State of Rajasthan*, 1996 Cr LJ 2158 (Raj).

In the present case, there was love affairs and subsequently they settled mutually. marriage between them. But when accused went away somewhere and did not return there, his wife committed suicide. Where the evidence of witness was simple in nature and deceased nowhere attributed pregnancy to accused, she, in her complaint, has not said anything of intimacy with accused but said that his mother was demanding money as precondition of marriage. It was not proved that accused intended by not marrying that she should commit suicide or knew was likely to commit suicide. Therefore, this act of being her individual, accused, was acquitted. *Satish* v. *State of Maharashtra*, 1997 Cri LJ 935 (Bom).

When dying declaration of deceased wife suffering 90% burns not reliable and there is no evidence of ill treatment by husband, conviction not proper. *Gajanan Singh* v. *State of Maharashtra*, 1996 Cri LJ 2921 (Bom).

When deceased though had time did not disclose cause of her committing suicide nor connected accused with it, ingredients of offence of cruelty and abetment of suic not established. *Prem Das* v. *State of H.P.*, 1996 Cr LJ 951 (HP).

Mere allegation of harassment made by deceased in her dying declaration agai accused is not sufficient to make it an offence of abetment of suicide. *Mahendra Sin* v. *State of M.P.*, 1996 Cr LJ 894 (SC).

The accused were alleged to have demanded dowry and treated deceased wi cruelty leading her to suicide. No evidence could be produced showing that t deceased was harassed within the meaning of explanation (b) of Section 498- Therefore offence under Section 306 had not been made out. *State of H.P.* v. *Nikku Ra* AIR 1996 SC 67 : 1995(5) Scale 94 : 1995(6) SCC 219 : 1995 Cr LJ 4184.

Even if it be taken that the petitioner had demanded the sum of Rs. 15,000/- fro the deceased and on his refusal to pay the same, the petitioner had got the decease declared unfit for recruitment to the Army, it cannot be said that the petitioner i doings so, had instigated the deceased for committing suicide or had engaged wit anyone in any conspiracy for doing any such things or had aided the deceased i committing suicide. *J.S. Ghura* v. *State of Rajasthan*, 1996 Cr LJ 2158 (Raj).

Intention of accused to aid or instigate or abet deceased is necessary to constitute offence under Section 306, IPC and mere non-payment of debt by deceased to accused is no intention of accused to abet suicide. *Pallem Denial Victor* v. *State of A.P.*, 1997 (1) Crimes 499 (AP).

When there are contradictions in evidence of material witnesses, acquittal of accused is proper. *State of H.P.* v. *Amin Chand*, 1996 Cri LJ 4223 (HP).

When it is not proved that accused intended by not marrying that she should commit suicide or knew that she was likely to commit suicide accused was acquitted as it was an independent act of deceased herself. *Satish* v. *State of Maharashtra*, 1997 Cri LJ 935 (Bom).

The dying declaration shows that the deceased was asked by her, mother in law to take the child to the first floor and she replied that she has just come on the ground floor. The husband intervened and said that why she was giving replies to her mother in law. If the accused had not crossed this limit it would have been a case of ordinary domestic quarrel of minor jerks and jars. But the husband exceeded that limit. He started assaulting his wife with fisticuffs. She took out the kerosene can from the Kitchen. While she was pouring kerosene on her, her husband who was standing in front of her used provocatie language . She also said that he should not further beat her but he continued to assault her. This brings the conduct of the accused in the category of abetment. When there was already fuel in the hands of the wife, he should not have added fuel to fire by uttering provocative language. Such utterance amounts to instigation to commit suicide (*see Brijlal* v. *Premchand*, AIR 1989 SC 166. She was goaded by the accused to bring an end to her life. The words used by the accused amounted to grave and serious provocation enough for an ordinary woman in the Indian set up to do what the deceased actually did. (*Gurbachan Singh* v. *Satpal Singh. AIR* 1990 SC 209 : 1990 Cri LJ 592). The wife was thus subjected to cruelty as defined in Section 113-A of the Evidence Act. *Arjun Kushwah* v. *State of M.P.*, 1999 Cri LJ 2538 (M.P.).

The burn injuries sustained by Aruna were not accidental. She committed suicide within 3 1/2 years of her marriage because of the cruel treatment by her husband. Therefore, Section 113-A of the Evidence Act springs into action. Having regard to all the circumstances of the case it must be held that the accused abetted the commission of suicide by his wife. There was not an astray act of assault on her but as her dying declaration shows there was a persistent course of cruel conduct on the part of the husband. He is therefore, guilty of the offence punishable under Section 306, IPC and the trial Court has rightly convicted him. *Ramesh Baburao Patil, v. State of Madhya Pradesh*, 2002 Cri LJ 3364 : 2002 Cri LR (SC&MP) MPJ 667 : 2002(4) MPLJ 425.

Where the complaint was closed merely on the ground that a case under Section 306 I.P.C. has been registered already against the applicant in revision. No investigation was made into the allegation whether Nimisha soon before her death was being subjected to cruelty by her husband and his family members in connection with the demand of dowry. Why it was so done in anybody's guess and in this revision it is not necessary for the Court to unravel this mystery. The matter is left for being looked into by superior police officers and to take such action as they deem necessary against the erring official or officials. *Asha Shukla v. State of U.P. and another*, 2002 Cri LJ 2233. (All.) : 2002 All LJ 823 : 2002(44) All Cri C 542 : 2002(1) All Cri R 544.

Where there is no reliable evidence to support it, therefore, this finding of the trial Court is not acceptable. A perusal of the entire evidence shows that the accused did not make any dowry demand or treat his wife cruelly after the mutual settlement between them after the order of the Family Court in September, 1988. Thus, during the period of about three years prior to the commission of deceased Vijaylaxmi, there is no proof of any demand of dowry or treating her with cruelty by the accused. The past, instances of cruelty which took place before the mutual settlement could not operate in the mind of the deceased to bring an end to her life. Those instances of cruelty of remote past had become stale enough to serve as the impelling force to drive the deceased to commit suicide. *Dwarika Prasad Soni v. State of M.P.*, 2002 Cr LJ 1080 (M.P.) : 2002(3) Cur Cri R 196 : 2002(7) DMC 122 : 2002(2) Hindu LR 720.

7. Husband Committing suicide: Instigation by wife.—The provisions of presumption under Section 113-A of the Evidence Act do not arise against the wife due to whose cruelty the husband commits suicide. It is certainly a case of mental cruelty by the wife due to her alleged characterise manner but unfortunately the legislature has not taken into account these factors. In the absence of any such presumption, inference of abetment because of the cruel conduct of the wife against her, cannot be raised. It is not a common course of events nor a natural result. The husbands generally inflict cruelty upon the wives. It is not that the wives are not cruel. But such cruelty by the wife cannot be said to be an instigation to the husband to commit suicide. Abetment has been defined under Section 107, IPC. There had to be either of the 3 acts by the abettor. Engaging with one or more other person or persons in any conspiracy for the doing of the particular act is one of them. There should have been a conspiracy that the husband led to commit suicide and along with the conspiracy there should be an act of illegal omission or there should be instigation of the person who commits suicide to do that act. There should be intentionally aiding an act or illegal omission. Even facilitation for commission of crime amounts to abetment. It is not a common feature that husband are led to commit suicide. So it is not a normal conduct. In the instant case there was no other material on record against the petitioner except the suicide note of th husband and the letter written by him to his own sister earlier. They were totall insufficient material to infer that the wife abetted suicide. She may be cause for th suicide, but not the abettor *Alka jaiswal* v. *State of MP.*, 2000 Cri LJ 672 (MP).

There used to be quarrels between the two families at public tap for getting water The accused were threatening and abusing the deceased women that they would revea the, contacts of the deceased to her would be husband illicit. Therefore, the decease jumped into a high level canal and drowned. It was held that the threatening words used by the accused were not sufficient to be described as instigating in th commission of the offence. *V. Adinarayana* v. *State of M.P.*, 2000 Cri LJ 1182 (AP) : 2000(1) ALT (Cri) 172 (AP).

A domestic quarrel between the deceased and the accused over some milk does not amount cruelty within the meaning of the explanation (a) to section 498-A, IPC so as to attract Section 113-A of the Evidence Act giving use to presumption that the accused abetted the commission of suicide by the deceased. In the ordinary course such quarrel abuses and even pushing the woman do not drive her to take extreme step of committing suicide. "*Laxmi Bai* v. *State of M.P.*, 2000 Cri LJ 3597 (M.P.)

When the accused was tried for abetting to comimt suicide and hence convicted. It was challenged in revision petition. It was held that the ingredient of office under Section 306, I.P.C. is not established, hence no conviction can be sustained on strength of evidence available on record. *Ashok Kumar* v. *State of M.P.*, (1995) 3 C Cr 126 (MP).

Conviction for abetment of suicide merely on the allegations of harassment to the deceased is sustainable. *Mahendra Singh* v. *State of M.P.*, 1995 SCC (Cr) 1157 (SC).

The legislative intent is clear enough to indicate in particular reference to explanation (b) that there shall have to be a series of acts in order to be a harassment within the meaning of explanation (B), the letters by itself though may a reprehensible conduct, would not, however bring home to charge of S.498-A against the accused. Acquittal of a charge under Section 306, as noticed though not by itself a ground for acquittal under Section 498-A, but some cogent evidence is required to bring home the charge of Section 498 as well, without which the charge cannot be said to be maintained. However, there was no such evidence available on record. Thus the accused would be entitled to be acquitted of the charge under Section 498-A *Girdhar Shankar Tawade v. State of Maharashtra*, 2002 Cri LJ 2814 (SC) : AIR 2002 (SC) 2078 : 2002(5) SCC 177 : 2002(4) JT 357 : 2002(4) Scale 44 : 2002(3) Supreme 583.

8. Conviction.—Conviction for offence under Section 306, I.P.C.—Abetment of suicide and cruelty by husband or his relatives was alleged—Deceased committed suicide within six years of her marriage, there was found no evidence of abetment of suicide. But witnesses being consistent about fact that deceased was treated with cruelty. It was held conviction under Section 498-A maintained but acquitted of offence under Section 306. *Dilip* v. *State of Rajasthan*, 1995 RCC 214 (Raj).

Illicit relationship between appellant and wife of deceased. Accused No. 1 had illicit relationship with Accused No. 2 who is the wife of the deceased. It is also not in dispute that Accused No. 1 was visiting the house of the deceased to meet Accused No. 2 and that he even went to the house of deceased when he came to know that the wife of the deceased was sent with her father for counseling and advise. He loudly stated that he would continue to have relationship with Accused No. 2 and would come to her house so long she does not object to the same. He also took her away from the house of PW-5, her brother and kept her with him for 4 days. Immediately after the said incident and deceased committed the suicide. Therefore, there is definitely a proximity and nexus between the conduct and behaviour of Accused No. 1 and Accused No. 2 with that of the suicide committed by the deceased. Besides, there is clear and unambiguous findings of fact of three Courts that the appellant is guilty of the offence under Sec. 306 of IPC. Such findings do not call for any interference in our hand. This Court also does not generally embark upon reappreciation of evidence on facts which are found and held against the appellant. *Dammu Sreenu vs. State of Andhra Pradesh*, AIR 2009 SC 2532 : 2009 CrLJ 3728 : 2009 (3) Crimes 35 (SC) : 2009 (7) JT 478 : 2009 (9) SCR 858 : 2009 (8) Scale 731 : 2009 (4) Supreme 525.

Deceased being fed up by illicit relationship between accused persons viz., her husband and her mother committed suicide.

The evidence of witnesses would have been a strong supporting evidence to dying declaration, if it was made, by the deceased as per the accepted procedure or manner. A dying declaration attaches evidentiary value provided it is corroborated not only by the eyewitness but also by circumstantial evidence *vis-a-vis* the medical evidence.

The evidence on record is enough for the purpose of coming to any conclusion that the deceased received burn injuries and succumbed to the same injury. It is not an answer to the allegation that the deceased committed or attempted to commit suicide being abetted by the accused petitioner and the co-accused.

The Investigating Officer himself did not visit the hospital to record the statement of the injured person under Section 161, Criminal Procedure Code. He rather sent the S1 (PW. 11) and that too after 19 days. There is no explanation from the Investigating Officer as to why he could not personally go to the hospital to record the statement of injured person and why he deputed PW. 11 after a long gap of 19 days from the date of occurrence. Nothing has been stated by the Investigating Officer why he did not make any requisition for dying statement of the injured person, if it was so required to be done in the interest of proper investigation, although, he got sufficient time for doing so. The manner in which dying statement of the injured/deceased was recorded without observing the bare minimum requirements, casts a shadow of doubt on the fact of recording the statement and genuineness of the same.

Is the Court expected to believe in, rely on and act upon such statement of the deceased recorded so casually and improperly without any supporting evidence worth gaining the confidence of the Court? The summit Court in *Arvind Singh vs. State of Bihar*, AIR 2001 SC 2124 = 2001 (6) SCC 407 = 2001 Cri LJ 2556, aptly held that the dying declaration should be dealt with care and caution and corroboration, though not essential as such, but is otherwise expedient to have the same in order to strengthen the evidentiary value of the declaration. Independent witnesses may not be available but there should be proper care and caution in the matter of acceptance of such a statement as trustworthy evidence. Little step further, the Apex Court in *Panchdeo Singh vs. State of Bihar*, AIR 2002 SC 526 = 2002 (1) SCC 577 = 2002 Cri LJ 973, observed thus, "confidence of the Court is the summum bonum and in the event of there being any affirmation thereto in the judicial mind, question of any disbelief or distrust would not arise. In the event however of there being some infirmity, howsoever negligible it be, the Court unless otherwise satisfied about the credibility thereof, ought to look for some corroboration, if however it is otherwise, question of requirement of a corroboration would not arise; dying declaration alluring confidence of the Court would be a sufficient piece of evidence to sustain conviction.

Further to note from the evidence of above witnesses is that, although they are neighbours and close to the victim, they have not deposed that they ever personally saw her being tortured physically by the accused persons. They have deposed merely on the basis of what was allegedly disclosed by the victim before the incident. Such evidence not being based on their personally acquired knowledge, in my considered view, is not an admissible evidence. *Swapna Saha Bhowmik vs. State of Tripura*, 2010 (2) CrLJ 1893 (Gau).

The accused as per oral evidence used to subject his wife to mental cruelty and letters written by her before the death showed that accused was dominating his wife and was treating her as a chattel. Thus conduct of husband was such as was likely to drive his wife to commit the suicide. This type of circumstances indicate that the accused had abetted his wife to commit suicide. However point of dowry was not proved and conviction under Section 304B was set aside but conviction under Section 306 and 498A was upheld. *Devykinandan* v. *State*, 2003 Cr LJ 1502 (MP) : 2003(2) All Ind Cas 123 : 2003(3) Rec Cri R 379 : 2003 Cri LR (SC&MP) MPJ 55.

Where outrageous act resorted to by the accused had left the deceased with no alternative but to commit suicide, the deceased was held guilty of abetting the suicide. *Dammu Ireenu* v. *State*, 2003 Cr LJ 2185 (AP) : 2003 (1) ALD (Crl) 664 : 2003 (2) CW Cri R 475.

Where the appellant was charged and convicted under Section 306/498A for instigating the wife to commit suicide, and in appeal it was found that accused was rarely talking to her wife who had eloped with someone for a particular period, it was held that such an act was not sufficient to hold him guilty of abetment under Section 306 or under Section 498A. *Ramesh Bhai Godad* v. *State*, 2003 Cr LJ 2445 : 2003(2) DMC 746 : 2003(2) Guj LH 657 : 2003(3) Guj LR 2390 : 2003(4) Rec Cri R 17.

In a case, the accused due to influence of intoxication hurled abuses at victim who committed suicide in night by throwing himself on railway track. Accused was not held guilty and prosecution for offence under Section 306 was quashed in exercise of inherent powers. *N. Prabhu Dayal Ahirwar* v. *State*, 2003 Cr LJ (NOC) 270 (MP) : 2003 Cri LR (SC&MP) MPJ 258 : 2003(1) MPHT 512.

When cogent and reliable evidence of relatives proved demand for dowry, absence of victim's statement before her friend about any harassment by itself is not sufficient to acquit accused, and order of conviction cannot be interfered with. *Randhir Singh* v. *State of Punjab*, 2004 Cr LJ 4985 : AIR 2004 SC 5097 : 2004(4) Crimes 193 (SC) : 2004(7) Supreme 420 : 2004(3) JCC 1608 : 2004 Recent Cr 740.

In the instant case, the accused denied the ill treatment and argued that deceased wanted to marry her cousin brother and for that she off and on used to run away from the matrimonial house on her own but all this was simply found the figment of imagination. It was held that conviction of accused for abetting his wife to commit suicide by subjecting her to cruelty was proper. *Raj Kumar* v. *State*, 2003 Cr LJ (NOC) 249 (MP).

Where there was no allegations of demand of money in FIR and no specific charge under Section 498B, IPC had been framed and post-mortem report also not duly proved during trial therefore in absence of cause of death established by evidence, conviction under Section 306, IPC was held not sustainable. *Veerla Venkateshwara Rao* v. *State of A.P.*, 2005 (2) Crimes 486 (AP).

It was established that wife had committed suicide consequent to ill treatment meted out to her by mother-in-law, sister-in-law and husband. It was held that these persons were liable to be convicted under Section 306/34 for abetting her to commit suicide. *Kamalakar Nandram Bhavsar* v. *State of Maharashtra*, 2004 Cr LJ 615 (SC) : AIR 2004 (SC) 503 : 2003(9) JT 570 : 2003(8) Supreme 424 : 2004(1) Crimes 31 (SC).

There was overwhelming evidence to show that accused had made life of his deceased wife intolerable by ill treating her and beating her frequently. On day of occurrence of incident she was not allowed to attend marriage of her near relation whereas husband had gone there. It was held that cruel behaviour of husband, who was, had instigated deceased wife to commit suicide and therefore he was liable to be convicted under Section 306, IPC. The accused husband and other in laws of deceased were, however, held entitled to be acquitted of other charges. *Batool* v. *State*, 2003 Cr LJ 3286 (Raj) : 2003(2) Crimes 101 : 2003(2) Hindu LR 421 : 2003(3) Rec Cri R 683.

The accused borrowed Rs. 4 lacs from the deceased. When the deceased demanded for repayment of the amount so as to perform his daughter's marriage, the accused used to postpone the repayment. On a particular date, while refusing to repay the amount the accused acted in a high-handed manner and challenged the deceased, and his son to do what they would like to do. They went inside the house and brought pesticide poison and gave it to deceased to consume and die. In the emotional mode the deceased consumed it and died. It was held the accused could be said to have committed the abetment of suicide. *Gundala Reddeppa Naidu* v. *State of A.P.*, 2005 Cr LJ 4702 (AP) : 2005 (2) ALD (Crl) 206 : 2006 (1) Andh LT (Cri) AP 152 : 2006(1) Rec Cri R 547.

Where the accused persons allegedly followed deceased in streets passing vulgar remarks, demanding her to fulfil their lust and spreading rumours against her in the village and the suicidal note was written immediately before committing suicide. It was held that the suicidal note which specifically mentioned that the accused persons were responsible for creating circumstances leading to death deceased and, therefore, conviction of accused under Sections 306 and 509 was proper. The co-accused in absence of specific role assigned to him in suicidal note were given benefit of doubt. *Pothyamsethi Satyanarayana Reddy* v. *State of A.P.*, 2006 Cr LJ 27 (AP).

9. Evidence.—The Supreme Court has observed in *State of West Bengal* v. *Orilal Jaiswal*, AIR 1994 SC 1418 : 1994 Cri LJ 2104 that the Courts should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance discord and differences were not expected to induce a similarly circumstanced individual in a given, society to commit suicide, the conscience of the

Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty. "*Laxmi Bai* v. *State of M.P.*, 2000 Cri LJ 3597 (M.P.)

On face of contradictory statement by father and sister of deceased regarding demand of dowry, evidence of harassment not worthy of credence. *State of Haryana* v. *Suresh Kumar*, 1993 Cri LJ 1400 (P & H).

Where there was homicidal death of two ladies. Dead bodies found in the toilet of the office and jewellery recovered from the possession of the appellant. *Held*, appellant guilty under Section 411 of I.P.C.—No other conclusion is possible of being arrived at except holding that the appellant could be found guilty only for an offence punishable under Section 411, I.P.C. In almost similar circumstances, Supreme Court in *Union Territory of Goa* v. *Boaventura D' Souza*, 1993 Cr LJ 181, found the accused therein guilty under Section 411, I.P.C. That was a case of murder and robbery. Proof offered was based on circumstantial evidence. Accused was alleged to have stayed in the house of the deceased and committed murder, object being gain. Injured eye-witness did not implicate the accused. Supreme Court also doubted the stay of the accused in the house of his relation. In that background, it was observed that an inference cannot be safely drawn that the accused therein had committed murder based on recovery of stolen articles one month after the incident. However, conviction was recovered under Section 411, IPC. Similarly in *Babula* v. *State of Rajasthan*, AIR 1992 SC 2091 : (1992) 3 Crimes 341 (SC). Supreme Court found that it was hazardous to convict the accused therein, for murder on the basis of recovery of stolen articles 1-1/2 months after the commission of crime, from a person to whom, the accused, had allegedly sold those articles. Even in that case, there was no clinching evidence about the presence of the accused in the house of the deceased when the occurrence had taken place. *Mohan* v. *State*, (1994) 1 Crimes 366 at p. 379 : (1994) 1 ALT (Cr) 442 : (1994) 1-LW (Cr) 78 (Mad).

The High Court has carefully considered the evidence as also the assailing grounds. Strangely enough, there is no basis on the part of '*V*' and he has very clearly and truthfully spoken about the painful facts. There is no dispute about the fact that he used to reside close by and the daughter was in regular contact, with the parents and it is but natural that she would convey to him about her woeful life. Under these circumstances, High Court does not see any ground on which this evidence can be discarded. *Laxman Irayya Yenganti* v. *State of Maharashtra*, (1995) 1 Bom CR 219 (222) : (1995) 1 B Cr C 265 : (1995) 1 Mah LJ 403 (Bom).

Prosecution case based on evidence of victim relying on two letters and suicide note written by her—Witnesses on these documents being parent and brother of deceased examined by police after ten months of occurrence—Documents not specifically put to accused under Section 313, Cr.P.C. Genuineness of documents not proved by prosecution otherwise and delayed examination of witnesses creating suspicion conviction was held not sustainable. *Babula Kundu* v. *State of Orissa*, (1994) 3 Crimes 390 (Ori).

The next head of evidence consists of the deposition of 'I' (P.W. 5), who is a neighbour and who categorically corroborates everything that '*V*' (P.W. 3) has deposed about and adds to the fact that the deceased used to tell her from time to time about the terrible situation under which she was living. The manner in which the accused used to assault the deceased and extort, money from her for liquor and that he even threatened to kill her has been deposed to by this witness. The principal ground on which 'K' assailed her evidence is that admittedly the mother tongue of the deceased was Telugu and this witness admits that she does not know Telugu. She has clarified in the evidence that the deceased knew Marathi and she used to talk to '*J*' in this language. The latter represents the correct position, more so since the deceased was residing in that locality and would have most certainly picked up enough of the local language to be able to communicate with others. Her having disclosed to '*J*' about the happening between the accused and herself is most natural. On the aspect of quarrels between the husband and the wife, the unemployment of the accused, the extortion of money and the physical assaults on the deceased. Court has the evidence of 'S' (P.W. 6) and 'R' (P.W. 7), both of whom are neighbours and who had also come to the scene immediately after the incident. As far as this evidence is concerned, '*K*' sought to contend that these persons shared the general bias and prejudice which had been generated against the accused, who was obviously not behaving well and therefore, they had gone against the accused. This is hardly any ground on which the evidence can be assailed because the witnesses have been cross-examined and their evidence is by and large unscalled. They establish quite clearly that everything which '*V*' (P.W. 3) has deposed about was, in fact, true. The High Court is conscious of the fact that there is no dying declaration in this case. There are no eye-witnesses and, therefore, it is on the basis of the aforesaid material alone that the charge will either stand or fail. *Laxman Irayya Yengan ti* v. *State of Maharashtra.* (1995) 1 Bom CR 219 (222) : (1995) 1 B Cr C 265 : (1995) 1 Mah LJ 403 (Bom).

Deceased not subjected to cruelty and was neither harassed to meet unlawful demand. Subjection to cruelty missing. Onus may shift on the accused. Hence offence was not made out. *Bhala Kumar* v. *State of M.P.*, 1995 Cr LR (MP) 268.

Cruelty has been committed soon before the death of the deceased reflecting the insignia of cruelty. Facts and circumstances of the case should be such as can reasonably sustain a presumption about the existence of a nexus of cause and effect between the alleged cruelty and suicide. *Bansiya* v. *State of Rajasthan,* (1995) 3 Crimes 75 (Raj).

In case of charge under Sections 498-A to 306, I.P.C. it is not safe to rely on the evidence of the brother of the deceased and his other relatives where there is possibility of fake insuniations and allegations. *Khemraj H. Agarwal* v. *State of Maharashtra,* 1995 Cr LJ 2271 (Bom).

Suicide was within one year of marriage, there was no evidence of ill-treatment by appellant. None of the elements required to constitute offence under Section 306, I.P.C. proved by prosecution. It was *held*, that the appellant is entitled to benefit of doubt, hence acquitted of all charges and conviction and sentence set aside. *Shekhar Amonkar* v. *State,* (1995) 2 Crimes 460 (Bom).

When married woman committed suicide. Presumption as to abetment under Section 113-A, Evidence Act. It was held not mandatory. *Nilakantha Pati* v. *State of Orissa,* 1995 Cr LJ 2472 (Ori).

Ocular evidence. We are of the opinion that this excerpt from his evidence cannot be said to be proof of the document as no statement was made that he recognized the handwriting or the signature of the appellant. Moreover, this letter had not been produced before the police during the course of the initial investigation and had been handed over to the police after several months. This fact, as also a reading of the letter, indicates that this was a concocted piece of evidence and the work of a legal mind, as no person would write such a letter meeting all legal requirements for implicating himself and his near relatives, in a claim for Dowry.

We, however, find from a reading of the testimonies of these witnesses that the problem, if any, lay with Karuna's mother-in-law Ramdulari and she and nobody else was the villain and general allegations with regard to the other accused find mention only in the statement of Ram Prasad. We are, therefore, of the opinion that in this background and keeping in view of the fact that Ramdulari has been acquitted, it would not be possible to maintain the conviction of the appellant on the basis of this evidence.

Admittedly, the conviction of the appellant has been recorded under Sec. 306 which is relatable to Sec. 113-A and though the presumption against an accused has to be raised therein as well, the onus is not as heavy as in the case of a dowry death. In this background, Ms. Makhija's arguments that the onus shifts exclusively and heavily on an accused in such cases is not entirely correct and in the background of sketchy ocular evidence and the additional fact that the dying declaration recorded by the Naib Tehsildar completely exonerates all the accused of any misconduct, clearly dispels any suspicion with regard to their involvement in this unfortunate incident. *Anand Kumar v. State of M. P.*, AIR 2009 SC 2155 : 2009 (2) SCR 775 (56) : 2009 (3) SCC 799 : 2009 (2) JT 662 (SC) : 2009 (3) Scale 1 (SC) : 2009 (2) Supreme 72 (SC) : 2009 (1) Crimes 383 (SC) : 2009 (2) JCC 1092 (SC).

10. Wife subjected to harassment in connection with demand to give consent for husbands' second marriage—Abetment of suicide.—The accused was subjected the deceased to harassment and cruelty by persistently partnering her to give consent for the second marriage. The deceased being frustrated, administered poison to her three minor children and committed suicide. It was held that the deceased committed suicide was but for act of accused and therefore ingredients of Sec. 306, IPC were attracted. *State of Karnataka* v. *Anni Poojary*, 2005 Cr LJ 2662 (Kant) : 2005 (2) DMC 152 : AIR 2005 Kant HCR 1193 : 2005 (2) Hindu LR 293.

The prosecution has specifically alleged that the day prior to the date of commission of suicide by the deceased, the deceased was tortured by the appellant, Anita and the other accused persons present in the house of the appellant, as a result of which the deceased committed suicide on the next day. On a perusal of the record of the present case, we find that both the trial Court as well as the High Court have disbelieved the said incident as, according to them, the statement of the witnesses to establish the said fact are not reliable and trustworthy. Those findings recorded by the trial Court and the High Court have not been challenged before us. It is not the case of the prosecution that the case in hand would fall within the ambit of clause firstly of Explanation 1 to Sec. 107, IPC.

It is pertinent to note that the appellant had brought Anita to stay with him at his house three months prior to the date of the death of the deceased. If the deceased had been so perturbed by the act of the appellant in marrying the said Anita and in bringing her to his house that she felt impelled to commit suicide then she could have done so on the very day when Anita had come to stay with the appellant in his house as naturally at that point of time her annoyance or dismay with life would have been at its pinnacle. From the period of three months which elapsed in between the incidents of the appellant bringing Anita to his house and the deceased committing suicide, it can be clearly inferred that it was not the act of the appellant which instigated or provoked the deceased to commit suicide.

The perpetration of physical torture on the deceased on the day prior to the date of the incident which led the deceased to commit suicide is the prosecution case all throughout. It is nowhere the case of the prosecution that the appellant had played any active role either in instigating or aiding the commission of suicide by the deceased for denying to accept Anita as the wife of the appellant. Anita, the second wife of the appellant was brought by the appellant to his house about three months prior to the date of the incident of suicide by the deceased and, therefore, bringing of the second wife to the house by the appellant cannot be said to have either incited or facilitated the commission of suicide by the deceased. It is also not the case of the prosecution as disclosed from the evidence led which we have scrutinised very minutely. The aforesaid contention, in our considered opinion, is far-fetched and is not established by the facts of the present case. After carefully assessing the evidence on record we find that there is no direct evidence to show that the appellant had by his acts instigated or provoked the deceased to commit suicide and has not done any act which could be said to have facilitated the commission of suicide by the deceased.

From the evidence on record available before us, we find that the prosecution witnesses have in their testimonies stated that the deceased was tortured both physically and mentally by the appellant for the first time after his marriage with the deceased when he was refused permission for marriage with said Anita by the deceased. On having been refused the permission for his second marriage with Anita, the appellant again, after a few days requested the deceased to accede to his request for marriage with Anita, which request was again refused by the deceased. Consequent to the said position and due to the adamant position taken by the deceased, cruelty was meted out to her by the accused which fact is sufficiently proved from the evidence on record. Therefore, we find no reason to take a different view than what has been taken by the trial Court and the High Court as far as Sec. 498-A, IPC is concerned. *Amalendu Pal alias Jhantu vs State of West Bengal*, 2009 AIR SCW 7070 : AIR 2010 SC 512

11. Acquittal.—Death was by 10% burning and suicide was alleged—Demand of dowry—Allegation was of consistent cruelty and harassment. There was found no cogent proof of such allegation. There being no proximate cause of homicide, offence was not proved. Hence acquittal upheld. *State of M.P.* v. *Shivujan Singh*, (1995) 1 CCR 262 (MP) (DB).

Girl committing suicide on being threatened by her erstwhile lover that as she refused to marry him he would destroy her and her family. Her lover having in his possession photographs of deceased with him.

The first question, which is required to be decided is, whether there is *prima facie* case against parents of the petitioner. The prosecution case shows that the parents made phone calls to the complainant and sought his appointment. They obviously were trying to push forward the marriage proposal of their son with deceased Rani. But, their attempt got scuttled at the very inception. Rani promptly made her mind clear to them, telling them that she would not marry their son. Making an attempt to push a marriage proposal of their son to the bride's parents is not a criminal activity. There is nothing on record to show that the parents met Rani to pressurize for agreeing to marry their son. Even the suicide note does not blame them. Rani in her suicide note did not utter a single word against the parents. The petitioners parents as discussed earlier, met two prosecution witnesses namely More and Dalvi for requesting them to act as mediators for pushing their proposal with the complainant and his family. There is nothing on record even to suggest that the petitioners parents tried to misuse the photographs for pressurizing Rani or her parents. *Devesh Dattabhau Pathrikar & Ors. vs. State of Maharashtra*, 2010 (3) CriLJ 3560 (Bombay) (Aurangabad).

Husband ill-treating his wife on false allegation of illicit relations with his younger brother and instigated her to commit suicide. When report of missing was lodged by brother of deceased, he did not express any kind of doubt against accused. Allegation of illicit relation could not be proved by leading cogent and convincing evidence. Held, presumption under S. 113A of Evidence Act cannot be invoked and conviction of accused liable to be set aside. *Bhup Ram vs State of Himachal Pradesh*, 2010 (4) CriLJ 4035 (HP).

Three of the accused have been acquitted and that no appeal against their acquittal has been filed is admitted on record. It is also clear from the impugned judgments that the Courts have relied heavily on the letter to support the finding of conviction against the appellant. This letter was sought to be proved in evidence by Ram Prasad, the father of the deceased, to whom it had been addressed.

This except from his evidence cannot be said to be proof of the document as no statement was made that he recognized the handwriting or the signature of the appellant. Moreover, this letter had not been produced before the police during the course of the initial investigation and had been handed over to the police after several months. This fact, as also a reading of the letter, indicates that this was a concocted piece of evidence and the work of a legal mind, as no person would write such a letter meeting all legal requirements for implicating himself and his near relatives, in a claim for Dowry.

Admittedly, the conviction of the appellant has been recorded under Sec. 306 which is relatable to Sec. 113-A and though the presumption against an accused has to be raised therein as well, the onus is not as heavy as in the case of a dowry death. In this background, Ms. Makhija's arguments that the onus shifts exclusively and heavily on an accused in such cases is not entirely correct and in the background of sketchy ocular evidence and the additional fact that the dying declaration recorded by the Naib Tehsildar completely exonerates all the accused of any misconduct, clearly dispels any suspicion with regard to their involvement in this unfortunate incident. *Anand Kumar vs. State of Madhya Pradesh*, AIR 2009 SC 2155 : 2009 (3) SCC 799 : 2009 (1) Crimes 383 : 2009 (2) SCR 775 : 2009 (2) JT 662 : 2009 (3) Scale 1 : 2009 (2) Supreme 72 : 2009 (2) JCC 1092.

Acquittal of husband of deceased-wife—When valid. The prosecution examined six witnesses including Shrirang, the father of the deceased, Vimal, the mother of the deceased and Smt. Nirmala, the elder sister of the deceased. The trial Court found that demand of gold ring by mother-in-law and cruelty to deceased on account of non satisfaction of the demand was proved only against mother-in-law. It was found that Anita had committed suicide. Accordingly, mother-in-law was convicted as afore-noted and rest of the accused persons were acquitted. As noted above, Suman challenged the conviction whereas the State challenged the acquittal of rest of the accused persons.

Learned Counsel for the appellant submitted that the trial Court had rightly held that in letter there was nothing to implicate the present appellant. Therefore, his acquittal was correct, but the High Court on erroneous reading of the document has directed conviction.

Learned Counsel for the State on the other hand supported the order. In the letter on which both the trial Court and the High Court have relied upon to conclude one way or the other, reference is made to several earlier letters. It specifically refers to the demand by mother-in-law of a gold ring. There is no reference to the present appellant in the letter.

The evidence of father, mother and sister is also relevant. Father has stated that except above letter he had not received any letter and the statement in the letter to the effect that the deceased had earlier sent 2/3 letters is correct. If on one hand he says that he had not received any letter, the question of not replying to them does not arise. Similarly, mother has stated that she cannot say whether there was any demand of in letter. Elder sister has accepted that deceased had written to her father that mother-in-law Suman was demanding gold ring in the letter.

Learned Counsel for the State submitted that there is some reference to money in the letter. The sentence is being read out of context. The deceased had written in the letter that she may have to get a gold ring but wherefrom will she get the money for buying it. Therefore, there is no reference to any demand of money by the present appellant. That being so, the High Court was not justified in upsetting the judgment of the trial Court. The impugned judgment of the High Court is set aside and that of the trial Court is restored. *Vijay vs. State of Maharashtra*, AIR 2009 (SC) 1217 : 2009 (2) SCC 87 : 2009 (1) Crimes 178 (SC) : 2009 (16) SCR 890 : 2009 (1) SLT 313 : 2009 (1) JCC 113.

Accused caught hold of deceased and asked to have sexual intercourse—She refused and then accused molested her but no sexual intercourse committed—After one hour of this incident she set herself on fire by pouring kerosene—There being no intention or positive act part of accused to instigate her for suicide. Accused not being abettor, conviction for abetting set aside—However he is liable for outraging modesty. *Deepak* v. *State of M.P.*, 1994 Cri LJ 767 (MP).

Where there was cruelty and demand of Dowry leading to committal of suicide. Hence conviction to husband and acquittal to parents in law. *Lalit Seth* v. *State of Punjab*, (1994) 1 Recent CR 68 (P&H).

The accused persons caused persistent humiliation to deceased by saying that she had committed theft in a marriage ceremony of some relative. After immediate return from relative's house she committed suicide. It was held that acts of accused were although humiliating but would not amount to instigation which prompted deceased to commit suicide. The accused were held entitled to the acquittal. *Neelam* v. *State*, 2003 Cr LJ (NOC) 160 (AP) : 2002(2) Andh LT (Cri) AP 186 : 2003(2) DMC 268.

Where there was nothing on record to show that the accused had created such circumstances for deceased that she was forced to end her life, the accused was acquitted. *Mehar Das* v. *State*, 2003 Cr LJ 2203 (P&H) : 2003(3) Crimes 505 : 2003(3) Rec Cri R 431 : 2003(2) All Cri LR 597.

Deceased committed by pouring Kerosene oil on body and setting herself on fire. The act of the deceased, according to prosecution was the result of the fact that she was ravished forcibly by the accused who cohabilitated with her regularly intimidating her. She had conceived and her pregnancy was terminated. It was held that the particular behaviour of accused in past though not substantiated by legal evidence on record, could not be taken into consideration as instigating, adding or abetting deceased to commit suicide. It was further held that there was no evidence to show that on the day of occurrence the accused had met deceased and had attempted to have sexual intercourse with her, and therefore, he could not be convicted under Section 306, IPC. *Nagendra Singh* v. *State of Jharkhand*, 2004 Cr LJ (NOC) 79 (Jharkhand) : AIR 2004 Jhar HCR 536.

Deceased widow committed suicide by burning herself after 5 months of her marriage. Her husband already expired of heart ailment after two months of marriage. In-laws of widow had demanded Rs. 40,000/- for treatment of her husband as financial assistance—Such demand cannot be said as unlawful—Wife was not harassed for such demand—After death of husband widow faced pathetic situation and this could have driven her to commit suicide. Hence acquittal of in-law-accused respondents was held fully justified. *State of M.P.* v. *Keval Chandra*, (1995) 4 CCR 135 (MP).

Allegation was of abetment to commit suicide—Accused forced deceased to pay huge money—Consequently deceased took poison but no instigation or aid was established—No offence made out against the accused. *Vedprakash Bhaiji* v. *State of M.P.*, 1994 Cr LR (MP) 161.

The accused's torturous behaviour compelled the deceased to commit the suicide but none of the accused was found involved in that case and no independent evidence involving the accused in any of these incidents was relied upon by the prosecution. The acquittal of the accused was held proper. *Baburao* v. *State*, 2003 Cr LJ 2181 (Bom) : 2003 All MR (Cri) 680 : 2003(3) CUR Cri R 386 : 2003(4) Mah LJ 943.

Where the deceased alongwith her son and daughter committed suicide but evidence showed that necessary ingredients of cruelty and harassment by accused were not established, acquittal of the accused was held proper. *State* v. *Ravindra*, 2003 Cr LJ 4361 (MP) : 2003(3) MPLJ 460 : 2003(4) Rec Cri R 544.

Where the deceased wife died due to consumption of poison and accused husband was alleged to have abetted deceased to commit suicide by neglecting her, it was held that the statement of deceased recorded by S.I. for over a period of 1-1/2 hours could not be treated as dying declaration as the doctor had not issued fitness certificate. Conviction of accused was set aside. *A. Vasantha Kumar* v. *State*, 2003 Cr LJ 4354 (Kant) : AIR 2003 Kant HCR 2528 : 2003(4) All Cri LR 279.

In a M.P. case, where it was alleged that non-payment of dues by the accused led the deceased to commit suicide and there was no allegation in complaint to suggest that the accused led a knowledge or intention to the effect that deceased would commit suicide, it was held that the proceedings against petitioner were liable to be quashed. *Ajay Patodia* v. *State of MP*, 2004 Cr LJ 797 (MP).

In a Supreme Court case the deceased bride committed suicide within two and half months after marriage. Letters written by deceased to her parents and friend did not support the case of prosecution that deceased was subjected to torture and harassment or was being taunted for not bringing car in dowry. The suicide note did not contain any statement which could be used against the accused. It was held that accused, father-in-law and mother-in-law were entitled to the acquittal. *Gurucharan Kumar* v. *State of Rajasthan*, 2003 Cr LJ 1234 (SC) : AIR 2003 (SC) 992 : 2003(2) SCC 698 : 2003(1) Supreme 165 : 2003(1) Crimes 329 (SC).

In an AP case where the accused had alleged that the deceased wife was unfit for conjugal happiness, the mere fact that some panchayat was held in that regard was held not sufficient to attract the provisions of Section 306 or 107, IPC. The prosecution evidence was vague and did not inspire confidence of Court. It was further held the allegation that the deceased wife was unfit for conjugal happiness could not be said to amount to harassment falling under "cruelty within the meaning of Section 498A and, therefore, the acquittal was proper. *Public Prosecutor, High Court* v. *Jangili Sammaiah*, 2004 Cr LJ 4489 (AP) : 2004(2) ALD (CRI) 579 : 2004(4) All Cri LR 836.

Since allegations contained in *fardbeyan* were totally reversed in trial, in absence of any evidence to establish demand of dowry and abetment to suicide, conviction and sentence imposed on accused was held liable to be quashed and set aside. *Dashrath Bhuiyan* v. *State of Bihar*, 2005 (3) East Cr C 35 (Pat).

The accused committed rape on victim and his wife threatened her not to disclose the matter to anybody. Victim subsequently committed suicide by consuming pesticide poison but post mortem and forensic science laboratory did not disclose offence of rape and guilt of accused was not proved beyond doubt. Hence conviction of accused and co-accused was set aside. *Mudavath Hema Naik* v. *State*, 2004 Cr LJ 847 (AP) : 2003(2) ALD (CRL) 85 : 2003(2) Andh LT (Cri) AP 240 : 2003(4) Crimes 140.

Suicide of wife and daughter-in-law of the appellant—Allegation of beating and committing cruelty—F.I.R. was 25 days delayed, evidence contradictory and inconsistence—Acquittal order by trial Court—Appeal against it was filed, acquittal was fully justified. *State of Himachal Pradesh* v. *Madan Mohan*, (1994) 3 Crimes 11 (HP).

Charge of abetting the commission of suicide by wife—Conviction under Section 306, I.P.C. and sentenced to rigorous imprisonment for 5 years—Also convicted under Section 498-A and sentenced to rigorous imprisonment for one year which was challenged in revision petition. It was held that the prosecution relied on dying declaration and testimony of prosecution witnesses. Mere statement of deceased in medico legal report is not reliable. The dying declaration should be recorded in question and answer form. The doctor should obtain signature of thumb-impression of such patient in case the patient is not able to do so and a note should be given in the report. Hence the dying declaration allegedly made by the deceased to the Doctor as mentioned in medico-legal report cannot be relied upon. The benefit of doubt goes to the appellant. *Harcharan* v. *State of Haryana*, (1994) 3 CC Cases 70 (P & H).

The deceased allegedly committed suicide by hanging as she could get a plot in her name even after haying to accused. It was held that mere non fulfillment Section 306. *Mohesh* v. *State*, 2003 Cr LJ (NOC) 50 (MP) : 2002 Cri LR (SC&MP) 411 : 2002(3) Crimes 356 : 2002(2) Cur Cri R 479 : 2002(3) MPHHT 359.

Prosecution of the husband and in-laws under Sections 306 and 498-A of I.P.C. Husband and wife were living separately there was found no evidence of torture or harassment by in-law—In-law's held rightly acquitted. *Chandrabhushan Bhimaj Bhushanwar* v. *State of Maharashtra*, 1995 Cr LJ 101 (Bom).

Where there was prosecution under Section 306, I.P.C. Appeal challenging the acquittal which was made. The trial Court has disbelieved the statement of the mother. The findings given by trial Court is not perverse and where there are two views the appellate court will not interfere. *State of M.P.* v. *Hakam Singh*, 1995 Cr LR 103 (MP).

In a Rajasthan case deceased along with accused allegedly had gone to *mandi samiti* for selling their agricultural produce and received the sale proceeds, though produce belonged to accused. The accused received the sale proceeds from the deceased who was found in the adjoining village. When the deceased told the accused persons that on account of situation, in which he had landed he would have to die. The accused persons allegedly replied that it did not matter to them. It was held that such a dialogue could not amount to abetment of suicide. *Shiv Dan Ram* v. *State of Rajasthan*, 2005 Cr LJ 36 (Raj).

In a Bombay case the prosecution wanted the Court to believe that the words "Whether you shall take or I shall take" only suggest that they refer to consuming of passion. The witnesses did not narrate whether the version was repeatedly altered and what were the words prior or latter. Held, on reference that offer by the husband that would he consume poison and prefer to die, instead of her witnessing the husband to consume poison and die. However, that alone could not be considered to be consequence of such utterance. The evidence on record was not sufficient to conclude proof of abetment. *Shankar Vishwanath Kalhe* v. *State of Maharashtra*, 2006 Cr LJ 1534 (Bom).

Where there was charge of abetment of suicide and prosecuted under Sections 306 and 498-A, I.P.C.—Acquitted of charge under Section 306, I.P.C. but convicted under Section 498-A, I.P.C. Revision petition was filed. It was held that there was infirmity in conviction, but since the occurrence took place in 1988 and appellant had undergone the agony of protracted trial and this appeal she has been sufficiently harassed and penalised, no useful purpose would be served by sending her to jail. *Lachi Bai* v. *State of M.P.*, (1995) 2 CCR 201 (MP).

Proof of demand of dowry—Accused expressing preference to cash instead of presenting dining table voluntarily by parents of deceased wife—It does not amount to demand of dowry—Nothing incriminating in evidence except version of interested parent witnesses—Dying declaration not implicating accused—No proof of ill-treatment or cruelty on part of accused acquittal of accused was held justified. *S. Aboboy Naidu* v. *R. Sundararajan*, 1994 Cri LJ 641 (Mad).

When harassment for dowry was introduced for first time during trial, conviction not sustainable. *Changala Jaya Sankara Rao* v. *State of A.P.*, 1997 (1) Crimes 122 (AP).

In a Karnataka case the accused had tried to outrage the modesty of deceased and the deceased committed secede a few days after the Court held that it could not be construed as an act of abetment to commit suicide. The accused was, however convicted under section 354 for outraging the modesty of woman. *Surya Kanth* v. *State of Karnataka*, 2003 Cr LJ 3562 (Kant) : AIR 2003 Kant HCR 2036 : 2003(4) All Cri LR 514 : 2003(10) All Ind Cas 326.

12. Summoning order—Validity of.—Summoning of the accused for offence Section 306—Appellant's remark to the deceased to go and die. It was held that it has no direct connection with the deceased going home and committing suicide—Proceedings pursuant to summoning order quashed. *Swamy Prahalddas* v. *State of M.P.*, 1995 SCC (Cr) 943 (SC) : 1995 Supp(3) SCC 438.

13. Bail.—Offence was made under Sections 306 and 498-A held to be serious offence against the society hence bail application of the accused should not be lightly allowed. Notwithstanding the fact that the accused happens to be an old lady of 75 years. *Lahari Bai (Smt.)* v. *State of Rajasthan*, 1995 Cr LR 166 (Raj).

When accused husband is guilty of harassing his wife on account of dowry and abetting her to commit suicide, there should be leniency in sentence to accused. *Ashok Kumar* v. *State of Haryana*, 1997 Cri LJ 1379 (P&H).

14. Suicide by newly married women.—When harassment by accused husband is proved by dying declaration and evidence of prosecution witnesses accused liable to be convicted under Sections 306 and 498-A, I.P.C. *Public Prosecutor High Court of A.P.* v. *Mohd. Hoshan*, 1996 Cri LJ 2834 (AP).

15. Suicide by Wife.—In the present case, looking at the evidence available on record , the learned Sessions Judge has rightly observed that no case of dowry demand or abetment is made and he has given cogent reasons in acquitting the accused respondents of the charges for the offence under Section 304B, 498-A and 306. IPC. The most important fact, which was discussed by the learned Sessions Judge, is that no report was lodged by the parents of the deceased, though they were present and this circumstance goes against the prosecution and rather shows that there was no dowry demand or torture by accused respondents and that is why they did not lodge report, Had there been any case of dowry demand or torture by accused respondents, certainly PW-7 Galbaji, who is father of the deceased, would have lodged the report with the police when has admitted that when he came SHO and PW-6 Vimal Kumar Jain, SDO were there and they recorded his statement. In these circumstances, this Court does not want to interfere with the impugned judgment and order of acquittal passed by the learned Sessions Judge, Jalore, as they are based on correct appreciation of evidence and especially keeping in mind the powers of the High Court while dealing with the appeal against acquittal. *State of Rajasthan v. Kesa and others*, 2002 Cri LJ 432. Raj. : 2002(3) All Cri R 430 : 2002(2) Hindu LR 200.

All that was alleged in the FIR or even at the stage of investigation was that there were frequent quarrels between the husband and wife sometimes resulting in physical assault, on account of the husband being addicted to consumption of 'Bhang' and the other allegation that the accused was aggrieved of the fact that his sister was not being properly treated by her husband who was brother of the deceased was also appeared to be untrue, it was held that the presumption under Section 113A of the Evidence Act could not be invoked to find the accused guilty of the offence under Section 306, IPC. It was further held that having regard to the facts of the case, though the prosecution failed to establish the offence under Section 306, IPC, the evidence on record justified the conviction of the accused under Section 498A, IPC. *Hans Raj* v. *State of Haryana*, 2004 Cr LJ 1759 : AIR 2004 SC 2790 : 2004(3) Crimes 11 (SC) : 2004(3) JT 45 : 2004(3) Supreme 676 : 2004(1) JCC 650.

In a Supreme Court case where the evidence on record made out a case of persistent and unabated harassment and acts of cruelty meted out to the deceased wife by accused. Conviction of accused was held proper. *Moti Lal* v. *State of MP (Now Chhattisgarh)*, 2004 Cr LJ 907 : AIR 2004 SC 2909 : 2004(2) SCC 469 : 2004(1) Supreme 518 : 2004(1) Crimes 341.

In a case of death of wife due to consumption of poison the was subjected to cruelty before her death as large number of injuries were found on her person which established that she was subjected to cruelty before her death. The evidence of witnesses showed that the accused and in laws had made a demand of motor-cycle which was not fulfilled. Plea of *alibi* taken by husband was found false. Conviction of accused under Section 306, IPC was held proper. *Ramesh Deo Pandey* v. *State of UP*, 2004 Cr LJ 98 (All) : 2003 All LJ 2581 : 2003(47) All Cro C 34 : 2003(2) DMC 610.

16. Bride burning.—Co-accused are entitled to benefit of doubt where there is neither any specific evidence against them nor any act was done by them in furtherance of common intention and his appearance of evidence is caused by them when guilt of husband is proved beyond doubt. *Deepak* v. *State of Maharashtra*, 1995 CrLJ 2219 (Bom).

In absence of any trace of kerosene on spot in room or its small on clothes and body of deceased, second dying declaration of deceased wife in presence of her several relations that appellant burned her by pouring kerosene, is not reliable as it may be based on advice of her relations. *Changala Jaya Sankara Rao* v. *State of A.P.*, 1997 (1) Crimes 122 (AP).

In a case where accused are charged of the offence under Sec. 498-A and Sec. 302 there should be no difficulty for the Court to convict the accused under Sec. 306 if the basic ingredients of the offence under Sec. 306 of IPC are established by the prosecution even without framing a charge under that section. What is material and relevant, is that the prosecution should establish that the accused had enough notice of the allegations which could form the basis for conviction under Sec. 306 of IPC. In a bride burning case there could be or could not be any eye-witness and if there is no direct evidence the Courts have to base the order of conviction either under Sec. 302 or under Sec. 306 of IPC on the basis of circumstantial evidence. Motive for committing murder and basic ingredients of the offence under Sec. 306 of IPC in such cases could be one and the same. In both the cases the accused would make every effort to disprove the case of the prosecution under Sec. 498-A, namely, that neither any demand of dowry was made nor any gifts or presents or money was received by the accused at a subsequent stage or that he subjected the deceased to cruelty for the same or for any other reason. In other words, the accused would try to disprove the motive if a charge is under Sec. 302 and/or to establish that the ingredients of the offence under Sec. 306 do not exist. The motive for conviction either under Sec. 302 or the basic ingredients to establish charge under Sec. 306 of the IPC in a case of bride burning would be common and, therefore, the conviction under Sec. 306 of IPC can safely be recorded and same would not result in failure of justice in any manner even if the charge under Sec. 306 was not framed and the accused was tried only under Sec. 302 r/w Sec. 498-A of IPC. There is absolutely no reason and ground as to why the trial Court cannot frame alternative charge under Sec. 306 of IPC in a case of bride burning particularly where the accused are charged under Sec. 498-A also. As a matter of fact, if the facts and circumstances demand, the trial Court should frame alternative charge under Sec. 306 also so as to keep the accused on guard and make him aware that there could be a conviction under Sec. 306 even if a charge under Sec. 302 of IPC is not established. *Kisan and Ors. v. State of Maharashtra*, 2007 CriLJ 130 (Bom).

17. Cruelty and abetment of suicide.—The basic difference between the two Sections 306 and Section 498A is that of intention, under the latter, cruelty committed by the husband or his relations drag the woman concerned to commit suicide, while under the former provision suicide is abetted and intended. *Sushil Kumar Sharma* v. *Union of India*, 2005 Cr LJ 3439 (SC) : 2005(6) SCC 281 : 2005(5) Supreme 137 : 2005 SCC (Cr) 1473 : 2005(2) JCC 1193.

Cruelty—Second Marriage—Scope.—Accused treated wife with cruelty for bringing insufficient dowry and also performed another marriage. Statement of witnesses showed that bigamy was in vogue in that place and was recognized as custom.

The proceeding under Section 125 Cr.P.C was compromised between the accused and Sangya Devi wife and at their instance consent order was passed by learned Chief Judicial Magistrate. The learned Sessions Judge has also observed that in view of second marriage of appellant with Sumitra Devi the accused has abetted the suicide of Sangya Devi. Sangya Devi was aware of the marriage of Sumitra Devi with accused and the fact that the accused had married second time with Sumitra Devi has been pleaded in the maintenance application. The maintenance application was prepared on 25.5.1999 and Sangya Devi had committed suicide in the intervening night of 26/27.08.1999. Therefore, it cannot be said that second marriage of accused with Sumitra Devi is the immediate cause of committing suicide by Sangya Devi and in other words by second marriage the accused had abetted suicide of Sangya Devi.

It has come on record that in the area to which the accused and Sangya Devi belong, it is not uncommon for a male to solemnize more than one marriage. Psyche of individual is influenced by the culture of the society in which he or she lives. PW-2 Shyama Nand aged 82 years who remained member of Gram Panchayat has stated that bigamy is prevalent in Kinnaur District and is recognized by custom as well. It is thus clear that for a male to have more than one wife was a part of custom and culture of the society of accused and deceased. In these circumstances, it cannot be said that the second marriage of the accused was the cause for Sangya Devi to commit suicide and for this reason appellant cannot be blamed to have abetted the suicide of Sangya Devi. The prosecution has not brought on record evidence so as to bring the case within the ambit of abetment as provided in Section 107 IPC. *Surendra Kumar vs. State of HP*, 2010 (2) CriLJ 1356 (HP).

This Court do not think that this expression is such a strong expression that the courts could come to the conclusion that it was only and only because of the behaviour and the treatment of the accused to the deceased that she was driven to commit suicide. This takes us to the other letter which has been proved by its author. When we see that letter it becomes clear that the husband of the deceased had become a drunkard. This is a letter written by a loving sister to her younger brother and his wife to mend their ways. She had advised her brother not to drink and not to start humiliating quarrels and fighting. True, it is stated to the effect that the mother should be comfortable and she should be made happy and the mother did not know how to talk and all of them had suffered the pain because of the talks of their mother. However, the daughter is careful enough to write that it should not be taken seriously and nobody should feel about it, and being the mother she should be ignored. This witness has written in the letter that Amma may say something without knowing consequence of the same. We do not think that this letter which has painted the accused with black brush is sufficient to hold that she was so bad and she ill-treated the deceased so much that the deceased was driven to commit suicide only because of these factors.

In the matter of offence under Sec. 306, IPC we would expect much stronger evidence than what is presented. True it is that the evidence about what happens within the four corners of walls is not available to the Investigating Agency. But in this case, very strangely, the Investigating Agency has not proceeded against the husband against whom there was a very strong suspicion. The Investigating Agency has instead made a scapegoat of the old mother perhaps trying to rely on the age old concept of bickerings between the mother-in-law and daughter-in-law. That is not the universal truth. The courts below should have therefore in such a matter appreciated the evidence with discerning eyes. The evidence should have been weighed with more care and the finding should have been arrived at that for but such ill-treatment by the accused, the deceased would not have committed suicide. Such would be the standard of proof in the matter under Sec. 306, IPC. It is indisputable true that the Court has to appreciate the evidence with open mind and not being driven by the age old concepts. Applying all these principles we find that the evidence falls short of the required standard of proof. We are, therefore, not in a position to agree with the courts below in so far as their findings are concerned. *Mankamma vs State of Kerala*, 2009 AIR SCW 7053 : 2010 CrLJ 389 (SC) : AIR 2010 SC 499

The charges under Sections 306 and 498-A of the IPC are independent of each other. Under Section 498-A of the IPC, the cruelty is committed by the husband and his relations dragging the woman to commit suicide. While under Section 306 of the IPC, suicide is abetted and intended [*Giridhar Shankar Tawade vs. State of Maharashtra*, 2002 (5) SCC 177 = 2002 Cri LJ 2814, referred to]. However, in the statutory provision under Section 498-A of the IPC, two specific instances have been taken note of in order to ascribe a meaning to the word "cruelty", where explanation (a) involves three specific situations viz. (1) to drive a woman to commit suicide, or (2) to cause grave injury, or (3) to cause danger to life, limb or health, both mental and physical. In explanation (b) there is an absence of physical injury that includes coercive harassment which obviously is equally heinous to match the physical injury, where one is patent, the other one is latent, but equally serious in terms of the provisions of the statute since same would also embrace the attributes of cruelty in terms of Section 498-A of the IPC. *Jamnalal Pande vs. State of MP*, 2010 (1) CrLJ 538 (MP).

The only thing which can be gathered from the entire evidence available on record happens to be that the victim was hypersensitive to ordinary petulance, discord and differences in domestic life which are quite common in the society and all these things are not expected to have induced her to take such an extreme step. Thus unfortunately, even if the entire case of the prosecution is taken as it is, ingredients of Section 107 of the Indian Penal Code are amiss in toto for the obvious reason that none of the witnesses examined in this case including the mother, father and brother of the deceased has made any specific allegation against the appellants except that they used to pass taunt against the deceased branding her to be of weaker mental faculty and not well-versed with the house-hold matters such as cooking etc. which cannot at all be termed as abetment. Speaking legally, the abetment or instigation literally means to goad, urge forward, provoke, incite or encourage to do an act, which if applied in the instant case, conviction for abetment appears to be a distant and envious neighbour and the same is liable to receive a forceful jolt.

Now let's turn to conviction under Section 498-A, IPC. It is not in dispute that the deceased had stepped in the house of the accused/appellants as a bride 17 years prior to the date of incident. Prosecution has not brought forth any material to show that the deceased was subjected to cruelty at the hands of the accused/appellants as is provided under Section 498-A, IPC. The taunts made by the accused/appellants to the deceased for not knowing the household work and that of her being a woman of weaker mental faculty as has been deposed by the witnesses in their evidence, cannot be construed to be cruelty in accordance with Section 498-A, IPC. *Murlidhar Sahu & Anr vs State of Chhattisgarh*, 2010 Cri LJ 1599 (Chattisgarh).

Accused person in-laws of deceased ill-treated her on account of non-fulfillment of dowry demand due to which deceased committed suicide. Evidence of prosecution witnesses viz., brother, parents and aunt was consistent.

The victim committed suicide. Such fact was proved by medical evidence. Inquest report proved that she committed suicide in her in-laws' place. In our considered view, he appellants being her in-laws were duty-bound to unfold the narrative, which was within their special knowledge. The appellants did not do so while being examined under Section 313. They did not even adduce any evidence. The Appellant No. 1 on the other hand tried to make aspertion on the victim that she had extra marital affair, although the defence did not lead any evidence on that score. The other accused Urmila could not check her grievance and categorically stated that they did not get any gold out of dowry.

The learned Judge held the appellants' guilty under Section 304-B/498-A of Indian Penal Code. Taking a sum total of the facts, followed by consistent evidence of witnesses being corroborated by each other, we do not find any scope to hold it otherwise, specially in case of appellants. We, however, find that the evidence on record which is held reliable to convict the appellants for the offence under Section 498-A of Indian Penal Code clearly makes out a case for offence of abetting suicide under Section 306 of ndian Penal Code with the aid of Section 113-A of the Evidence Act, 1872. The facts of his case do not support the conviction of the appellants under Section 304-B of Indian Penal Code. *Jhantu Sardar and Ors. vs. State of West Bengal*, 2010 (3) Cri LJ 3012 (Cal).

18. Essential to constitute offence.—The deceased was undoubtedly hype ensitive to ordinary petulance, discord and differences which happen in our day-to-c life. Human sensitivity of each individual differs from the other. Different people beh differently in the same situation.

The intention of the Legislature and the *ratio* of the cases decided by this Court clear that in order to convict a person under Section 306, IPC there has to be a cl *mens rea* to commit the offence. It also requires an active act or direct act which led t deceased to commit suicide seeing no option and this act must have been intended push the deceased into such a position that he committed suicide.

In the light of the provisions of law and the settled legal positions crystallized by series of judgments of this Court, the conviction of the appellant cannot be sustain Consequently, the appeal filed by the appellant is allowed and disposed of. *Gang Mohan Reddy vs. State of Andhra Pradesh*, 2010 (2) CrLJ 2110 (SC).

Abetment involves a mental process of instigating a person or intentionally aidi that person in doing of a thing. In cases of conspiracy also it would involve that men process of entering into conspiracy for the doing of that thing. More active role whi can be described as instigating or aiding the doing of a thing it required before a pers can be said to be abetting the commission of offence under Sec. 306 of IPC. *Kishang Mangalgiri Goswami vs. State of Gujarat*, AIR 2009 SC 1808 : 2009 CrLJ 1720 : 2009 SCC 52 : 2009 (2) JT 84 : 2009 (2) Scale 31 : 2009 (1) Supreme 491 : 2009 (1) SLT 69

19. Mental imbalance.—To convict a person for an offence under Section 306, I it has to be seen that instigation to do a particular thing must be there. 'Instigati literally means provocation, incitement, urge or persuasion to do any thing. In t present case none of the witnesses had made even a whisper that the deceased w abetted by the appellant to commit suicide. Most of the witnesses including the paren of the deceased have stated that the deceased was not having mental equilibrium ev before marriage and was receiving treatment for the same. Thus it can be presum that the deceased might have taken such extreme step at the cost of her life under t influence of mental imbalance. Even according to the statement of witness, father deceased, once the accused/appellant had written a letter to him requesting to visit h and solve the problem as the deceased was not obeying his instructions. The enti evidence brought on record goes to show that the deceased was not actuated by a abetment to end her life by committing suicide rather it is the mental imbalance whi drove her to do so. *Madhukar vs State of Madhya Pradesh (now Chhattisgarh)*, 2010 (LJ 1623 (Chha).

20. Mental torture.—In the present case, the charge against the appellant is th he along with other two accused "in furtherance of common intention", menta tortured Jitendra Sharma (the deceased) and abetted him to commit suicide by the sa act of mental torture. It is trite that words uttered on the spur of the moment or in quarrel, without something more cannot be taken to have been uttered with *mens re* The onus is on the prosecution to show the circumstances which compelled th deceased to take an extreme step to bring an end to his life. In the present case, apa from the suicide note, extracted above, statements recorded by the police during th course of investigation, tend to show that on account of business transactions with th accused, including the appellant herein, the deceased was put under tremendou pressure to do something which he was perhaps not willing to do. Prima facie, it appears that the conduct of the appellant and his accomplices was such that the deceased was left with no other option except to end his life and, therefore, clause firstly of Sec. 107 of the IPC was attracted.

In the light of the material on record, in our judgment, it cannot be said that the trial Court was in error in drawing an inference that the appellant had "instigated" the deceased to commit suicide and, therefore, there was ground for presuming that the appellant has committed an offence punishable under Sec. 306 read with Sec. 34, IPC. It is trite that at the stage of framing of charge, the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclose the existence of all the ingredients constituting the alleged offence or offences. For this limited purpose, the Court may sift the evidence as it cannot be expected even at the initial stage to accept as gospel truth all that the prosecution states. At this stage, the Court has to consider the material only with a view to find out if there is ground for "presuming" that the accused has committed an offence and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction. See *Niranjan Singh Karam Singh Punjabi & Ors. v. Jitendra Bhimraj Bijja & Ors.*, AIR 1990 SC 1962.

In view of the settled legal position, noted above, we are convinced that the trial Court was correct in law in coming to the conclusion that a case for framing charge against the appellant had been made out. Similarly, the scope of revisional powers of the High Court under Sec. 401 of the Code being limited, the High Court was justified in dismissing the Revision Petition, preferred by the appellant. *Chitresh Kumar Chopra vs State (Govt. of NCT of Delhi)*, 2010 AIR SCW 645 : AIR 2010 SC 1446.

The concurrent findings were found against the appellant, however, in the interest of justice, we again carefully examined the entire evidence and documents on record. The evidence of Sushmna PW. 6 (neighbour of the deceased), Vidhya PW. 7 (sister of the deceased) and Vasant PW. 8 (father of the deceased) clearly lead to the only conclusion that this was a case of extreme mental cruelty which was perpetuated from the point of marriage and lasted till the deceased had committed suicide. There cannot be any iota of doubt that the extreme mental cruelty and torture compelled the deceased to put an end to her life. The appellant was wholly responsible for creating all the circumstances which led the deceased to take an extreme step of putting an end to her life.

The letter written by the deceased to her parents immediately before she had committed suicide, gives graphic description of the number of instances of extreme mental torture, day in and day out. This letter gives the impression that the appellant was deriving sadistic pleasure in causing extreme mental torture to the deceased. He would leave no stone unturned to ensure that the maximum mental torture and agony is caused to the deceased. We do not find the slightest doubt that the circumstances which have been enumerated in letter and the testimony of witnesses lead to a situation where the deceased virtually was left with no option except to take an extreme step of putting an end to her life. *Milind Bhagwanrao Godse vs. State of Maharashtra*, AIR 2009 SC 1828 : 2009 (3) SCC 699 : 2009 CrLJ 1736 : 2009 (1) Crimes 439 : 2009 (2) JT 574 : 2009 (2) SCR 39 : 2009 (2) Scale 621 : 2009 (2) Supreme 94 : 2009 (2) SLT 207 : 2009 (2) JCC 948.

21. "Abetment"—Meaning of.—Abetment involves a mental process of instigatin a person or intentionally aiding that person in doing a of thing. *Kishangiri Mangalgi Goswami vs. State of Gujarat*, AIR 2009 SC 1808 : 2009 CrLJ 1720 : 2009 (4) SCC 52 2009 (2) JT 84 : 2009 (2) Scale 31 : 2009 (1) Supreme 491 : 2009 (1) SLT 698.

22. Dowry Demand.—The accused married Kantaben (deceased). Soon after tw years of his marriage, the accused started in flicting mental and physical torture on he and she was taunted by the accused for not bringing sufficient dowry in the marriage He also demanded from the victim an amount of Rs. 40,000/- for the purpose o purchasing a house. He even wrote letters to the in-laws and demanded Rs. 40,000/ for purchasing the house. The demand was persistent. Even threats were administere to the deceased and her family members. Thus, the accused inflicted mental an physical torture on the victim which prompted her to commit suicide by burning hersel after pouring kerosene on her body. Thus, as per the prosecution case, the appellan has committed the offence punishable under Secs. 498-A and 306 IPC read with Secs. 3 and 7 of Dowry Prohibition Act.

The complaint was given by Dhulagiri Gumangiri Goswami on 17.05.1999. On the strength of the complaint given by the complainant investigation was carried out.

It is pointed about that the accused himself had taken the deceased to the hospita and from his conduct it clearly shows that the accused was not guilty. In essence, it is submitted that the commission of alleged offences has not been established by the prosecution.

The conviction so far as it relates to Sec. 306 IPC, therefore, cannot be sustained in view of the background facts and is set aside. But the materials on record particularly the letters on which specific emphasis has been led by the trial Court and the High Court amply demonstrate the commission of offences punishable under Sec. 498-A IPC and Sec. 3 of DP Act. The convictions are sustained. But the sentence in respect of Sec. 3 of DP Act is reduced to three years. *Kishangiri Mangalgiri Goswami v. State of Gujarat*, AIR 2009 SC 1808 : 2009 CrLJ 1720 : 2009 (4) SCC 52 : 2009 (2) JT 84 : 2009 (2) Scale 31 : 2009 (1) Supreme 491 : 2009 (1) SLT 698.

No evidence of dowry. In order to sustain conviction under Sec. 306, IPC, it must, therefore, be proved by the prosecution that there was abetment of suicide. According to the allegations of the complainant and the case of the prosecution, the deceased was instigated to commit suicide by constant harassment in connection with demand of Rs. one lac and motorcycle by the appellant and his mother. In the present case the prosecution has failed to prove that deceased was subjected to cruelty or harassment by the appellant in connection with the demand of dowry. The statements of prosecution witnesses are inconsistent, contradictory and unreliable. It would be pertinent to mention here that presumption under Sec. 113A of the Indian Evidence Act cannot be taken as the marriage of the deceased was not solemnized within a period of seven years before her death. Accused not liable to be convicted for offences under Sections 304B, 306 and 498A. *Suresh Kumar alias Sushil and etc. v. State of Rajasthan*, 2006 CriLJ 116 (Raj).

Suicide by woman within 7 years and cruelty by husband does not automatically give rise to presumption. Having regard to the principles aforesaid, we may now advert to the fact of the present case. Here is a case where the evidence on record discloses that the deceased wanted to be married in a literate family. She was not happy with the fact that her husband was illiterate and also with the status and condition of the family of her husband. She was also required to do some domestic work as the family was poor, for which she was not happy. The deceased was of the view point that her life has been spoiled by marrying appellant. The letter reflects the attitude of the in-laws of the deceased towards the deceased. In the said letter there was no reference of any act or incident whereby the appellants were alleged to have committed any wilful act or omission or intentionally aided or instigated the deceased to commit suicide.

On such slender evidence, therefore, we are not persuaded to invoke the presumption under Sec. 113-A of the Evidence Act to find the appellant guilty of the offence under Sec. 306 IPC.

The next question which remains forour consideration is whether an offence is made out under Sec. 498A of IPC. Though the letter allegedly written by the deceased mentions the fact that the attitude of the family was not good towards the deceased and she was not treated well but there is no mention about any of such incident. Witnesses in their statements have emphasized that the mother-in-law of the deceased used to ask the deceased to run hand driven flourmill to which she was not habitual. In the year 1988 when the abovementioned incident occurred, the hand driven flourmills were generally used by women in the poor families in the villages and even till today one may find use of the same in some villages in the country. Thus asking one to run the same at that point of time may not amount to an act of cruelty.

In the said statements there is also a mention of an incident where the deceased had been beaten by her husband. The mother-in-law cannot be held liable for the said act; rather there is evidence on record of PW3 who had stated that mother-in-law had once restrained her son. Though in the statement of PW 1 there is mention of one or two incident when the present appellant had beaten the deceased but there appears to be possibility of embellishment. The father of the deceased (PW2), in his statement has not made any statement regarding cruelty being committed on his daughter in her in-laws house. After analyzing the said evidence and the statements made by PW1 and PW3 we are of the opinion that the benefit of doubt should be granted to mother-in-law. *Rajbabu and Anr. v. State of M.P.*, AIR 2008 SC 3212 : 2008 (8) JT 250 (SC) : 2008 (10) Scale 437 (SC) : 2008 (5) Supreme 666 (SC) : 2008 (8) SLT 472 (SC) : 2008 (8) SRJ 119 (SC) : 2008 CrLJ 4301 (SC) : 2008 (3) Crimes 313 (SC) : 2008 (3) JCC 2013 (SC) : 2008 (3) Recent CR 890 (SC).

Dowry death/Abetment of suicide. Deceased was harassed by accused husband and mother-in-law for demand of dowry, died by consuming poison within seven years of her marriage. Accused husband sought financial assistance from his father-in-law for going abroad. Deceased was pressurized that her father should render financial help to accused husband who was in the need of money. Held, accused husband guilty of offence under S. 306 IPC and not under S. 304B. *Amarjit Singh alias Mintu and Anr vs State of Punjab*, 2010 (4) CriLJ 4134 (P&H).

23. Difference between Sec. 306 and 498-A.—One other provision which is relevant to be noted is Sec. 306, IPC. The basic difference between the two Sections i.e. Sec. 306 and Sec. 498-A is that of intention. Under the latter, cruelty committed by the husband or his relations drag the woman concerned to commit suicide, while under the ormer provision suicide is abetted and intended. *Satish Kumar Batra and Ors. v. State f Haryana.*, AIR 2009 SC 2180 : 2009 (5) SCR 451 (SC) : 2009 (12) SCC 491 : 2009 (5) T 403 (SC) : 2009 (5) Scale 280 (SC) : 2009 (3) SLT 379 (SC) : 2009 CrLJ 2447 (SC) : 009 (2) JCC 1341 (SC).

24. Intention and *mens rea* for offence.—Accused and deceased earlier had love ffair. Subsequently deceased in clear terms severed her relationship with him.

Taking clues and the ratios quoted, the learned counsel appearing for the etitioners asserted that even though the case of prosecution is accepted as truthful, it annot be said that the petitioner intended to cause deceased Rani's death by suicide. Ie also pointed out that the last incident in the series had occurred on 16th December, bout two weeks prior to the unfortunate event. He pointed further that there is nothing n record to show that within those two weeks, the petitioner further provoked Rani or er family members. He said, there is no proximity between Rani's suicide and the ncident that had *lastly* occurred on 16th December. He, therefore, asserted that the etitioner cannot be said to have intention to cause Rani's suicidal death.

This Court think, this argument is rather superficial. As discussed above, the etitioner was persistently pushing his proposal to gel married to Rani? He, in the rocess, almost forgot that Rani no longer intended to marry him. Assuming that earlier e and Rani had romantic relationship and assuming that Rani expressed her love to im, ultimately Rani in clear terms severed her relationship with him and made it mply clear to him that she no longer wanted to marry him. Instead of accepting this, s the wish of his beloved and getting out of her way, the petitioner started blackmailing er. The last incident of 16th December clearly show that his intentions were cruel and evengeful. He, in clear terms, theatened Rani and her brother that he would destroy Rani and her family. Having realized that Rani would never marry him, the petitioner ntended to finished Rani's prospects of good life. In the process, if Rani succumbed to he pressure and commits suicide, apparently the petitioner would not have minded. Vhen the petitioner stated that he would destroy her, he clearly indicated all possible neans of Rani's destruction. It could be her defamation, it could be destroying her rospects of getting married through an arranged marriage, it could be her destroying er attempt to get a job and start a new life and it could be her death by any means. So, *rima facie*, it is seen that the petitioners intention was to finish Rani as a person. It an, therefore be said that the petitioner had intention and *mens rea* for committing the ffence under Section 306 of the Indian Penal Code. Held, it *prima facie* established that he petitioner intended by his acts *inter alia* the possibility of Rani committing suicide. *Devesh Dattabhau Pathrikar & Ors. vs. State of Maharashtra*, 2010 (3) CriLJ 3560 Bombay) (Aurangabad).

25. Conversion of offence under Sec. 302 to Sec. 306—Permissibility.—It is bvious that even though there is no specific charge framed and the offence under other ection is made out, the Court can record a finding under such a charge, which is unishable with lesser sentence for a cognate offence.

In a situation, where both the charges under Ss. 302, IPC and 306, IPC cannot be evelled against the accused, but, if the circumstances suggest conclusively that the ffence was sufficiently proved to the extent of the offence under S. 306, IPC, this Court, being an appellate Court, can always hold that the accused has committed an offence under Sec. 306, IPC and the conviction for the said offence can safely be recorded. *Godugula Adellu v. State of A.P.*, 2008 CriLJ 206 (AP).

26. Mention of names of persons responsible in suicide note.—In order to substantiate a charge under Section 306 it has to be established that the person abetted must commit suicide. Death by commission of suicide must have been the desired object of the abettors; and with that in view they must have instigated, goaded, urged or encouraged the victim in commission of suicide. The instigation may be by provoking or inciting the person committing suicide and this instigation may be gathered by positive acts done by the abettors or by omission in the doing of a thing. Thus the acts or omission committed by the abettors immediately before the commission of suicide are vital. The mere fact that certain persons have been named in the suicidal note to be responsible for his death is not by itself a ground to fasten one with the charge of abetment. In terms of Section 107, it must prima facie appear to hold that that the person named in the suicide note to be responsible for commission of suicide has abetted in the act. The act for conduct of the accused, even if there may be any, however, insulting and abusive those may be, will not by themselves suffice to constitute abetment of commission of suicide, unless those are reasonably capable of suggesting that the accused intended by such acts consequence of suicide. *Anil Kr. Sarkar v. The State of W. B. and Ors.*, 2009 CriLJ 4678 (Cal).

27. Abetment of unsuccessful attempt to commit suicide.—Merely because S. 306 opens with the words "if any person commits suicide" it cannot be held that in a case of unsuccessful suicide there is no attempt to abet the commission of suicide. The abetment becomes complete only when suicide is committed and Section 306, IPC principally would come into operation only when suicide successfully takes place. The content and character of an offence of attempt to commit suicide is qualitatively different from the attempt to abet the commission of suicide. Suicide and its attempt on the one hand and abetment of commission of suicide and its attempt on the other are treated differently by law and, therefore, the one who abet the commission of an unsuccessful attempt to commit suicide cannot be held to be punishable merely under Section 309 r/w. 116, IPC, to implement the scheme of law he has got to be held to be punishable under Section 306 r/w. 511, IPC. *Berin P. Varghese and Ors. v. State of Kerala*, 2008 CriLJ 1759 (Ker).

* * * * *

Sec. 307. Attempt to murder.—Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; if hurt is caused to any person, by such act, the offence shall be liable either to *imprisonment for life*, or to such punishment as is hereinbefore mentioned.

Attempt by wife convicts.—When any person offending under this section is under sentence of *imprisonment for life*. he may, if hurt is caused, be punished with death.

Illustrations

(a) *A* shoots at *Z* with intention to kill him. under such circumstances that, if death ensued. *A* would be guilty of murder. *A* is liable to punishment under this section.

(b) *A* with the intention of causing the death of a child of tender years exposes it in a desert place. *A* has committed the offence defined by this section though the death of the child does not ensue.

(c) *A*, intending to murder *Z*, buys a gun and loads it. *A* has not yet committed the offence. *A* fires the gun at *Z*. He has committed the offence defined in this section and, if by such firing he wounds *Z*, he is liable to the punishment provided by the latter part of "the first paragraph" of this section.

(d) *A*, intending to murder *Z*, by poison, purchases poison and mixes the same with food which remain in *A*'s keeping ; *A* has not yet committed the offence in this section. *A* places the food on *A*'s table or delivers it to *Zs* servants to place it on *Z's* table. *A* has committed the offence defined in this section.

Synopsis

1. Amendment....1919
2. Attempt to murder. 1919
   (a) Attempt to murder—Ingredients. 1928
3. Scope. 1928
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18. Conviction....1961
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24. Mentally deranged accused 1972
25. Motive 1973
26. Plea of alibi 1973
27. Cruelty and attempt to murder. 1973
28. Injuries. 1973
29. Chances of false implication....................1974
30. Mischief of fire and causing injury 1975

1. Amendment.—The words “imprisonment for life” were substituted for the word “transportation for life” by Act 26 of 1955, Section 117 and Sch. (with effect fror 1.1.1956). The clause within brackets has been added by the Indian Penal Cod Amendment Act, 1870 (27 of 1870), Section 11 and the words within quotations i Illustration (c) have been inserted by the Amending Act, 1891 (12 of 1891), Sch. II.

2. Attempt to murder.—To justify a conviction under Section 307, it is nc essential that bodily injury capable of causing death should have been inflictec Although the nature of injury actually caused may often give considerable assistance i coming to a finding as to the intention of the accused, such intention may also b deduced from other circumstances, and may even, in some cases, be ascertainec without any reference at all to actual wounds. The section makes a distinction betweer an act of the accused and its result, if any. Such an act may not be attended by an result so far as the person assaulted is concerned, but still there may be cases in whicl the culprit would be liable under this section. It is not necessary that the injury actuall caused to the victim of the assault should be sufficient under ordinary circumstances t cause the death of the person assaulted. What the Court has to see is whether the act irrespective of its result, was done with the intention or knowledge and unde circumstances mentioned in the section. An attempt in order to be criminal need not b the penultimate act. It is sufficient in law, if there is present an intent coupled witl some overt act in execution thereof. Whether there was intention to kill or knowledg that death will be caused is a question of fact and would depend on the facts of a giver case. The circumstances that the injury inflicted by the accused was simple or mino will not by itself rule out application of Section 307, IPC. The determinative question i intention or knowledge, as the case may be, and not nature of the injury. In the instan case the accused fired gun from a very close range of about 6-8 feet aiming at the victir when he was sleeping. The bullet broke into pieces and three such pieces struck th victim on his leg. Both intention and knowledge in terms of Section 307 can b attributed to the accused. Therefore, the High Court was justified in recordin conviction of the accused appellant under Section 307, IPC. *Vasant Vithu Jadhav v State of Maharashtra*, 2004 Cr LJ 1786: AIR 2004 SC 2678: 2004(9) SCC 31: 2004(3) J 267: 2004 (2) Suprme 351: 2004(2) Crimes 5 (SC).

Appellant had intention to commit murder as he threw full glass of acid on body c injured informant, causing extensive injury. Prosecution proved case beyond reasonabl doubts against appellant. He has rightly been found guilty under Sections 341, 323 326 and 307/34. *Amar Soni & Anr vs State of Jharkhand*, 2010 (4) CriLJ 4003 (Jhar).

This Court do find absolutely no reason to doubt the statements of witnesses witl regard to the incident. An independent witness in as much that he had been employe ith the complainant party as well as the accused party at various times. It also ppears that he was the focus of the quarrel and the motive that had precipitated the ncident, as both the parties were pushing for employing which had led to the npleasant situation between them. Likewise we find difficult to disbelieve the tatement of PW. 3 the injured victim himself as he has given a graphic description as o what had happened. It is true, as has been contended that there are some differences etween the statements of these two witnesses but they are bound to occur with the vidence being recorded after about five years. It must also be borne in mind that a arrot like deposition after a long lapse of time smacks of tutoring and some differences n fact advance the credibility of the witnesses. We also find that the counter version iven by the accused cannot be accepted. The accused has claimed that PW. 3 had an vil eye on Neelam Bahal but if that was the reason for the incident they were further alled upon to explain as to how the injuries had been suffered, more particularly, as he incident had apparently taken place outside the residential home of the appellants.

We are, however, of the opinion that there is some uncertainty about the nvolvement of Neelam Bahal, Appellant. The facts of the case indicate that she was erhaps not aware that Rakesh Bahal was carrying a weapon in his pocket or on his erson. The prosecution evidence also reveals that it was only after the quarrel had eached a certain pitch that he had rushed inside the house and had brought a knife nd caused the injuries to Satish Chandra. We also find that no specific overt act has een attributed to Neelam Bahal and only a very tenuous role that has been ascribed to er. To our mind this kind of evidence creates a clear doubt as to her participation.

We are, therefore, of the opinion that Neelam Bahal, Appellant must be given the enefit of doubt, and thereby acquitted. The appeal *qua* her is allowed.

A reading of the above would indicate that though the general condition of the atient was very bad yet there is no categorical statement in the medical certificate ssued by doctor that the injuries were in fact dangerous to life. We are unable to athom as to whether this was a deliberate omission or an oversight but whatsoever it nay be the benefit must accrue to the accused. We have also gone through the evidence f doctor and find that he had admitted that he had mentioned that the injury was langerous to the life as he did not think it necessary to do so. At the same time we are nable to accept that the case would fall under Sections 323 and 324 of the IPC but in he light of the statement of victim that he had remained in hospital for fifteen days due o the injuries caused to him, makes out a case of grievous hurt. Rakesh Bahal alone hould thus be held guilty under Section 326 of the IPC simpliciter. We are told that he as already undergone almost one year of the sentence and in the light of the fact that he incident happened in the year 1987 when he was a young man of about 25 and now nust be of middle age, we reduce the sentence to the period already undergone by him. *Neelam Bahal and Anr. vs. State of Uttarakhand*, 2010 (2) CrLJ 2100 (SC).

When complainant party protested against abuses, accused person took out sword and assaulted them causing injuries on various parts of their body. Evidence of vitnesses supported prosecution case narrating in detail as to the manner in which ictims were assaulted. Although doctors have not specifically stated regarding injuries ustained by victims to be serious in nature. But, fracture or dislocation of a bone or ooth are designated as grievous hurt in view of Sec. 320(7). *Mukesh Rathore vs State of Chhattisgarh*, 2010 Cri LJ 1289 (Chatt).

Petitioner who was holding iron rod in his hand and other accused inflicted blov causing injuries on head of informant and his son. The injuries sustained by the victim at the hands of the petitioners could not be denied as the factum of occurrence wa corroborated by several witnesses as has been referred in the order impugned recorde by the learned Additional Sessions Judge. It was not the case of the prosecution tha the accused persons had administered poison, rather the petitioner inflicted blow wit iron rod on his head in furtherance of common intention with the co-accused causin injuries having got bearing in the injury report as well as in the post-mortem report the deceased. However, the learned Counsel is silent as to the finding of pesticide in th stomach of the deceased in the viscera report furnished by the Forensic Scienc Laboratory which gives altogether a different circumstance as to the cause of death.

No offence in the given situation is made out under Section 302 or 307 of th Indian Penal Code against any of the petitioners and at best, it could be under Sectio 325 of the Indian Penal Code as the materials *prima facie* suggest without much mor discussion and without prejudice to the merit of the case. As regards complicity of th petitioner Rupa Devi in the alleged offence is concerned, her earlier version before th police suggests that it was Dhananjay Kumhar who was aggressor and, therefore, *prim facie*, charge under Section 325/34 of the Indian Penal Code cannot be, in my view directed against her and I find material sufficient to consider her case for discharge an accordingly she is discharged in Baghmara. For the reasons stated above, I find *prim facie* materials to proceed against other two petitioners for the charge under Sectio 325/ 34 of the Indian Penal Code. *Anup Kumhar and Ors. vs. State of Jharkhand*, 201 (3) Cri LJ 2963 (Jhar).

Under Section 307, IPC what the Court is to see is whether the act irrespective its result was done with the intention or knowledge and under circumstance mentioned in that section. The intention or knowledge of the accused must be such a is necessary to constitute murder. Without this ingredients being established, there ca be offence of 'attempt to murder' under Section 307, IPC the intention preceeds the a attributed to the accused. Therefore the intention is to be gathered from all th circumstances and not merely form the consequence that ensures. The prosecution ha utterly failed to place any material from which the intention or knowledge could b gathered that the appellant has done the act with the intention to commit the murde Rather, the medical report suggestes that the injuries are not so grievous in nature fro which it could be said that there was intention and knowledge of the appellant commit such murder. *Meghnath De* v. *The State* 1999 Cri LJ 2252.

Appellant caused injury on head of informant by Sabal. There was evidence witnesses and independent witness.

It appears that the prosecution case is in support of the evidence of informant ar independent witness and also the evidences of PWs. 1 and 4. The I.O. and the doct have not been examined in this case and no injury report proved in the trial Court. It difficult to say that the injury caused to the informant is grievous in nature ar dangerous to his life.

In that view of the matter, conviction of the appellant under Section 307 of tl Indian Penal Code is bad in law and the same is converted under Section 324 of tl Indian Penal Code.

Since, the evidence is that the accused assaulted the informant by Sabal, which is dangerous weapon. Accordingly, the sentence of R.I. for four years under Section 307 of the Indian Penal Code is altered to the sentence for two years under Section 324 of the Indian Penal Code. It appears from the record that the appellant was not granted bail. After that, the appellant has filed this appeal and he remained in custody for more than the conviction passed by the trial Court or by this Court. In that view of the matter, trial Court is directed to release this appellant forthwith, if not wanted in any other case. *Patrik Kindo vs. State of Bihar (Now Jharkhand)*, 2010 (3) Cri LJ 2961 (Jhar).

It is sufficient to justify a conviction under Section 307, IPC if there is present an intent coupled with some avert act on execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of the result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore an accused charged under Section 307, IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of simple hurt. *State of MP* v. *Saleem*, 2005 Cr LJ 3435 (SC) : AIR 2005 SC 3996 : 2005 (5) SCC 5541 (SC) : 2005 (4) Supreme 733 : 2005 SCC (Cri) 1329.

The accused, with deliberate intention of causing the death of his father-in-law, gave him three blows on the head. He fell down sense less on the ground. The accused, thinking that he was dead, put under his head a bundle of fire-wood, and set fire to the hut in which he was lying, with the intention of removing all evidence of crime. The medical evidence in the case showed that the injury caused by blows would not have caused death if the hut had not been set fire to and that the burning caused the death. *Held*, that the accused was not guilty of murder, because when he set fire to the hut he thought that his father-in-law was dead, and his object in setting fire to the hut was apparently to remove evidence of the crime, and not to make the deceased's death certain. He was therefore guilty of an attempt to commit murder under Section 307, I.P. Code. 15 Bom 184. A culprit who inflicts 20 incised wounds on the body of person most of which were aimed at his head must be charged with murderous intent and the sentence of transportation for life is not excessive. 13 PWR 1915 Cr : 132 PLR 1915. The accused, in the course of a quarrel with her sister-in-law and in a fit of anger, flung her child, three years old, into a pond four feet deep, on the edge of which her house was situated, and at the same time gave expression to wish that the death of the child should rest as a course on the woman with whom she was quarrelling. *Held*, that the circumstances gave rise to a presumption that the intention of the accused was to cause death of the child, and that she was therefore, guilty of an offence under Section 307, although the child was picked up by a stander by without loss of time. 5 Ind Cas 138 : 11 Cr LJ 48. A person intentionally discharging a loaded gun at another from a short distance inflicting injuries which might have proved fatal, is guilty of an offence under Section 307, Penal Code, and not merely of causing grievous hurt. 16 Cr LJ 542 : 29 Ind Cas 670.

In a case the accused gave only one knife blow on the chest of victim and that injury was found simple in nature. He did not try to make a second attempt by the same knife on any part of the body of the victim. The injuries caused by the other accused were only simple. In these circumstances, the Court held that by causing the said injuries the accused could not be said to have an intention to commit murder and conviction of accused who caused incised wound or the chest of victim was attuned to one under Section 324 and the other accused were released or probation. *Kailash v. The State of Rajasthan*, 2002 Cri LJ 390(Raj).

Accused who was driving jeep alleged to have dashed same against complainant in an attempt to kill him. Co-accused was also allegedly present in same jeep.

The findings recorded by the trial Court leading to acquittal of respondent/ accused, the nature of the overt-act attributed to respondent/accused; the fact that the complainant in his First Information Report did not even mention the presence of Shivprasad at the time of the incident, and in view of the above quoted dictum of the Apex Court in the case *Javed Alam vs. State of Chhattisgarh*, AIR 2009 SCW 3918, Court does not find any infirmity in the findings recorded by the trial Court leading to acquittal of respondent/accused, which may warrant interference by this Court in this appeal against acquittal. *State of Chhattisgarh vs. Shivprasad Katvariram Rajwade*, 2010 (3) CrLJ 2530 (Chha).

Causing of injury with sharp edge weapon offence under Section 307, I.P.C. is made out. The doctor opined that injury could prove dangerous to life if injured not hospitalised in time. There was land dispute between parties, offence under Section 307, I.P.C. is *prima facie* made out. *Nanak Chand* v. *State of Haryana*, (1994) 1 Recent Cr R 342 (P & H).

Conviction under Section 307, I.P.C.—Sentenced to rigorous imprisonment for 5 years. Which was challenged in appeal. It was held that appellant had sufficient opportunity to select portion of body for giving blow. He took out knife and gave the blow on the chest and the blow was given with calculated action. The blow caused serious incised wound and damaged the parts. Hence offence to 'attempt to murder' is proved. *Bansidas* v. *State of M.P.*, 1994 Cr LR (N) 270 (MP).

Accused came to deceased hotel and shot his abdomen with a fire arm Medical evidence showing that there was impaction of bullet inside serum on left side of abdomen and despite operation said bullet could not be extracted. Deceased was shot by the appellant from fairly close quarters. Deceased remained hospitalized more than two months for the injury sustained by him. From the evidence of Doctor as well as from the medical papers it is evident that there was impaction of bullet inside serum on the left side of the abdomen and despite operation conducted by doctor on two occasions, the said bullet could not be extracted. That apart, according to Doctor the injury sustained by the victim was life threatened injury.

In that view of the matter, Court finds that the appellant with intention to cause the death of deceased fired upon him and he committed offence punishable under Section 307 IPC. *Dharam Chand Rajbhar vs. State of W.B.*, 2010 (3) CrLJ 2516 (Cal).

Husband wanted to injure the wife with a blade which was snatched by people assembled. But husband brought a sickle and inflicted one incised wound on her neck. This injury was dangerous for life. Hence conviction upheld. *Jaisingh* v. *State of Madhya Pradesh*, 1995 Cr LR 194 (MP).

In the absence of two of the independent eye-witness not being produced and one of the eye-witnesses refusing to identify the appellant as the person connected with the commission of the crime, it is absolutely unsafe, if not improper, to depend on the solitary evidence of A.S.I., and head constable, even though A.S.I., had sustained injuries. It was held that conviction u/Sec. 307, IPC wholly based on the uncorroborated testimony of two police officials is not sustainable. 1988 (1) Crimes 518 (Del).

The prosecution should make out facts and circumstance as envisaged in Section 300, I.P.C. Unless it can be said that the intention or knowledge of the accused was to cause such bodily injury as would come within the scope of Section 300, I.P.C. he cannot be found guilty under Section 307, I.P.C. It must be proved that if act complained of would have culminated in the death of the victim, the offence would have come within the ingredients as envisaged in Section 300, I.P.C. *Abhi Ram Mukhi* v. *State of Orissa*, 1996 Cr LJ 234 (Ori).

Though the injury was by a pellet, it only seems to have granted the head at S. It is therefore held that ingredients of Section 307, are not satisfied qua 5. *M.P. Kochor* v. *State of Gujarat*, 1996 Cr LJ 2465 (SC).

Where there were multiple incised wound on his right little finger right upper arm, left little ring, middle and index fingers, on the palmar aspect and left little ring, accused was held guilty under Section 307, I.P.C. *Kishan Singh* v. *State of Rajasthan*, 1996 Cr LJ 251 (Raj).

When the appellant inflicted nine incised wounds on vital parts of the body of the victim who was of a tender age of ten years, it can safely be presumed that he intended to kill him. Intention to commit murder in this case can also be inferred from the existence of a strong motive on the part of the appellant against the victim. The statement of doctor to the effect that, had timely medical aid been not given to the victim his injuries would have proved fatal, also brings the offence within the ambit of Section 307, IPC. *R.T. Badjujar* v. *State of Maharashtra*, 1996 Cr LJ 2482 (Bom).

When injury was caused by sharp edged weapon on vital part of body of injured person whose evidence is corroborated by medical and other independent evidence, conviction under Section 307, I.P.C. proper. *Rabindra Nath Murthy Naidu* v. *State of W.B.*, 1996 Cri LJ 2928 (Cal).

The prisoner in this case threw two bricks, described as large, at a jailor, one of which struck him in the shoulder. *Held*, that the facts did not justify a conviction for attempt to murder. AWN 1881, 172. Where the appellant was proved to have put something found subsequently to be poisonous by the Chemical Examiner, into the food prepared for the prosecutor's family, and there was no evidence as to the quantity of the poison found in the food or as to the probable effects on any one who might have eaten it, held, that the accused must have intended to cause hurt and was guilty of offences under Sections 328 and 511. 5 LBR 79 : 3 Ind Cas 721 : 10 Cr LJ 363 ; but *see* AIR 1921 Lah 108 : 3 LLJ 191 : 22 Cr LJ 194 : 50 Ind Cas 50. In an attempt to murder all elements of murder exist except the fact of death. The cause of success is immaterial. An attempt to commit the murder is an act done with intent to commit the crime and forming part of the series of acts which would constitute such actual commission and would be the last proximate act done in the execution of the crime, the completion of the offence being prevented only by some cause independent of the offender's violation. 1960 Mad WN 528. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intention coupled with some overt act in execution thereof. For the purposes of criminal liability, it is sufficient, if the attempt had gone so far, that the crime would have been completed, but for extraneous intervention which frustrated its consummation. AIR 1959 Punj 134 : ILR 1958 Punj 2319 : 1959 Cr LJ 368.

Where evidence of victim and eye-witnesses corroborated prosecution case and where it was corroborated by the evidence of doctor and I.O., and besides this, where an accused was eye-witness also identified, conviction of other accused was held proper. *Mohmed Ari* v. *State of Gujarat* with *State of Gujarat* v. *Mohmed Arif*, 1997 Cri LJ 65 (SC).

When it was found that victim of attack was testifying that accused on being refused glasses for drinking liquor, went to his tractor and brought gun into hotel, loaded it and fired at him but he was saved as he stretched on ground, prosecution proved seizure of gun and live and empty cartridges through SI. Besides this, that facts were also testified by victim and report of Assistant Director (Ballistics) were found also supporting prosecution case and therefore, it was held not commission of offence is proved. *Praveen* v. *State of Haryana*, 1997 Cri LJ (SC) 252.

The prosecution should make out facts and circumstances as envisaged in Section 300, IPC. Unless it can be said that the intention of knowledge of the accused was to cause such bodily injury as would come within the scope of Section 300, IPC, he cannot be found guilty under Section 307, IPC. It must be proved that if act complained of would have culminated in the death of the victim, the offence would have come within the ingredients as envisaged in Section 300, IPC. *Abhi Ram Mukhi* v. *State of Orissa*, 1996 Cr LJ 2341 (Ori).

To justify conviction. It is to essential that bodily injury capable of causing death should have been inflicted but there should be an intent coupled with some overt act in execution thereof. *Hari Mohan Mandal* v. *State of Jharkhand*, 2005(3) East Cr C 57 (SC).

Mere firing does not raise inference of attempt to murder. Fire should be specifically aimed. The *mens rea* required under Section 300, I.P.C. has to exist, there has also to exist an effective act to achieve the end of killing. An "attempt" means doing everything by an accused within his power to achieve the final result, but the final result alludes because something, beyond his control intervense *e.g.* there may be slight deflection of the shot or something comes in between suddenly or the victim is saved with medical aid after being struck. In the instant case the act of firing generally in the direction of approaching police people did not show aiming at the group or on a particular police official. It was not shown that firing was so dangerous as in all probabilities to kill one of the members of police party. So, that act did not fall under Section 307, I.P.C. *Rajan* v. *State*, 2000 Cri LJ 2423 (M.P.).

Though the injury was by a pellet, it only seems to have grazed the head of S. It is, therefore, held that ingredients of Section 307 are not satisfied *qua S. M.P. Khachar* v. *State of Gujarat*, 1996 Cr LJ 2465 (SC).

The evidence showed that prior to the incident both the accused and the victim had (taken) some rum and were drunk. Immediately before the incident the accused was talking with two persons and the victim was standing there. On this, the accused reprimanded the victim and an altercation which lasted for 10 to 15 minutes took place between them, culminating in the accused inflicting a single blow with a pen knife on the abdomen of the victim. On these facts, it would be difficult to conclude that the accused had the requisite intention to commit the murder of the victim within the terms of Section 307, IPC. For the said reason, only an offence under Section 324, IPC and not one under Section 307, IPC would be made out against the accused. *Ekos Joseph Vargese* v. *State of Maharashtra*, 1999 Cri LJ 1430 (Bom).

The accused had entertained a serious grudge and grievance against the deceased as well as injured complainant. The prosecution succinctly established this motive. Apart from that, the manner and mode in which the accused made criminal trespass with criminal intention to cause hurt and commit serious offence with dangerous dharia and giving three successive blows on the persons of the deceased who was undefended, unarmed, helpless, aged, clearly demonstrated his intention. In view of the circumstances, The accused was held liable to be convicted under Section 307 IPC., *State of Gujarat* v. *Mahendra Mulji Kerai Patel*, 1999 Cri LJ 768 (Guj).

Accused was armed with country made pistol and is alleged to have inflicted firearm injury, which was proved by medical evidence. The testimony of injured was not reliable nor corroborated by any other evidence. Therefore, the witness is not wholly reliable and to base conviction on his evidence, corroboration was needed. Evidence of S.I. Sudama Singh, (P.W.2) which could have corroborated the evidence of Khurmulli (P.W.1) is not believable. Therefore, despite Khurmulli (P.W.1) being injured, his testimony is not corroborated by any other evidence and is not sufficient to base conviction of appellant. It is true that principle of *falsus in unofalsus in omnibus* is not applicable in India and the duty of the Court is to spare out grain of truth from heap of chaffs of falsehood, but in the instant case the falsehood and truth have been so intermingled, that it is difficult to spare out the grain of truth from the evidence of Khurmulli, (P.W.1), therefore, the prosecution fails to prove its case. *Daya Nand Yadav (in Jail) v. State of U.P.*, 2002 Cri LJ 2230 (All.) : 2002 All LJ 818 : 2002(44) All Cri R 650 : 2002(1) All Cri R 318 : 2002(2) Crimes 7.

The occurrence took place on the night of 30.6.1978 and 1.7.1978 *i.e.* in summer season. It was season when sale of ice was on the top. Therefore, the witness has given reasonable and probable explanation regarding his presence at his ice shop. The shop of the witness was adjacent to the place of occurrence and in all probabilities he could reach the spot hearing the altercation between the appellant and the injured. There is nothing in the cross-examination of the witness to show that he had any ground to depose falsely against the appellant. It has also come in the evidence that appellate was a bully character and as such Rafiq Ahmad (P.W. 4) would not have dared to depose falsely against him. In this way, the testimony of injured has been fully corroborated by two other witnesses. The testimony of occular witnesses is further corroborated by medical evidence, F.I.R. and other circumstances of the case. *Bhoora v. State of U.P.*, 2002 Cri L.J. 2716 (Allah.) : 2002 All LJ 1023 : 2002(44) All Cri C 830 : 2002 All Cri R 932.

Even assuming that Ex. P-1 and the evidence of P.W. 1 can be brushed aside, the evidence of P.W.2 which is corroborated by the evidence of the truthful witness P.W. 5 and the medical evidence adduced through P.Ws. 3 and 4 Doctors would clearly show that the respondents 1 and 2 (A1 and A2) had committed the Act of attempt to murder P.W. 2. No doubt, there may be some contradiction between the evidence of P.W.2 and P.W. 5 As indicated above, the entire evidence adduced by P.W.5 can be accepted as true. He implicated only respondents 1 and 2(A1 and A2). On the other hand, P.W.2 has implicated all the three accused. In view of the above contradiction. It cannot be said that the entire case of the prosecution is untrue. *State by Public Prosecutor, Madras v. Murugan and others*, 2002 Cri LJ 670(Mad.) : 2001(2) Mad LW (Cri) 815.

The fact that P.W. 1 was sent from the scene of occurrence to the police station with burn injuries immediately after the incident is also a circumstance which corroborates P.W.1's evidence. The fact that P.W. 1 has received burn injuries is fortified by the medical evidence of the Doctor. P.W.7 has stated that P.W.1 received partial burn injuries all over his body except back, abdomen etc. According to P.W.7 both the hands of P.W.1 had become defunct due to burns. It is further in the evidence of P.W.7 that such injuries are possible when kerosene is sprinkled on the body and is set on fire, he also described the injuries as grievous in nature. The evidence of P.W. 7 is not challenged during his cross-examination at all. Thus, in the light of this evidence, the findings of the learned Assistant Judge that the prosecution has poured beyond reasonable doubt the broad spectrum of the incident, namely, the accused sprinkled kerosene on the body of P.W.1 and set fire to him must be held to be in accordance with the evidence on record and has to be up held. *Gellapudi Satyam v. State*, 2002 Cri LJ 762 (AP) : 2001(1) Andh LT (Cri) AP 503 : 2001(1) Crimes 408 : 2002(1) Cur Cri R 202.

In this case, there is evidence that accused appellant No. 3 Iqbal gave only one knife blow on the chest of PW. 1 Ratnesh Kumar and that injury is found simple in nature and there is no evidence that he tried to make a second attempt by the same knife on any prt of the body of P.W. 1 Ratnesh Kumar. By this Act of the accused appellant No. 3 Iqbal Mohammed, it cannot be held that accused appellant No. 3 Iqbal Mohammed had intention to murder PW. 1 Ratnesh Kumar and all the three doctors, namely, PW. 9 Dr. S. S. Mehta, P.W. 13 Dr. N. S. Kothari and P.W. 14 K.C. Vyas nowhere have stated that the injury No. 1 mentioned in injury report Ex. P/9 of P. W. 1 Ratnesh Kumar was sufficient in the ordinary course of nature to cause death and, therefore, in these circumstances, it cannot be held that by inflicting this injury on the chest of P.W. 1 Ratnesh Kumar, the accused appellant No. 3 Iqbal had an intention to commit murder of P.W. 1 Ratensh Kumar, and therefore, the findings of the learned sessions Judge convicting the accused appellant No. 3 Iqbal for the offense under Section 307 IPC are liable to be set aside. Since the injury No. 1 mentioned in report Ratnesh Kumar has been found simple in nature and, therefore, the act of the accused appellant No. 3 Iqbal Mohammed would be covered for the offence under Section 324 IPC and thus, he is to be convicted for the offense under Section 324, IPC in place 307 IPC and rest accused appellants Nos. 1 and 2 Kailash and Babu Rao are to be convicted for the offence under Section 324 read with 34 IPC in place of 307/34, IPC and the findings of learned Sessions Judge are liable to be altered accordingly. *Kailash and Others v. The State of Rajasthan* 2002 Cri LJ 390 (Raj.).

Single knife blow given on the chest causing incised wound causing no fracture - Injury was simple, therefore, there was no intention to kill the injured and conviction of the accused under Section 307, therefore, converted under Section 324 IPC. Since the injury No. 1 mentioned in report Ratenesh Kumar has been found simple in nature and, therefore the act of the accused appellant No. 3 Iqbal Mohammed would be converted for the offense under Section 324 IPC and thus, he is to be convicted for the offense under Section 324 IPC and thus, he is to be convicted for the offense under Section 324

IPC in place 307 IPC and rest accused appellants No. 1 and 2 Kailash and Babu Rao are to be convicted for the offence under Section 324 read with Section 34 IPC in place of 307/34 IPC and the findings of the learned sessions judge are liable to be altered accordingly. *Kailash and Others v. The State of Rajasthan* 2002 Cri LJ 390 (Raj.).

(a) Attempt to murder—Ingredients.—The essential ingredients required to be proved in the case of an offence under Sec. 307 are : (i) that the death of a human being was attempted; (ii) that such death was attempted to be caused by, or in consequence of the act of the accused; and (iii) that such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as : (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death, or that the accused attempted to cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury. *Chimanbhai Jagabhai Patel vs. State of Gujarat*, AIR 2009 SC 3223 : 2009 (11) SCC 273 : 2009 (2) Crimes 34 (SC) : 2009 (4) JT 102 : 2009 (4) SCR 275 : 2009 (4) Scale 188 : 2009 (2) Supreme 712.

3. Scope.—To determine whether an act falls within the ambit of this section, three considerations appear to be essential ; (i) the nature of the act done; (ii) the intention or knowledge of the agent; and (iii) the circumstances under which the act is done. AIR 1943 Nag 145 : 44 Cr LJ 512. To support a conviction under this section, it must be proved that the accused intended by his act to cause death and also that the act was one capable of causing death in the natural and ordinary course of things, although death did not eventually ensue. 1 Weir 328 ; 32 PLR 1911 : 12 Cr LJ 125 : 9 Ind Cas 731. The scope of Section 307, is very clear. The intention or knowledge, which is necessary to constitute murder, may exist combined with an act which falls short of the complete commission of the offence. The murderer may do an act towards the commission of the murder, but may involuntarily fail, or be intercepted, or prevented from commission of the crime. To justify a conviction under Section 107, therefore, it is not essential that actual injury capable of causing death should have been inflicted. 154 Ind Cas 534 : A1R 1935 Oudh 176 : 1935 OWN 131 : 1935 Cr C 582 : AIR 1935 Oudh 181. All that is necessary in such a case that the act must be capable of causing death in the natural course of things ; and if it is not of that description the assailant is not guilty of the offence of attempt to murder. 155 Ind Cas l014 : 36 Cr LJ 854 : 1935 Nag 177 ; AIR 1941 Nag 302 : 43 Cr LJ 54 ; AIR 1941 Mad 489 : ILR 1941 Mad 592 : 42 Cr LJ 821.

An act regarded from two points of view ; one in relation to the intention which preceded the act and another, the actual consequence which follows from it. For the purpose of this section what is material is the intention or knowledge, not the consequence of the actual act done for the purpose of carrying out the intention. The section clearly contemplates an act which is one with the intention of causing death but which fails to bring about the intended consequence on account of the intervention of a cause operating independently of the volition of the agent. 44 Cr LJ 512 : AIR 1943 Nag 145 : ILR 1943 Nag 411; 1953 All WR (HC) 491 : 1954 Cr LJ 68 : AIR 1954 All 59. So far as a conviction is to be based on knowledge as opposed to intention, the act (necessarily the injury caused) must be likely to cause death and Section 307 or Section 308 will apply according to the degree of likelihood and the knowledge of the assailant established. *Ibid* ; *see* also AIR 1944 Sind 82 : 45 Cr LJ 598. Where simple injury is caused with knife, the offence committed is one under Section 324 and not under this section. AIR 1942 Pesh 21(2) : 43 Cr LJ 594 ; *see* also AIR 1941 Lah 322 : 43 Cr LJ 166 : AIR 1939 Mad 780 : 40 Cr LJ 922 ; AIR 1938 Rang 220 : 39 Cr LJ 692 ; AIR 1936 Lah 914 : 38 Cr LJ 24. For the application of this section it is not necessary that the injury capable of causing death should have been actually inflicted. AIR 1940 All 113 : 41 Cr LJ 362 ; AIR 1937 Lah 619 : ILR 1937 Lah 111 : 38 Cr LJ 1052 ; AIR 1936 Oudh 294 : 37 Cr LJ 747 ; 39 CWN 334 : AIR 1935 Cal 561 : 36 Cr LJ 1275 ; AIR 1935 Pesh 74 : 37 Cr LJ 25.

For the purpose of this section, what is essential is the intention or knowledge and not the consequence of the actual act done for the purpose carrying out the intention. AIR 1950 MB 21. Under this section, it is the intention or knowledge and the circumstances under which the act is done that are important. Even if the accused did not have a deliberate intention, if he must have had the knowledge that his act was likely to cause death, this section applies. The intention of the accused has to be taken to cause injury likely to cause death, and the fact that the injury was providentially relatively slight is not relevant to the provisions of section. 1937 MWN 556 ; *see* also 18 Lah 111 : 117 Ind Cas 284 : 38 Cr LJ 1052 : AIR 1937 Lah 619 ; *see* also 162 Ind Cas 841 : 37 Cr LJ 787 : 1936 OWN 553 : 1936 Cr C 648 : AIR 1936 Oudh 294 ; AIR 1941 Pat 51 : 42 Ind Cas 303. If a person who has an evil intent does an act which is the least possible act that he could do towards the accomplishment of a particular crime that he has in his mind he is not entitled to plead in his aid an obstacle intervening not known to himself, 14 All 38. This section is exhaustive.

"The intention or knowledge which is necessary to constitute murder may exist, combined with an act which falls short of the complete commission of that offence. The murderer may do an act towards the commission of the murder, but may involuntarily fail or be intercepted or prevented from consummating the crime. This and the following section seem to apply (as the Illustrations show) to attempt to murder, in which there has been not merely a commencement of an execution of the purpose, but something little short of a complete execution, the consummation being hindered, by circumstances independent of the will such as author. The act or omission, although it does not cause death, is carried to length as at the time of carrying it to that length, the offender consider sufficient to cause death. Whether the act causes hurt or not is material only with reference to the degree of punishment which the section authorises. There may be many atrocious and deliberate attempts to murder falling within the provision, which not only cause no hurt, but which are not even trespasses or assaults.—*Morgan and Macpherson*. The intention must be gathered from the nature of the act, manner and object proclaimed. Where complainant was beaten to unconsciousness, conviction under Section 307 is justified. AIR 1929 Lah 67 : 79 Cr LJ 1008 : 112 Ind Cas 224 ; *see* also 125 Ind Cas 183 : AIR 1930 Lah 253 ; AIR 1930 Lah 491 : 126 Ind Cas 573. This section applies where the act is done with sufficiently guilty intention and knowledge that death would occur but death does not occur owing to something which is beyond the accused's control. AIR 1932 Bom 279 : 56 Bom 434 : 33 Cr LJ 613 : 34 Bom LR 571 : 138 Ind Cas 503.

As pointed out the manner in which the alleged incident is supposed to have taken place does not fit in with the injuries received by the complainant. The most glaring inconsistency is the story of the complainant's having held the blade of the knife, alleged to have been used in the commission of the offence, with both hands and thereby suffering incised injuries on his left palm. The injury report shows that the complainant did not have any incised injury or any other injury on his left palm and the injury to his right palm was not of an incised nature, but a bruise which could have been caused by a blunt instrument. Moreover, the knife, which was seized and was alleged to have been used for the commission of the offence, was never sent for forensic examination so as to connect it with the offence. Furthermore, the other sharp-cutting implements, which were also seized, were also not sent for such examination. Even the mat which had blood stains on it was not sent for such examination and it could, therefore, not be proved as to whether the blood stains thereon were of human or animal origin. Coupled with the above is the fact that on going to the hospital in the night for medical treatment, the complainant did not even disclose to the doctor as to how he had sustained the injuries. The doctor was, therefore, not at all aware of any such incident, as presented by the prosecution, having been committed. Coupled with the above is the fact of the delay in lodging the FIR after consultation with the local villagers. Therefore, chances of fabrication in the FIR cannot be ruled out. *Prabir Mondal and Anr. vs. State of West Bengal*, 2010 (1) Cri LJ 444 (SC).

Failure on part of investigation. The very fact that all four of them came to the place, all being armed with firearms and they all rushed to the office of the victim and one of them shot him and then all of them fled away, was proved beyond doubt.

In any event, both the brothers subsequently mustered up courage and came to Court and deposed in most clear language which could not be shaken during cross-examination. We are unable to upset the conviction. We fully appreciate the contention that there had been lapses and failure on the part of the investigative agency. But that would not demolish or could not demolish the entire case when the victim himself and his brother categorically deposed as against the appellants them. Minor anomaly and/or discrepancy in evidence would not per se amount to acquittal of the accused. *Ajoy Sen alias Mahanta & Anr. vs State of West Bengal*, 2010 Cri LJ 943 (Calcutta).

The submission of the learned senior Counsel for the appellants that since deceased received only one and two fatal injuries respectively, the common object at the most could be to cause injuries and not fatal injuries hardly merits acceptance. The deadly weapons with which appellants were armed, the number of injuries inflicted on deceased, and the murderous assault lead to a certain inference that the appellants shared common object of committing murder with other accused. That they were more than five and formed unlawful assembly is beyond doubt. deceased died on the spot. Witness fortunately survived after surgery and hospitalization for more than month. *Anna Reddy Sambasiva Reddy vs. State of Andhra Pradesh*, AIR 2009 SC 2661 : 2009 (3) Crimes 17 (SC) : 2009 (12) SCC 546 (SC) : 2009 (5) JT 617 : 2009 (6) Scale 223 : 2009 (6) SCR 755 : 2009 (4) Supreme 506.

There cannot be duality of opinion that ordinarily, air rifle or airgun is used for killing small birds, etc. Airguns are regarded as safe weapons. The observations made by learned Author Modi in the Commentary on "Medical Jurisprudence and Toxicology" (23rd Edition) at page 713 is thus :

"Air Rifles and Air Pistols : In these rifles, compressed air is used to fire lead slugs.

Here, as the mass of the pellet and velocity are low, usually minor injuries are caused. Serious injuries at short range are however reported."

Thus, it may be gathered that though airgun is usually regarded as safe weapon, yet when used at short range, the same may be dangerous one. *Rajesh Madhukar Srisundar v. State of Maharashtra*, 2008 CriLJ 1857 (Bom).

Accused assaulting complainant with lathi and Farsa. Causing amongst other, two injuries on head of complainant. Nature of injuries were grievous and were caused by use of sufficient force. It is seen that the High Court had arrived at erroneous hypothetical conclusions ignoring the fact that the nature of injuries were grievous and were caused by use of sufficient force by sharp edged weapons. The injuries were so serious that both the investigating agency and the doctor felt that dying declaration was to be recorded. That being so, the High Court's conclusion that the offence under Sec. 307 was not made out is clearly indefensible. *State of M.P. v. Imrat and Anr.*, AIR 2008 SC 2967 : 2008 (10) SCR 847 (SC) : 2008 (11) SCC 523 : 2008 (10) Scale 143 (SC) : 2008 CrLJ 3869 (SC).

Accused who was driving jeep alleged to have dashed same against complainant in an attempt to kill him. Co-accused was also allegedly present in same jeep.

The findings recorded by the trial Court leading to acquittal of respondent/accused, the nature of the overt-act attributed to respondent/accused; the fact that the complainant in his First Information Report did not even mention the presence of co-accused at the time of the incident, and in view of the above quoted dictum of the Apex Court in the case *Javed Alam vs. State of Chhattisgarh*, AIR 2009 SCW 3918, Court does not find any infirmity in the findings recorded by the trial Court leading to acquittal of respondent/accused, which may warrant interference by this Court in this appeal against acquittal. *State of Chhattisgarh vs. Shivprasad Katvariram Rajwade*, 2010 (3) CrLJ 2530 (Chha).

The accused in sudden quarrel stabbed a person to death and co-accused injured another person during the same course of incident. The accused were acquitted under Section 307 as injury was of minor nature but their acquittal was set aside by High Court. On appeal against conviction it was held that it was sufficient to justify a conviction under Section 307 if there was present an intent coupled with some overt act in execution thereof and that it was not necessary that bodily injury capable of causing death could have been inflicted. *Hari Mohan Mandal* v. *State of Jharkhand*, 2004 Cr LJ 3112 (SC) : AIR 2004 SC 3687 : 2004(2) Crimes 434 (SC) : 2004(2) Supreme 460 : 2004(4) JT 377 : 2004(3) Scale 466.

Where on the evidence, the act of the accused amounts to an attempt to commit murder, the Magistrate should commit the accused to Sessions Court for trial and should not try the case himself. 5 MLT 25 : Ind Cas 114 : 11 Cr LJ 196. A person firing two shots successively at another person clearly shows murderous intent. 11 PWR 1910 Cr : 5 Ind Cas 602 : 11 Cr LJ 171. An offence under this section does not depend at all on the nature of the hurt actually inflicted. It is an offence which may be committed without inflicting any hurt at all, as will be clear from the first illustration to the section. 4 LBR 311 (FB) : 9 Cr LJ 11. Where in a case under this Section *A* and *B* were named as assailants at the *Thana* and when the police reached the spot the name of *C* was substituted instead of *B*, and the only eye-witness said their backs were seen. *Held.*

that the accused could not be convicted on account of there being blood stains on the clothes and the evidence of the trackers which is by no means infallible. 14 PWR 1919 Cr : 67 PLR 1913 : 19 Ind Cas 196 : 14 Cr LJ 196.

The act which is punishable under Section 307. I.P. Code must be an act which is itself capable of causing death. Where a person pulled the trigger twice and aimed the gun at a certain person but with no result, in the absence of proof that the gun was loaded, a conviction under Section 307, I.P. Code cannot be had. 2 Bur LJ 75 : 1923 Rang 251 : 24 Cr LJ 850 : 74 Ind Cas 1042. Where appellant, a sower, pursued deceased whom he thought to be the person wanted at the police-station and fired three shots and the deceased who was standing in the river at the time of the third shot never appeared again. *Held*, there is no sufficient evidence to support the conviction. 1923 Lah 415. Act must by itself be capable of causing death in natural or ordinary course of events. AIR 1930 Lah 63 ; *see* also 31 PLR 1004. Important consideration under Section 307 is intention or knowledge of accused and circumstances under which offence is committed. AIR 1930 Lah 253. Where in a dark night the accused was proved to have fired a revolver in order to keep guard and it appeared that the shot was not aimed at any one in particular. *Held*, that the accused was not liable to be convicted under Section 307, I.P. Code, because the evidence was not conclusive and the accused was entitled to the benefit of doubt. 9 Lah LJ 331 : 1927 Lah. 853 : 109 Ind Cas 342 : 29 Cr LJ 518. Where the accused fires at Police-Officer who attempts to arrest him he is guilty under this section. AIR 1933 All 627 : 1933 Cr C 1006 ; *see* also 143 Ind Cas 593 : 37 CWN 312 : 1933 Cr C 49 : 60 Cal 643 : 34 Cr LJ 611 : AIR 1933 Cal 354 ; AIR 1933 Lah 852. Where there was no evidence except disappearance of the deceased and three shots by accused, he could not be convicted under Section 307 unless he could have had knowledge or intention to cause death in charge under Section 302. AIR 1923 Lah 415 : 25 Cr LJ 308 : 76 Ind Cas 1028. Where two person fought almost to their death and one of them laid a complaint, conviction of the other under Section 307 was not right, as, if death had ensued, accused would have been entitled to benefit of Exception 4 to 300. AIR 1925 Rang 133 : 26 Cr LJ 409 : 84 Ind Cas 1094. Where an accused was charged under Section 307 and the trying Magistrate, in convicting him, relied on the fact that some abrasions were found in his person. *Held*, that unless an incriminating circumstances is proved by the prosecution to exist against an accused person he should not be called upon to explain away its existence. AIR 1929 Nag 350 : 1929 Cr C 673.

First-part of Section 307, does not even contemplate that it must be necessary that the victim should receive even a simple hurt. All that is necessary is, that the accused should have the intention to commit murder of the victim or he should have knowledge that he is likely to cause his death. 1963(1) Cr LJ 387. Where the initial firing is by the accused and police fired in self defence, it was held that the accused has got no right of self-defence and was convicted under Section 307. 1963 All WR (HC) 746.

Two elements are necessary in order to constitute an attempt (1) *mens rea* and (2) *actus reus*. 1979 Raj LW 254 : 1983 Raj LR 532 : 1980 All LJ 377 (a third element resides the above two that the act was done with such *mens rea* as would have constituted the act of murder). The requirement that the act must be done with such intention or knowledge or under such circumstances that if death caused by that act, the offence of murder would emerge was not upheld and hence the conviction under

Section 324 was not upheld. 1969 SCD 208 ; 1981 Raj Cr C 340 ; (1984) 2 188 : 1984 Cr LR 131.

In cases of attempt to commit by fire arm, the act amounting to an at commit murder is bound to be the only and the last act done by the culprit. Till h ires, he does not do any act towards the commission of the offence and once he fires, and something happens to prevent the shot taking the effect, the offence under Section 306 is made out. AIR 1961 SC 1782 : 1961 SCD 859 : (1962) 1 SCJ 189 : 1961 (2) Cr LJ 848. *See* also AIR 1961 Mad 498 : (1962) 2 MLJ (Cr) 487 : 1961 Mad WN 423 : 1961 (2) Cr LJ 781 : 74 Mad LW 678 (for what constitutes an attempt). An attempt is the third stage of an act which is completed *viz*. intention, preparation, attempt and commission. It is an act or series of acts which lead to the commission of an offence and stops short of commission by frustration because of something which the doer of the act neither foresaw nor intended. AIR 1955 Bhopal 9 : 1955 Cr LJ 1033.

Accused stabbed complainant's brother/PW. 1 and his wife/Beena with knife. Earlier complaint filed before police requesting to get accused evicted from their house. He demanded that five cents of property should be assigned to the mother, but PW. 1 was not amenable. A week back, PW. 1 orally complained before the police requesting to take steps to get the mother and the appellant evicted from the house. Since there was no development, PW. 1 filed complaint against the appellant at Police Station and thereafter he along with Beena had been to the house. Noticing PW 1 and Beena at the courtyard, the appellant came out and stabbed PW. 1 by stating that he and his wife had filed complaint against him and that none of them would be spared. The stab fell at the back left side and was bleeding. Seeing that, Beena rushed to rescue him. By the time the appellant stabbed Beena and it fell at her buttock. Beena ran towards the southern courtyard. The appellant chased her and kicked, following which Beena fell down. When PW. 1 rushed to Beena, the appellant took to his heels with the knife. The neighbours gathered and PW. 1 and Beena were taken to the District Hospital, from where they were referred to the Medical College Hospital. While undergoing treatment, at 4.30 p.m., Beena succumbed to the injuries. It was further deposed that being motivated because of the filing of complaint, PW. 1 and Beena were stabbed by the appellant with the intention to commit murder. PW. 1 identified Exh. P1 and the clothes. *Mohanan vs. State of Kerala*, 2010 (3) Cri LJ 2920 (Ker)

To justify conviction under section 307, IPC, it is not essential that bodily injury capable of causing death should have been inflicted. An attempt in order to be criminal need not be the penultimate act foreboding death. It is sufficient in law if there is present an intent coupled with some overt act in execution thereof, such act being proximate to the crime intended and of the attempt has gone so far that it would have been complete but for the extraneous intervention which frustrated its consummation. There are different stages in a crime. First intention to commit it; second preparation to commit it; third an attempt to commit it. If at the third stage the attempt falls, the crime is not complete but law punishes for attempting the same. An attempt to commit crime must be distinguished from an intent to commit it or preparation of its commission. A police appeal was deputed to search the house of the appellant along with two other members of his staff. When he went to the house of the appellant along with the other officers, the accused tried to assault them. He somehow escaped from the assault. Again accused tried to pierce with a sword but he escaped that he assault and caught hold of him but then he threatened that would kill. This was all the evidence that had been given which would only mean that there was only a threat to assault the police officer but the over acts attributed to him would not amount to attempt to murder, at best it could be one of attempt to assault but there was not even an injury upon the victim. *Sagayam* v. *State of Karnataka*, 2000 Cri LJ 3182 (SC) : AIR 2000 (SC) 2161 : 2000(4) SCC 454 : 2000(5) JT 260 : 2000(4) Scale 43 : 2000(3) Supreme 437.

Offence can be made out under Section 307, I.P.C., provided the act done was with such intention or knowledge and under circumstances that by that act death can be caused. *Rakesh Kumar* alias *Rakesh* v. *State of U.P.*, 1995 UP Cr R 40 (All).

Where accused given knife blow on vital part of injured with knowledge and intention that it may cause death, offence under Section 307 is made out. *Krishan Kumar v. State (Delhi Administration)*, 1993 Cri LJ 19 (Del).

The appellants who were landlords were charged for committing offence punishable under Section 307. The appellants fired gun shots on the tenant as a result of which her (tenant) grandson was injured. Landlords wanted to get premises vacated with force. *Held*, that counsel's contention that appellants were old men and having a feeling of remorse and the incident was of ten years old, as such it would be harsh to sent them back to jail, could not be justified. Landlords were trigger happy who tried to throw out tenant by use of firearms. However, considering the fact that appellants were old men and acted in heat of the moment their sentence to be reduced from three years to one and a half years. A fine of Rs. 5,000 in all *i.e.*, Rs. 2,500 each to be paid by them and the amount so recovered should be paid to the complainant and her grandson by way of compensation. 1987 Cri LJ 1969 (SC) : AIR 1987 SC 1335.

It is not necessary for the offence of attempt under this section that any hurt or injury should have been caused by the act. 1969 Cr LJ 686 : AIR 1979 Ker 98. The act must be one which is capable of causing death. AIR 1970 Ker 98 : 1970 Cr LJ 633 ; (1982) 2 SCC 149 : 1982 Cr LR (SC) 316.

In a case where the injury that is caused does not cause death, but is caused under such circumstances that had death ensued, the accused can be held guilty of the offence punishable under Section 307, I.P.C. 1988 (1) Guj LR 64.

Offence of attempt to commit murder or culpable homicide—Sudden occurrence of scuffle in dark night. There was knife injuries on non-vital parts of body—It can be said that accused had knowledge that he was likely to cause death. It was *held*, that offence falls under Section 308 and not under Section 307. *Tuaram Gundu Naik v. State of Maharashtra*, 1994 SCC (Cri) 432 ; (1994) 1 SCC 465.

Where murder committed without enmity under mental tension. *Held* that accused requires sympathetic attitude. *Gulam Dastageer* v. *State*, (1995) 1 CCR 553 (Raj).

Offence under Section 307, can be made out even if no apparent hurt was caused. *Rakesh Kumar* alias *Rakesh* v. *State of U.P.*, 1995 JIC 47 (Alld).

When the appellant inflicted incised wounds on the vital parts of the body of the victim who was of a tender age of ten years. It can safely be presumed that he intended to kill him. Intention to commit murder in this case can also be inferred from the existence of a strong motive on the part of the appellant against the victim. The statement of doctor to the effect that had timely medical aid been not given to the victim his injuries would have proved fatal also brings the offence within the ambit of Section 307, I.P.C. *K.T. Balgujar* v. *State of Maharashtra*, (1996) Cr LJ 2482 (Bom).

In absence of even a single injury on vital part, cognizance of offence under Section 307, I.P.C., to be vacated. *Sarab @ Sarleeswar Prodhan* v *State of Orissa*, (1995) 9 OCR 623 (Ori).

When the evidence of eye-witnesses as to incident in which accused attacked victims by sharp weapon causing injuries found cogent and reliable then minor discrepancies as to date of incident and in medical certificate is of no consequence. *Vari Appalanaidu v. State*, 2005 Cr LJ 1459 (AP).

4. Intention or knowledge.—A person commits an offence under Section 307 when he has an intention to commit murder and in pursuance of that act does an act towards its commission irrespective of the fact whether the act is the penultimate act or not. The expression "whoever attempts to commit an act" in Section 511 can only mean whoever intends to do a certain act with the intent or knowledge necessary for the commission of that offence. The same is meant by the expression 'whoever does an act with such intention or knowledge and under such circumstances that if he, by that act, caused death, he would be guilty of murder' in Section 307. The expression 'by that act' does not mean that immediate effect of the act committed must be death "The word "act" denotes, according to Section 33 as well, a series of act. *Held*, on facts of the case that the course of conduct adopted by the accused in regularly starving the wife in order to accelerate her end came within the purview of section 307 though it was not the last act which if effective would cause death. AIR 1961 SC 1698 and (1910) 2 KB 124 relied on but ILR 14 All 38, 1891 All WN 174 overruled and 10 Cr LJ 363 distinguished]. AIR 1961 SC 1782 : 1961 SCD 859 (1962) 1 SCJ 189 : 1961 (2) Cr LJ 1848. *See* also ILR (1962) 1 Punj 6 : 1962 Raj LW 70 (intention to commit murder can be inferred even if any simple hurt is caused) ; AIR 1960 Punj 282 : 1960 Cr LJ 651 ; AIR 1959 J & K 119 : 1959 Cr LJ 1316 (the gist of the offence under Section 307 is the question of intention) ; 1956 All WR (HC) 49 : 1956 All LJ 1093 ; 1956 MBLJ 159 ; AIR 1956 Sau 107 : 1956 Cr LJ 1439 (absence of *mens rea*—Use of agricultural implements) ; AIR 1955 TC 266 : 1955 Cr LJ 1535 (intention or knowledge may be gathered from the nature of weapon and injuries) ; 1955 Cr LJ 1092 : AIR 1955 Pat 300 ; AIR 1954 All 59 : 1954 Cr LJ 68. The nature of the weapon used, the exposed intention and motive of the accused, the nature of the injuries and the place where caused and the severity to blows are all to be taken into consideration. (1965) 1 Cr LJ 766 : AIR 1965 SC 843.

If the accused had used a sophisticated rifle there would have been no doubt about the fact that his intention was to kill and even if the shot had missed the victim, he would still have been liable. From the fact that he used a firearm that was not only unlikely but was incapable of endangering life it is very clear that the intention was to cause injury and not to cause death. It is not proper for the court to be totally carried away by the word "firearm" because it is of greater consequence that the courts must scrutinize the type of fire-arm that was used and the consequences that emanate therefrom. Secondly, what the court must also guard against are the type of half-baked unprofessional opinions that are based on a very unrealistic and immature knowledge of medical science that are sprouted out in the witness-box by ignorant medical practitioners most of whom are unfortunately in Government service and who technically pass off when put in the witness-box as expert. No court is obliged to be led by the nose by the opinions from this class of persons unless those opinions when scrutinised pass the scientific test. It was held that on asses sment of the injuries caused which were not of much consequence, the accused would be liable for conviction under Section 324, IPC and not under Section 307, IPC. *Prabhu v. State of Karnataka*, 2001 Cri LJ 1427 (Kant).

The victim has narrated that when he was accosted and exhortation raised to finish him and a blow was raised towards him by the appellant, he cried out that he should not be killed and, at the same time, raised his right arm to ward-off the blow which, on falling instantaneously, severed his head. The severity of the blow speaks for itself. The damage done has its own story to tell. *Held*, the hand not been raised in a bid to defend, the aim was the head of the victim. The blow thus aimed would have clearly spelled out the murderous intent of the appellant. It is from that angle the guilt of the appellant needs to be viewed rather than the result achieved. *Antony* v. *State of Kerala*, AIR 1995 SC 2451 : 1995 Cr LJ 4167.

'Mar do sale Ko' or *'Aj Jan se Mardalo'* terms do not indicate the intention to cause death. It was held only exclamation. *Mannu Lal Yadav* v. *State of U.P.*, 1994 JIC 202 : (1994) 1 Crimes 653 : 1994 UP Cr R 247 (All).

Absence of intention or knowledge. To constitute an offence under Section 307 I.P.C. two ingredients have to be established namely (i) intention or knowledge relating to commission of murder and (ii) the doing of act towards it. For an offence under Section 307 I.P.C. presence of intention or knowledge is material and not the consequence of the actual act done for the purpose of carrying out the intention. In the absence of intention or knowledge there can be no offence of attempt to murder. The injured witnesses have not stated that the accused intended to kill them. The evidence showed that they received simple injuries. In the absence of intention or knowledge which is necessary ingredient of Section 307 I.P.C, the accused cannot be held guilty for the offence under Section 307 I.P.C. The accused appellants having voluntarily caused simple hurt to the witnesses in furtherance of their common intention, they are liable for the offence under Section 323/34 I.P.C. *Om Prakash and Ors. v. State of U. P.*, 2009 CriLJ 1677 (All).

Absence of Common object. The High Court rightly noted that the evidence adduced by the prosecution did not establish that remaining accused persons had any knowledge that Gajadhar was carrying a country made pistol or that he would go to shoot the deceased. The testimony of PW-2 shows that Janardan was initially arising the voters not to caste vote for Ramakant Yadav but to vote for his candidate and subsequently he had resorted to rowdism in order to disturb the voting process so that Ramakant Yadav may not win the election and that simple injuries were caused by blunt weapon to three persons. Therefore, as rightly observed by the High Court the common object of the assembly was not to commit the murder of Chandra Bhan Singh and it was the solitary act of Gajadhar. PW-2 had also stated that he had not seen the lathis or country made pistol in the hands of any of the accused persons at the time when Janardan was disturbing the voters and was asking them not to caste vote in favour of Ramakant Yadav. PW-4 *i.e.* Constable on duty had also stated that there was fight between the parties regarding disturbance in voting. *State of Uttar Pradesh vs. Gajadhar Singh*, AIR 2009 SC 1935 : 2009 (1) Crimes 348 : 2009 (11) SCC 366 : 2009 (2) JT 354 : 2009 (2) Scale 452 : 2009 (2) SCR 17 : 2009 (1) Supreme 793.

Where there was sudden quarrel—Simple injuries by sharp cutting weapon and certain injuries on chest—Acquittal by Trial court was given—Conviction by High Court under Section 307, I.P.C., and sentenced to 3 years, R. I.—Petition to Supreme Court was tiled and it was held that, there was no motive or intention to cause injury which is necessary to bring offence under ambit of Section 307, I.P.C. The injuries caused are only skin deep hence the case would fall within scope of Section 324, I.P.C. *Sanjay Kumar* v. *State of M.P.*, 1995 JIC 553 (SC) : (1995) 1 East Cr C 437 (SC).

Two respondents were present and indeed their mere presence by itself cannot be of criminal nature in the sense that by their mere presence a common intention can not be attributed to them. Indeed, they have not done anything. No overt act is attributed to them though it was tried to be claimed by one of the witnesses that when the police party reached that they were standing on one leg. This also appears to be a tall claim without any basis and the High Court has rightly not believed this story which was tried to be introduced.

There can be no dispute that the specter of superstition had affected the psyche of all these accused persons. The case of the Shahrunnisa (A-3) is one of a Mohammedan lady whose husband and daughter were overpowered by the superstitious belief. The force of the superstition was so overpowering that A-1 and A-2 probably were convinced of the non-existent supernatural powers of A-2. A poor Mohammedan lady coming from the humble background, whose husband and whose daughter claimed these powers could not have ordinarily opposed which was being done and, therefore, had to see with open eyes the death of her two sons. We do not think that her not opposing the gruesome acts speaks in favour of her nurturing the common intention. The High Court was undoubtedly right that she could be afraid of A-1 and A-2 has she herself might be under the superstitious psyche.

It is bane of the Indian society that in search of some worldly gains, the society becomes superstitious and blindly follows the path which leads only to desolation. Number of lives are lost and number of families are destroyed because of this false belief in the so-called black magic and so-called supernatural powers. All this is a result of the total lack of education and human avarice. It is for this reason that we agree with the findings of the High Court. Even the case of the 4th respondent is no different. True it is that he was a police Constable, but the fact is that he has not committed any overt acts. Again it is his own wife who claimed all the supernatural powers and went on to commit the horrible acts of un-paralleled cruelty against the two innocent boys. True it is that it was his duty to stop the crime from being committed but inaction on his part would not by itself make him join the company of the guilty accused. This is apart from the fact that he has not been asked about his duty in his examination. In fact, the whole prosecution is strangely silent about the aspect of Sec. 221 IPC nor was such charge ever levelled against him.

We are dealing with an appeal against acquittal where the law so far crystallized desists us from fact finding exercise. Though, the whole evidence is open for us to appreciate the finding of acquittal that too by the High Court has to be given its own weight. We have, therefore, gone through the evidence ourselves only to find that the evidence against the two respondents is not clinching enough and it cannot be said that the finding of the High Court is perverse or such as cannot be reached after reasonable and careful survey of the evidence. A suspicion by itself cannot take place of the proof much less in an appeal against acquittal. The law requires hard facts duly proved by admissible and truthful evidence. In case where the High Court has recorded the finding of acquittal giving benefit of doubt, unless such a finding was an impossible one, the interference at this stage is not feasible. We, therefore, would agree with the High Court, though with a heavy heart. *State of Uttar Pradesh vs. Sahrunnisa*, AIR 2009 SC 3182 : 2009 CrLJ 4151 : 2009 (9) Scale 170 : 2009 (9) JT 16 : 2009 (6) SLT 47 : 2009 (10) SCR 237.

It is not necessary that injury capable of causing death should have been inflicted. AIR 1983 SC 305 : 1983 Cr LJ 331 ; 1979 Cr LJ 400 ; 1972 Cr LJ 938 ; AIR 1971 SC 335 : 1971 Cr LJ 288 (no conviction in case of no evidence as to the nature of the injury caused). In 1982 Cr LJ 626 : AIR 1982 SC 82 (accused not intending to injure from shots fired by him-no conviction). The act must be done with intention knowledge requisite for the commission of the offence of murder. AIR 1961 SC 1182 : 1962 (2) Cr LJ 848.

When medical evidence shows one simple injury and other dangerous to life only if medical treatment not given, no intention to cause death can be inferred. *Piara Singh* v. *State of Punjab*, 1996 Cri LJ 4333 (P & H).

When the evidence, circumstances and nature of injuries show intention to commit murder, the conviction is justified. *Rohtas* v. *State of U.P.*, 1997 (2) East Cr C 177 (SC).

It is sufficient to justify a conviction under Sec. 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged under Sec. 307, IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt. *State of M.P. v. Imrat & Anr.*, AIR 2008 SC 2967 : 2008 (10) SCR 847 (SC) : 2008 (11) SCC 523 : 2008 (10) Scale 143 (SC) : 2008 CrLJ 3869 (SC).

5. Under such circumstances.—In Sections 307 and 308, the words "under such circumstances" have used to distinguish "attempted" murder from "attempted culpable homicide not amounting to murder. An offence under Section 307 can be committed where there is no intention is proved but only knowledge the act is imminently dangerous that it must in all probability cause death and that an offence under Section 308 can be committed where there is no intention proved but only the knowledge of offender that he is likely to cause death by the act. In so far as the words "attempt" is used in the marginal notes to sections may be *held* to connote intention but it should not receive weight in construing the section itself. AIR 1943 Nag 145 : 44 Cr LJ 512. The expression "under such circumstances" refers to facts which would introduce a defence to a charge of murder such as for instance that the accused was acting in self-defence or in the course of military duty. AIR 1932 Bom 279 : 33 Cr LJ 613 : 56 Bom 434. Both in Section 307 and Section 308, the phrase "under such circumstances" does not stand by itself and it has to be read in conjunction with "such intention of knowledge". 1952 Cr LJ 1467 : AIR 1952 Pepsu 138 ; 1982 Cr LJ 654.

Cruelty and attempt to murder.—Accused husband subjected victim, second wife, to physical and mental torture and attempted to kill her. Evidence of witnesses that accused used to beat victim under influence of liquor.

Initially the defence case was that the victim had herself poured kerosene oil. However, the suggestion was changed during the cross-examination of the victim. I have already mentioned earlier that the victim was given a suggestion that kerosene oil fell on her body accidentally in the midst of scuffle. Strangely, while giving statement under Section 313, Cr.P.C., accused neither pleaded that the victim had herself poured kerosene oil to make out a false case or that the said petroleum product had accidentally fell on her body.

Be that as it may a good number of independent witnesses from the locality have deposed in chorus that the victim came running to the house of P.W. 3 and was found terrified and reported that her husband had attempted to kill her by setting her afire. No prosecution witness was given any suggestion that he or she was giving a tainted testimony due to any enmity or grudge against the accused. At any rate, the suggestion given to the victim that kerosene oil fell on her body in the midst of scuffle is somewhat an admission of the accused and the same can be considered as corroborative evidence under Section 21 of the Evidence Act, 1872.

In the cross-examination, has deposed that she herself was tortured by her step-mother and that she did not have good relation with her. In my considered opinion, this might be the reason for giving a twisted testimony to defend her father. I am also of the view that the defence story of pouring kerosene oil just to teach a lesson to the husband, who was already in an angry mood and physically powerful, is inconceivable. In ordinary course, in such a situation, a battered and mentally week woman would run for cover instead of challenging a physically sound and intoxicated person.

Section 307, I.P.C. relates to the offence of attempted murder. Under this provision of law, if any act is done with such intention or knowledge that the act was likely to cause death, if not prevented or intercepted, it would constitute the offence of attempt to murder. In the case before me, large quantity of kerosene oil, was poured on the body of the victim woman. Had the appellant been successful to ignite the wearing apparels of the victim there would have been every possibility of her death. Hence, conviction of the appellant under Section 307, I.P.C., having based on evidence does not call for interference. *Sri Maran Nama vs. State of Tripura*, 2010 (2) CriLJ 1594 (Gau).

6. Evidence and proof.—Where the doctor treating the injuries, who is the best person to describe the exact nature of the injuries and their natural effect, does not say that the injuries inflicted by the accused are sufficient, in the ordinary course, to cause death, an intention to cause death cannot be deduced from the nature of the injuries and their natural and probable consequences. 155 Ind Cas 1014 : 36 Cr LJ 854 : AIR 1935 Nag 177. Although the nature of the injuries caused may often given considerable assistance to a Court in coming to finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even in some cases be ascertained without reference at all to the actual wounds inflicted upon the person attacked. 154 Ind Cas 697 : 36 Cr LJ 534 : 1935 OWN 312 : 1935 Cr C 582 : AIR 1935 Oudh 24 ; ILR 1964 Cut 730 : 1965 (2) Cr LJ 169 (interference of intention to kill can be made for nature of the act done). For liability under Section 307, the prosecution has to prove the following facts : (1) that the accused did an act, and (2) that the act was done with such intention or knowledge and under such circumstances that if he by that act caused death would be guilty of murder. AIR 1958 All 627 : 1958 Cr LJ 1112.

Evidence showing that appellant accused alongwith others went to spot and attacked deceased and caused his death and also caused injuries on injured.

The Injuries sustained by PW 2 were simple, but at the same time, it should hot be forgotten that though the injuries caused by the accused were simple, they have acted actually with an intention to cause his death. It is quite evident that all of them went to the spot with Veecharuval and attacked the deceased and caused his death.

It is not in controversy that one deceased died due to homicidal violence and following the inquest made by the Investigating Officer, the dead body was subjected to post-mortem and all the accused stood charged for the offences referred to above and on trial, accused 1 and 3 were found guilty of murder. *Thangaraj vs. State*, 2010 (3) CriLJ 3409 (Mad).

To constitute an attempt to murder contemplated by Section 307, there must be some overt act combined with evidence of '*mens rea*. The burden is always on the prosecution to prove from the '*actus reus*' that is, the accused had done something and secondly the '*means rea*' i.e., in taking the step he was inspired by the intention. AIR 1955 Pat 330 : 1955 Cr LJ 1092 ; AIR 1960 Punj 135 : 1960 Cr LJ 393 ; AIR 1977 SC 2083 : 1977 Cr LJ 1738 ; 1979 UJ (SC) 281.

Accused came to deceased hotel and shot his abdomen with a fire arm Medical evidence showing that there was impaction of bullet inside serum on left side of abdomen and despite operation said bullet could not be extracted. Deceased was shot by the appellant from fairly close quarters. Deceased remained hospitalized more than two months for the injury sustained by him. From the evidence of Doctor as well as from the medical papers it is evident that there was impaction of bullet inside serum on the left side of the abdomen and despite operation conducted by doctor on two occasions, the said bullet could not be extracted. That apart, according to Doctor the injury sustained by the victim was life threatened injury.

In that view of the matter, Court finds that the appellant with intention to cause the death of deceased fired upon him and he committed offence punishable under Section 307 IPC. *Dharam Chand Rajbhar vs. State of West Bengal*, 2010 (3) CrLJ 2516 (Cal).

Doubtful evidence—Absence of any explanation of Injuries on accused. It is difficult to hold that the complainant party was in settled and peaceful possession of 2/3 share of the plot in question on the date of incident and there seems to be weight in the defence argument that the accused party was in possession to the extent of 1/2 share and in any view of the matter there was a *bona fide* dispute between the parties regarding their shares and extent of possession. This finding gives twist to the entire prosecution version and it is not clear as to who were in fact the aggressors and whether the injuries caused by the accused persons to the complainant party were in fact caused in their right of their private defence or not.

The High Court also came to the conclusion that witnesses cannot be said to be totally independent witnesses as the defence had filed documentary evidence to show that Lalloo, the father of the accused persons had lodged an FIR against these witnesses for an offence under Sec. 308 IPC. These witnesses were, therefore, also somewhat inimical to the accused persons and their evidence cannot be given due weight especially with regard to the use of Lathi and Danda by the prosecution witnesses, particularly when such an important fact had not been stated by them in their statements recorded under Sec. 161 Criminal Procedure Code and the statements being contradictory to each other with regard to the use of Danda by the prosecution witness. The High Court arrived at the conclusion that the injuries of the accused persons have not been satisfactorily explained.

The High Court in the impugned judgment arrived at a definite finding that it is highly doubtful that the complainant party was in exclusive possession of the disputed land at the relevant time and witnesses cannot be considered to be independent witnesses. A serious doubt has been cast on the credibility of the prosecution version. The High Court allowed the appeal and set aside the conviction and sentence of the appellants and they were acquitted of the offences charged for.

When we apply the above mentioned parameters laid down by a number of cases decided by this Court to the facts of this case, then conclusions become irresistible and no interference is warranted by this Court. Consequently, the appeal filed by the State of UP being devoid of any merits, is accordingly dismissed. *State of Uttar Pradesh vs. Banne*, 2009 CrLJ 2234 : 2009 (4) SCC 271 : 2009 (3) Scale 35 : 2009 (3) JT 552 : 2009 (2) SLT 687.

It was alleged that accused persons first fired pistol at victim causing injury to his abdomen and therefore inflicted knife injuries. According to medical evidence, there was no gun-shot injury on the person of the victim. No cartridges were recovered by the prosecution. Held, the testimony of prosecution witnesses were not reliable, as they had reached spot after occurrence of incident and the occurrence of incident was narrated to them by the victim. There were inconsistencies in the manner of occurrence narrated by the victim to witnesses and statement of victim before Court. Conviction of accused under Section 307, IPC was not proper. *Ishwar Singh* v. *State of MP*, 2004 Cr LJ 2776 (MP) : 2004 Cri LR (SC & MP) 454 : 2004(3) Cur Cri R 310 : 2004(2) MPHT 506 : 2004(2) MPLJ 479.

Where the accused stopped the victim, sprinkled chilly powder on his face and assaulted him on his face, head and other parts of his body, conviction under Section 307 was held proper. On a careful scrutiny of the evidence of the accused, injured and other witnesses established the fact that the accused was not of unsound mind and, therefore, it was held that the benefit of Section 84, IPC could not be extended to the accused so as to hold that he committed the act while he was in the state of mind but not of unsoundness. The Court, however, in view of the fact that the accused was suffering from schizophrenia, the sentence of imprisonment for a period of 5 years was reduced to simple imprisonment for a period of two years 20 days which he had already undergone. *Venkatesh* v. *State of Karnataka*, 2005 Cr LJ 1112 (Kant) : AIR 2005 Kant HCR 307 : 2005(2) All Cri LR 139 : 2005(1) Kant LJ 612.

Where ditching material was found that the students attempted to take away the life of the principal of the college who had rusticated him, conviction of the student for attempt to murder was held proper. *Atish Behera* v. *State of 'Orissa*, 1996 Cr LJ 270 (Ori).

Offence punishable under Sections 377/34, I.P.C. and 25/27 of Arms Act discharged from liability—Revision petition was filed and *held* that the discharging of the non-applicants without testing the truth or otherwise of *alibi* is premature assessment of evidence which is not only against the cannon of justice but is also against rule of prudence. *Chandrika Prasad* v. *Rajaram*, (1995) 3 CCR 742 (MP).

Evidence of eye-witnesses out of a trial and not effected by the information received during an investigation. (1986) 2 Crimes 624.

When trial court has not given any finding as to competency of witnesses, it was not justified in recording evidence of that witness and also relying on it. In view of this illegality the order of trial court is unsustainable. Hence, case remanded to trial court for *de novo* trial. *State of Karnataka* v. *Shabuddin*, (1995) 1 Kar LJ 168 (DB).

The evidence of eye-witness regarding presence of co-accused person was not trustworthy. Their testimony *vis-a-vis* accused cannot be accepted. The evidence of injured witness was not cogent and reliable. Time of incident was not proved. Hence. acquittal does not call for interference. *State of U.P.* v. *Baboo Ram*, 1995 Cr LJ 643 (Alld).

Where circumstances not formed complete chain of evidence—Conviction, *held* not sustainable. *Raisa w/o Mohd. Hussain* v. *State of Madhya Pradesh*, 1995 Cr LJ 169 (MP).

Medical evidence showed injuries to prosecution-witness as well as to accused. Injuries on accused not explained—Evidence of prosecution witnesses inconsistent and not reliable—Doubt on origin of fight—Case not proved beyond reasonable doubt. *Held*. benefit of doubt goes to accused who cannot be convicted on conjectures or surmises. *Ashwani Kumar v. State of Punjab*, (1995) 2 CC Cases 484 (P & H).

Conviction was appealed—No eye-witness was available—Medical evidence adduced on record fully corroborating the victims with regard to the injuries inflicted on them. Injuries grievous and extensive—Indicative of an attempt of murder—Extra-judicial confession submitted in natural sequence indicative of appellant voluntarily inflicting injuries and plea of private defence not available. Hence, judgment and order needs no interference. *Kisto Majhi* v. *State*, (1995) 2 Crimes 623 (Cal).

(a) Evidence of police personnel—Absence of any other *independent witness*. It is true that the prosecution should not be insisted upon independent witness while convicting the accused on the basis of the police personnel evidence, but the police personnel evidence should be corroborated by other evidence. Prosecution has not been able to produce a single witness pointing towards the fact that the arms used by the appellants were serviceable or not. Even for recoveries of arms from the accused appellants has also not been proved by independent witness. The findings arrived at by the trial Court is not perverse so far as acquittal of the accused appellants for the offence under Sections 3/25 Arms Act. It may be possible that in order to avoid their arrest they must not have co-operated the police personnel or hindrance was created by them in the discharge of duties by the police personnel for that the trial Court rightly convicted the accused appellants under Section 353, IPC, but so far as guilt of the accused appellants for section 307, IPC, in absence of independent evidence or any corroborative evidence such like FSL report, benefit of doubt can be given to the accused appellants. The charge of Section 307, IPC framed by the trial Court is not proved and the accused appellants are entitled to be given the benefit of doubt in absence of any other independent evidence or corroborative evidence. *Bhairon Singh & Anr. vs State of Rajasthan*, 2010 Cri LJ 1177 (Raj)

(b) *Related eye-witness*. The statement of witness who is none other than the daughter of the deceased. The incident according to her took place at about 2.00 A.M. in the night when the appellant hacked her mother and father. She stated that on her raising hue and cry one Kanniah Tata and others came to the spot. She did not reveal the name of the appellant to the neighbours when they came to the house on her raising hue and cry. Kanniah Tata who is examined as PW-7 stated in his evidence that PW-4 informed him that her father and mother were beaten by somebody. The evidence on record suggests that even PW-4 has also acquaintance with the appellant but she did not mention the name of the appellant at any point of time prior to her evidence in the Court. Her evidence is also vague based on which it would be difficult to record any finding of commission of any crime by the appellant. *Gajula Surya Prakasarao vs. State of Andhra Pradesh*, 2010 (1) SCC 88 : 2009 (4) Crimes 199 (SC) : 2009 (13) Scale 656 : 2009 (14) JT 203 : 2009 (8) SLT 546.

Reliability of Eye-witness. PW. 2 Suresh Kumar at the time of occurrence was studying in the school. He is the friend of Raj Kumar, who is the brother of PW. 1. According to him, on the date of occurrence, PW. 2 and his friend Raj Kumar accompanied PW. 1 and the deceased to go to river for taking bath. On the way, the occurrence had taken place. He could state about the occurrence only. He did not refer about the other happenings with reference to the motive as spoken to by PW. 1. At the time of deposition, he was studying B.A. in Nesamani Christian College. He clearly corroborated the evidence of PW. 1 with reference to the overt acts attributed to each of the accused. Nothing has been elicited from PW. 2 that he had anything to speak falsehood against the accused. As a matter of fact, when the victim was taken in a car to hospital, he also accompanied him. When Exh. P1 complaint was given to PW. 11 Head Constable, PW. 2 attested the said complaint. In Exh. P1 also the name of PW. 2 is mentioned. PW. 2 was examined at the hospital during the course of inquest by PW. 14. Therefore, there is no reason to reject the evidence of PW. 2. *Vijaykumar vs. State*, 2009 (12) SCC 629 : 2009 CrLJ 3056 : 2009 (7) JT 36 : 2009 (6) SCR 919 : 2009 (6) Scale 364 : 2009 (8) SLT 27.

7. Sections 307 and 34—Common intention.—Once it is decided that the act is so done by a number of persons in furtherance of the common intention of all, the legal position is that each person shall be *held* to have committed the entire criminal act. Hence a charge under Section 307, read with Section 34, is sustainable in law. (1964) 1 SCWR 501 : 1964 SCD 766 : AIR 1965 SC 182 : 1965 (1) Cr LJ 126 ; AIR 1978 SC 1604 : 1978 Cr LJ 1474 ; AIR 1961 SC 1782 : 1961 (2) Cr LJ 848.

Absence of common intention. Prosecution has not brought on records any evidence to show that the accused persons had a common intention to commit the murder of deceased. It has not been shown that even otherwise they were bearing any common grudge against the deceased. Evidently, both the accused and the deceased were customers of the said Wine shop. They might have picked up some quarrel. At the time when the occurrence took place, appellant being an employee of the said shop the question of his coming to the place of occurrence together with the other accused did not arise. The evidence of prosecution witnesses, particulary P.Ws. 1 and 2, on which both the Courts below have relied upon, even if taken at their face value, would merely show that it was the accused who had assaulted the deceased with an iron rod: appellant was said to have only kicked the deceased.

A general statement was made that about a month prior to the incident, when the deceased had gone to Nandi Wine shop, quarrel between him and the accused persons took place. According to PW. 1, at that point of time, accused persons had threatened the deceased. From whom he had heard thereabout has not been disclosed.

Indisputably, P.W. 1's house was situated at about one furlong from the place of occurrence. He came to the place of occurrence in search of his brother. He failed to bring any material on record as to on what basis he arrived at the conclusion that accused persons had formed a common intention.

Ms. Shenoy may also not be correct in contending that all the accused persons ran away together. PW. 2 deposed that they went in different directions. Appellant, according to PW. 1, ran towards the Wine shop. Thus, it is not a case where all the accused came together and ran away together. A bald statement said to have been made by him that the accused while assaulting the deceased had exhorted that they would not leave him till he died, cannot be a ground to hold that the same by itself is demonstrative of the fact that accused No. 3 also had a similar intention. Admittedly, no weapon was recovered at the instance of appellant. He was wholly unarmed. On the basis of the voluntary statement made by the Accused alone, an iron rod was recovered.

We are not concerned herein as to whether the said iron rod was the weapon of assault. Having regard to the quality of evidence that the prosecution had led, in our opinion, it is difficult to come to the conclusion that all the accused persons had a common intention to commit the murder of the deceased.

The prosecution has failed to establish why and how a quarrel had started. The prosecution even has not proved as to why the Accused No. 1 was carrying the iron rod even before the quarrel with the deceased started or as to whether the appellant was aware of this. It has also not been shown that he along with other accused persons came to assault the deceased. Appellant ordinarily was expected to be at his work place only. His presence at the spot, therefore, has sufficiently been explained.

For the aforementioned reasons, we are of the opinion that appellant cannot be held guilty for commission of offence punishable under Sec. 302 read with Sec. 34 of the IPC. The very fact that the appellant was unarmed and must be presumed to have been performing his duties at his place of employment, it cannot be said that he had formed any kind of common intention at the spot to murder the deceased. Some incident might have taken place and he might have formed a common intention to teach a lesson to the deceased. He might be guilty for commission of offence punishable under Sec. 323 of the IPC and not for commission of offence punishable under Sec. 302 read with Sec. 34 of the IPC. He is sentenced to the period already undergone. *Nagaraja vs. State of Karnataka*, AIR 2009 SC 1522 : 2009 (1) Crimes 278 (SC) : 2009 (1) JT 48 : 2008 (16) Scale 380 : 2008 (17) SCR 1127 : 2009 (1) Supreme 94.

Accused causing injury by firing gun. He was charged of attempt to murder. The testimony of injuries witness corroborated with injury report and F.I.R. Evidence showed that accused persons before firing shouted to kill victim and then fired from guns. Hence, intention was clearly to commit murder. Offence under Sections 307/34 made out. *Mohar Singh* v. *State of U.P.*, 1995 Cr LJ 649 (Alld).

Accused assaulted his first wife—F.I.R. was lodged. The charge-sheet may not be quashed. Interference was *held* not possible. *Richpal Singh v. State* of *Rajasthan*, 1994 Cr LR 177 (Raj).

Four accused persons were found guilty under Section 307/34, I.P.C., and sentenced to 3 years R.I. which was challenged in appeal—Hence, it was *held* that there are material contradictions in statement of two injured and that other eye-witnesses also have contradicted themselves on material points. The story put up by prosecution appears unbelievable and doubtful. The weapon of offence *'Rampt* was not examined by the doctor so as to find out if injuries could have been caused by that *Rampt*. Main accused No. 1 has since died, the conviction of other co-accused is liable to be set aside. *Babu Lal and others* v. *State*, (1994) 2 CC Cases 477 (P & H).

Appeal was made against acquittal—Case not supported by independent witness—Weapon not produced—Impugned order for conviction may be set aside. Benefit of doubt may be given. *Dilbagh Singh* v. *State of Punjab*, (1994) 2 CC Cases 215 (P & H).

Offence under Section 307, I.P.C.—Acquittal was appealed by *State*—Motive of offence as alleged by prosecution found to be false—No blood found at the place of occurrence. Time of incident was also not proved—Two ocular witnesses being highly interested ones. Acquittal order was confirmed. *State of U.P.* v. *Baboo Ram*, 1994 ACC 412 (All).

The co-accused was convicted along with the main accused for the offence under Section 307 read with Section 34. It was held that the conviction with the help of Section 34 could not be upheld because he did not know that the main accused would be inflicting an injury on the victim with the intention of murdering him and that the co-accused could be convicted for the act done by him under Section 323, IPC.

Trial for attempt to commit murder—Evidence on record not bringing home the guilt of the accused beyond reasonable doubt—Accused to be acquitted. *Machhindra Sidu Chavan* v. *State of Maharashtra*, (1994) 1 CCR 140 (Bom).

Trial of two appellants under Section 307, read with Section 34 and 323/34, I.P.C.—First appellant convicted under Section 307, I.P.C., whereas second under Section 307/34, I.P.C., by Session Judge—Conviction confirmed by High Court—Hence. appeal was made. It was *held*, that one of the accused inflicted blow by sharp edged weapon on head of injured and another accused inflicting only one *lathi* blow on shoulder of the injured. Injury on head proved to be grievous and serious one. Hence accused inflicting injury on head liable to be convicted under Section 307, I.P.C. The accused giving only one blow on shoulder does not share common intention and liable to be convicted only under Section 323, I.P.C. *Kuldip Singh v. State of Punjab*, 1994 Cri LJ 2201 : (1994) 3 Recent CR 137 (SC).

Appellant alleged to have instigated other two accused to kill *J*—Other two accused fired shot which hit *J*—Two independent witnesses turned hostile. Another eye-witness being near relation of *J* and no relation proved between appellant and other two accused persons, conviction against appellant was held non-sustainable. *Hameed v. State of U.P.*, (1994) 1 Crimes 847 (All).

Where there is nothing on record to show that accused exceeded right of private defence, conviction not sustainable. *Badri v. State of U.P.*, 1997 (1) Crimes 135 (All).

8. Sections 307 and 148.—In a case of rioting to evade and resist arrest by lawful authority, conviction under Sections 307 and 149 is sufficient. AIR 1952 Mani 2 : 1922 Cr LJ 1500.

Common object of *unlawful assembly.*—Section 149, IPC consists of two parts. The first part of the Sec. means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Sec. 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object.

The distinction between the two parts of Sec. 149 cannot be ignored or obliterated. In every case, it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first part, but offences committed in prosecution of the common object would be generally, if not always, be within the second part, namely, offences which the parties knew to be likely committed in the prosecution of the common object.

Sec. 14 IPC has clear application to the facts of the cases. Therefore, the trial Court and the High Court were justified in convicting the appellant. The appeals are dismissed. *Raj Nath vs. State of U.P.*, AIR 2009 SC 1422 : 2009 (4) SCC 334 : 2009 (1) JT 373 : 2009 (1) Scale 619 : 2009 (1) Supreme 370 : 2009 (1) SCR 336 : 2009 (1) JCC 801.

If apparently accused had fired only in the air with an idea to scare away the aggressors so that they should scatter then he has obviously committed no offence. It was nobody's case that he had fired at the two dead persons. The finding of both Courts is clear that only two accused had fired. The High Court dismissed the appeal of appellant Deomuni Sharma on the wrong impression that even he was convicted of the offence under Sec. 302, IPC substantively or with the aid of Sec. 149, IPC, one look at the Trial Court's judgment suggests that he was not so convicted. The Trial Court convicted him only of offence under Sec. 307 read with Sec. 149, IPC. Therefore, the very basis of the High Court judgment against the appellant is knocked down. The other appellants who were convicted for the offence under Sec. 304 Part I, IPC have not filed any appeal nor has the prosecution come up in appeal against this finding and the consequent conviction for offence under Sec. 304 Part I, IPC. Therefore, this finding has become final. Reading the finding as it is, along with the finding given, it is clear that the appellant's conviction which is also not specifically referred to by the High Court is per se incorrect as the appellant was never convicted for the offence under Sec 302, IPC and even that finding of the Sessions Judge was never challenged by the prosecution. *Deomuni Sharma v. State of Jharkhand.*, AIR 2009 SC 2731 : 2009 (9) SCR 587 (SC) : 2009 (8) Scale 303 (SC) : 2009 (4) Supreme 459 (SC) : 2009 (6) SLT 83 (SC) : 2009 (2) Crimes 490 (SC) : 2009 CrLJ 3948 (SC).

9. Sections 307 and 324.—There is no indication from the evidence that the accused really intended or attempted to caused any deadly injury. The offences committed by the accused fall under Sections 324 and 448 Penal Code and under Sections 307 and 452 Penal Code, 1964 BLJ 660. The fact that no vital organ of *A* has been cut would not by itself be sufficient to take the accused out of the purview of Section 307. 1965 SCWR 284 : 1965 Cur LJ 360 : 1965 SCD 281 : AIR 1965 SC 843 ; AIR 1960 J & K 104 : 1960 Cr LJ 1080 (in the absence of any evidence to show that the accused had any intention of causing death by firing, the offence fell under Section 354). The prosecution must establish in an offence under this section that intention or knowledge of the accused was of the description mentioned in Section 300. 1980 UP Cr Rul. 70.

Appellant caused injury on head of informant by Sabal. There was evidence of witnesses and independent witness. It appears that the prosecution case is in support of the evidence of informant and independent witness and also the evidences of PWs. 1 and 4. The I.O. and the doctor have not been examined in this case and no injury report proved in the trial Court. It is difficult to say that the injury caused to the informant is grievous in nature and dangerous to his life.

In that view of the matter, conviction of the appellant under Section 307 of the Indian Penal Code is bad in law and the same is converted under Section 324 of the Indian Penal Code.

Since, the evidence is that the accused assaulted the informant by Sabal, which is dangerous weapon. Accordingly, the sentence of R.I. for four years under Section 307 of the Indian Penal Code is altered to the sentence for two years under Section 324 of the Indian Penal Code. It appears from the record that the appellant was not granted bail. After that, the appellant has filed this appeal and he remained in custody for more than the conviction passed by the trial Court or by this Court. In that view of the matter, trial Court is directed to release this appellant forthwith, if not wanted in any other case. *Patrik Kindo vs. State of Bihar (Now Jharkhand)*, 2010 (3) Cri LJ 2961 (Jhar).

Evidence showing that appellant accused alongwith others went to spot and attacked deceased and caused his death and also caused injuries on injured.

The Injuries sustained by PW 2 were simple, but at the same time, it should hot be forgotten that though the injuries caused by the accused were simple, they have acted actually with an intention to cause his death. It is quite evident that all of them went to the spot with Veecharuval and attacked the deceased and caused his death.

It is not in controversy that one deceased died due to homicidal violence and following the inquest made by the Investigating Officer, the dead body was subjected to post-mortem and all the accused stood charged for the offences referred to above and on trial, accused 1 and 3 were found guilty of murder. *Thangaraj vs. State*. 2010 (3) CriLJ 3409 (Mad).

Though injuries by dangerous weapon are serious, offence under Section 307, not made out thus modified to one under Section 324. *Dharmapal* v. "*State of Punjab*. 1993 Cri LJ 2856 (SC).

High Court does not find any case for an offence under Section 307. I.P.C. because there is no definite opinion of the Doctor. The offence under Section 325. I.P.C.. is only made out. Permission to compound the offence is accorded. *Abdul Latif v. State* of *M.P.*, 1994 Cr LR 55 N (MP).

Injuries was from, country-made pistol—Conviction was held u/Secs. 307, IPC and 324 IPC and 3/25 Arms Act. Revision petition was filed, the testimony of witness is reliable. The oral evidence is corroborated by medical evidence and recovery of pistol at the instance of accused. F.I.R. was promptly lodged. Hence, conviction u/Sec. 307, IPC and 3/25 Arms Act is sustained. *Sumar v. State of Rajasthan*, (1995) 2 RCD 434 (Raj).

Injuries was caused by appellant to his wife—Conviction and sentence thereof—Challenged in appeal. It was hence, *held* that more than one knife blow inflicted which were sufficient to cause death in ordinary course of nature. Hence, intention to cause death was made out. Since the injuries were caused under mental unbalance the sentence of 4 years, R.I. and fine of Rs. 500/- reduced to 2 years rigorous imprisonment and fine of Rs. 100/- respectively. *Gulam Dastageer* v. *State*, (1994) 2 WLC 607 (Raj).

The accused assembled together and attempted to murder the injured victim but evidence showed that main accused dealt blow with spade on head of victim and other accused had not come together with main accused. It was held that conviction under Section 307/149 was not sustainable but main accused was convicted under Section 324 as he had not repeated the blow on the injured. *Muni Lal Paswan* v. *State*, 2003 Cr LJ 1625 (Pat) : 2002(2) BLJ 693 : 2002(2) East Cri C 272.

The accused in another case under the influence of liquor had caused gun shot injury to victim in his hotel. The evidence of victim as to manner of occurrence was reliable and no evidence was led by defence to substantiate its case. The guilt of accused could be said to have been proved but keeping in view of the fact that injury caused was simple the conviction was altered to Section 324. *Karunamoy Sarmah* v. *State*, 2003 Cr LJ 2270 Orissa : 2003(95) Cut LT 477.

When injuries caused were simple in nature and were not on vital part of the body the offence under Section 324 was held to have been made out and conviction was altered from under Section 307 to one under Section 324 penal code. *Sarjog Turi* v. *State*, 2003 Cr LJ 2864 (Jhar) : AIR 2003 Jhar HCR 831 : 2003(3) East Cri C 188.

In a case the accused inflicted injuries on the deceased with knife. The injuries which were caused on abdominal area and were relatively of minor nature. He was admitted to the hospital where he died because of gangrene. The accused was held liable to be convicted under Section 324 and sentenced to undergo imprisonment for period already undergone and pay fine of Rs. 5000/-. *State of Karnataka* v. *Bhadrayya Bhaskar Rane*, 2004 Cr LJ (NOC) 111 : AIR 2004 Kant HCR 883.

The accused was alleged to have caused gun shot injury on person of complainant. Despite firing from close range non-vital part (thigh) was aimed at and shot was not repeated which exhibited that there was no intention to kill. Conviction of accused was altered from Sections 307 to 324 and taking into the account a 23 years long duration of case the sentence of imprisonment was substituted by a fine of Rs. 7500/- *Rameshwar* v. *State*, 2003 Cr LJ 3437 (All) : 2003 All LJ 1653 : 2003(1) All Cri R 720 : 2003(50) All LR 567.

Several persons were present at the place of occurrence. None of them tried to prevent accused from assaulting. The accused caused grievous injuries by inflicting

Farsa blows due to some dispute regarding cutting of paddy crops, he, however, had also accompanied the injured to the hospital after the occurrence. It was held that if accused had intention to kill, he could have killed the injured easily, and, therefore, the accused was guilty under Sections 326 and 324 and not under Section 307, IPC. *Atawari Mandal* v. *State of Jharkhand*, 2006 Cr LJ 291 (Jhar).

Keeping in view the nature of injuries and the statement of the doctor and other circumstances, it is not a case under Section 307, I.P.C., but a case under Section 324, I.P.C. Hence, conviction under Section 307, I.P.C., set aside, and the appellant is convicted under Section 324, I.P.C. *Buddin* v. *State of .U.P.*, 1995 (32) ACC 116 (All).

Conviction under Section 307, I.P.C., was challenged in revision petitions. It was *held* that the accused appellant caused incised wounds to injured 'S' while he was taking water from accused's field. The incident was at spur of moment and there was no intention to kill. Hence, offence under Section 307 is not made out. However, conviction under Section 324 is justified. *Ramadheen v. State of M.P.*, 1994 Cr LR (MP) 14.

Injuries were simple in nature—Conviction under Section 307 was challenged in appeal. The doctor admits that injuries on the person was simple in nature. The convictions cannot be based on assumption and presumption but actual facts on record. From the perusal of medical report and Statement of doctor no offence under Section 307 is made out. Hence, conviction under Section 307 I.P.C. is converted into one under Section 324, I.P.C. *Bhau, Gir v. State of M.P.*, 1994 Cr LR 57 (N) (MP).

Conviction under Section 307, I.P.C., and sentenced to rigorous imprisonment for 5 years was challenged in revision petition. The nature of altercation and conduct of the appellant while causing injury to deceased indicates that accused had actually no intention to murder nor he made such an attempt. His intention was only to teach a lesson and not to murder and with that end in view he attacked and caused injuries which were not sufficient to cause death. Hence no offence under Section 307, I.P.C., is made out. The conviction altered from under Section 307, I.P.C., to Section 324, I.P.C. *Dilawar v. State*, 1994 UP Cr R 288 (All).

Intention or knowledge to commit murder must exist—Injury was being skin deep only—Circumstances not revealing that assault was made with intent to murder—Thus case would fall under Section 324 and not under Section 307 as held by High Court—Parties being neighbours expressing desire to compound matter. It was held that to ensure lasting peace parties permitted to compound matter and hence conviction under Section 307 set aside and appellants acquitted. *Sanjay Kumar v. State of M.P.*, 1994 SCC (Cri) 586 : 1994 Supp(1) SCC 502.

When only simple injuries caused and no fatal blow inflicted though accused had plenty of time, only beating was intended and not to cause death. *Pravat Kumar Mishra* v. *State of Orissa*, 1996 Cri LJ 4357 (Ori).

It was alleged that accused committed injury with chopper on neck of victim. But evidence was showing that there was grapping and dragging from both sides. Where assault between accused and deceased took place due to quarrel; nature of injury was found to be simple in nature and victim was completely conscious throughout. If accused cann't held liable for offence under Section 307, it would fall under Section 324 namely voluntarily causing hurt with dangerous weapon. *Manohar* v. *State of Karnataka*, 1997 Cri LJ 398.

Though both the accused came together but the role played by co-accused was minimal insofar as he had not assaulted the injured who was the real target but he had only inflicted minor injury on the hand of the son of injured with a knife Conviction of co-accused under section 307, read with section 34 along with man accused was held not proper and the co-accused was held liable for conviction under section 324, IPC. B.M. *Singh* v. *State of Karnataka*, 2001 Cri LJ 36 (Kant).

10. Sections 307 and 325, IPC.—The accused caused grievous and simple hurt with tappers knife to the victim. When the victim questioned her attitude of the accused towards his own daughter. It was held that in view of the relationship between the parties it could not be said that he had any requisite intention to do away with the life of the victim and therefore Section 307 was not attracted, but definitely the ingredients under Section 325, IPC were satisfied. *Gurram Sambaiah* v. *State*, 2005 Cr LJ 238 (AP) : 2005(1) Andh LT (Cri) 299 (AP).

Petitioner who was holding iron rod in his hand and other accused inflicted blow causing injuries on head of informant and his son. The injuries sustained by the victim, at the hands of the petitioners could not be denied as the factum of occurrence was corroborated by several witnesses as has been referred in the order impugned recorded by the learned Additional Sessions Judge. It was not the case of the prosecution that the accused persons had administered poison, rather the petitioner inflicted blow with iron rod on his head in furtherance of common intention with the co-accused causing injuries having got bearing in the injury report as well as in the post-mortem report of the deceased. However, the learned Counsel is silent as to the finding of pesticide in the stomach of the deceased in the viscera report furnished by the Forensic Science Laboratory which gives altogether a different circumstances as to the cause of death.

No offence in the given situation is made out under Section 302 or 307 of the Indian Penal Code against any of the petitioners and at best, it could be under Section 325 of the Indian Penal Code as the materials *prima facie* suggest without much more discussion and without prejudice to the merit of the case. As regards complicity of the petitioner Rupa Devi in the alleged offence is concerned, her earlier version before the police suggests that it was Dhananjay Kumhar who was aggressor and, therefore, *prima facie*, charge under Section 325/34 of the Indian Penal Code cannot be, in my view, directed against her and I find material sufficient to consider her case for discharge and accordingly she is discharged in Baghmara. For the reasons stated above, I find *prima facie* materials to proceed against other two petitioners for the charge under Section 325/ 34 of the Indian Penal Code. *Anup Kumhar and Ors. vs. State of Jharkhand*, 2010 (3) Cri LJ 2963 (Jhar).

The accused allegedly caused injuries to complainant by *lathi*, fist and kicks causing injuries on his head, hand and leg. There was absence of fracture on his body. It was held that from the nature and number of injuries caused and the weapon used it could not be said that the attempt was made to cause death of complainant and, therefore, the conviction of the accused under Section 307/149 IPC deserved to be converted to Section 325/149, IPC. *Chand Patel* v. *State of MP*, 2005 Cr LJ 3420 (MP) : 2005 Cri LR (SC & MP) Mpi 691 : 2005(4) MPHT 125.

11. Sections 307 and 149.—*Held, on* facts that the common object of the unlawful assembly was to give to a severe thrashing to the complainant, that is only voluntarily causing grievous hurt to him. The conviction under Section 307/149 was not therefore, warranted by law. AIR 1955 Bhopal 9 : 1955 Cr LJ 1033 ; AIR 1979 SC 1599 : 1980 Cr LJ 831 ; AIR 1982 SC 59 : 1982 Cr LJ 189 (no proof that the other accused used weapons driving assailant-sentence reduced); AIR 1974 SC 1567 : 1974 Cr LJ 1033 (the charge under Section 149 read with the substantive offences can not be vitiated if there are other persons who might not have identified or convicted but were party to the crime and together constitute the statutory number).

Where no over act was attributed to any of the accused on the injured, the mere fact that the accused writ armed with *lathis* would not by itself, prove that they shared the common object with which the main accused was inspired. In the instant case, the petitioners No. 3 to 5 were simply said to have been holding *lathis* at the relevant time and admittedly they were coming from field with paddy. So there was no any intention on their part for committing any occurence as well as the said occurrence took place at the spur of moment and the said accused had not used the *lathis* in any way. Thus the accused No. 3 to 5 could not be said to be members of the unlawful assembly. *Naurangi Mahto* v. *State,* 2001 Cri LJ 1525 (Jharkhand).

The High Court has completely overlooked the evidence on record and the impugned judgment shows total non-application of mind. The High Court observed that the doctor has not stated that the injury was sufficient to cause death in the ordinary course of nature. PW. 1 had noted that 1/3 of the leg was chopped off below the knee. He had categorically stated that the injury could have caused death. The Doctor *i.e.* the Radiologist clearly stated that the aforesaid chopping of the leg was grievous in nature. With some strange logic the High Court observed that merely on the testimony of witness it cannot be assumed that the injury was sufficient to cause death in ordinary course of nature.

The evidence of PW. 5 the victim clearly shows the gruesome nature of the attack and the intention of the accused persons. According to him, accused Ram Singh and Bapulal caught hold of him. He was laid down on the ground and the accused Krishan Lal chopped out the left foot and Ram Singh caught hold of his left leg and Bapulal caught hold of his right leg, Arjun caught hold of his leg and Krishan Lal kept his legs on his left hand and put clothes in his mouth and caught hold of his head. Leela Krishan said that his foot jaw has been chopped off and the heels should also be chopped out. Accused Suraj Singh kept his leg on a log of wood and Leela Krishan chopped out his feet by axe from above the ankle. The trial Court noticed that the leg was chopped out between the knee and the ankle. Krishan Lal asked Ram Singh to keep the chopped pieces of the leg in the bag and Ram Singh picked up the pieces of legs and kept them in the bag. Though accused Arjun Singh asked that both his eyes should be taken out, accused Ganga Ram told him that chopping of his one leg was sufficient to cause his death.

Thereafter the High Court directed suspension of sentence. By then they had suffered custody for about 3 months 15 days more. There was no similarity in the period of sentence already suffered by the accused persons when the High Court passed the impugned judgment.

Looked at from any angle the judgment of the High Court is clearly unsustainable. deserves to be set aside which we direct. The judgment of the trial Court stands restored so far as conviction as well as the sentences are concerned. *State of Madhya Pradesh vs. Kashiram*, AIR 2009 SC 1642 : 2009 (4) SCC 26 : 2009 CrLJ 1530 : 2009 (9) JT 140 : 2009 (1) SCR 806 : 2009 (2) Scale 118 : 2009 (1) SLT 765 : 2009 (2) JCC 872.

Attempt to murder—Incident was established—Intention of causing death was not established. Hence, conviction under Section 326/149 made out only. *Chhota* v. *State of Rajasthan*, 1995 Cr LR 108 (Raj).

The charge under Sections 307/149, IPC is about firing shots on the members of police force in the prosecution of the aforesaid common object. It is astonishing that there is allegation of firing shots by the accused in the prosecution of the aforesaid common object, but prosecution side (police and public witnesses) did not receive even a scratch on their bodies by the alleged firing in the prosecution of the common object and the accused-appellant is said to have himself received fire-arm injuries by the fires from the side of the police.

It was alleged that unlawful assembly was made by accused persons with common object to commit the alleged offence. But where five accused persons were acquitted, it was held that in such circumstances, conviction of other accused on the same evidence was not proper. *Santosh Kumar* v. *State*, 1997 Cri LJ 984 (Alld).

In *Uma Shanker Bharti v. State of U.P.*, 2001 Cri LJ 362 (All), there was a group assault by 11 persons. One of the victims sustained head injury. The prosecution evidence was absolutely silent with regard to the author of the head injury . There was complete absence of specification of the author of the head injury. Even medical officer's had come up with a categorical statement that the head injury was sufficient in the ordinary course of nature to cause his death. In view of the above facts, the conviction of accused persons under section 307, read with. Section 149 was held liable to be set aside.

12. Sections 307 and 326.—There is nothing incongruous between Sections 307 and 326 and conviction under both of them is therefore not improper, though punishment for them should be only one. 167 Ind Cas 943 : 38 Cr LJ 487 : A1R 1937 Sind 61. Where an accused person shoots one with a pistol and thereby causes hurt to him, he is liable to conviction under the latter part of Section 307 and his conviction under Section 326 for the same offence is not warranted. 1953 All LJ 408 : 1953 Cr LJ 1677 : AIR 1953 All 726.

Causing injuries, though with the intention of causing death but which do not result in death, does not come under Section 307. 25 Cut LT 212 : AIR 1959 Ori 21 : ILR 1958 Cut 700 : 1959 Cr LJ 213 (punishable under Section 326).

There was absolutely no reason to doubt the statements of witnesses with regard to the incident. PW.2 was an independent witness in as much that he had been employed with the complainant party as well as the accused party at various times. It also appears that he was the focus of the quarrel and the motive that had precipitated the incident. as both the parties were pushing for employing which had led to the unpleasant situation between them. ·Likewise we find difficult to disbelieve the statement of the injured victim himself as he has given a graphic description as to what had happened. It is true, as has been contended by Ms. Jaiswal. that there are some differences between the statements of these two witnesses but they are bound to occur with the evidence being recorded after about five years. It must also be borne in mind that a parrot like deposition after a long lapse of time smacks of tutoring and some differences in fact advance the credibility of the witnesses.

There is some uncertainty about the involvement of Neelam Bahal, appellant No.l. The facts of the case indicate that she was perhaps not aware that Rakesh Bahal was carrying a weapon in his pocket or on his person. The prosecution evidence also reveals that it was only after the quarrel had reached a certain pitch that he had rushed inside the house and had brought a knife and caused the injuries to Satish Chandra. We also find that no specific overt act has been attributed to Neelam Bahal and only a very tenuous role that has been ascribed to her. To our mind this kind of evidence creates a clear doubt as to her participation. Held that Neelam Bahal, appellant No.1 must be given the benefit of doubt, and thereby acquitted. The appeal qua her is allowed.

Though the general condition of the patient was very bad yet there is no categoric statement in the medical certificate issued by Dr. S.M.Sehgal that the injuries were in fact dangerous to life. We are unable to fathom as to whether this was a deliberate omission or an oversight but whatsoever it may be the benefit must accrue to the accused. We have also gone through the evidence of Dr.S.M.Sehgal and find that he had admitted that he had not mentioned that the injury was dangerous to the life as he did not think it necessary to do so. At the same time we are unable to accept Ms. Jaiswal"s statement that the case would fall under Sec. 323 or 324 of the IPC but in the light of the statement of victim that he had remained in hospital for fifteen days due to the injuries caused to him, makes out a case of grevious hurt. Rakesh Bahal alone should thus be held guilty under Sec. 326 of the IPC simpliciter. We are told that he has already undergone almost one year of the sentence and in the light of the fact that the incident happened in the year 1987 when he was a young man of about 25 and now must be of middle age, we reduce the sentence to the period already undergone by him. *Neelam Bahal & Anr vs State of Uttarakhand*, 2010 AIR SCW 88 : AIR 2010 SC 428

Revision against charges under I.P.C. and Arms Act—Husband caused 9 injuries to his wife by sword—All injuries found simple and not sufficient to cause death but there being strong suspicion against petitioner. Hence, simpleness of injuries has no importance at the time of framing of charge. Revision was therefore dismissed. *Richpal Singh* v. *State of Rajasthan*, 1994 RCC 631 : 1994 Cr LR 177 (Raj).

This Court do find absolutely no reason to doubt the statements of witnesses with regard to the incident. An independent witness in as much that he had been employed with the complainant party as well as the accused party at various times. It also appears that he was the focus of the quarrel and the motive that had precipitated the incident, as both the parties were pushing for employing which had led to the unpleasant situation between them. Likewise we find difficult to disbelieve the statement of PW. 3 the injured victim himself as he has given a graphic description as to what had happened. It is true, as has been contended that there are some differences between the statements of these two witnesses but they are bound to occur with the evidence being recorded after about five years. It must also be borne in mind that a parrot like deposition after a long lapse of time smacks of tutoring and some differences in fact advance the credibility of the witnesses. We also find that the counter version given by the accused cannot be accepted. The accused has claimed that PW. 3 had an evil eye on Neelam Bahal but if that was the reason for the incident they were further called upon to explain as to how the injuries had been suffered by PW. 3, more particularly, as the incident had apparently taken place outside the residential home of the appellants.

We are, however, of the opinion that there is some uncertainty about the involvement of Neelam Bahal, Appellant. The facts of the case indicate that she was perhaps not aware that Rakesh Bahal was carrying a weapon in his pocket or on his person. The prosecution evidence also reveals that it was only after the quarrel had reached a certain pitch that he had rushed inside the house and had brought a knife and caused the injuries to Satish Chandra. We also find that no specific overt act has been attributed to Neelam Bahal and only a very tenuous role that has been ascribed to her. To our mind this kind of evidence creates a clear doubt as to her participation.

We are, therefore, of the opinion that Neelam Bahal, Appellant must be given the benefit of doubt, and thereby acquitted. The appeal *qua* her is allowed.

A reading of the above would indicate that though the general condition of the patient was very bad yet there is no categorical statement in the medical certificate issued by doctor that the injuries were in fact dangerous to life. We are unable to fathom as to whether this was a deliberate omission or an oversight but whatsoever it may be the benefit must accrue to the accused. We have also gone through the evidence of doctor and find that he had admitted that he had mentioned that the injury was dangerous to the life as he did not think it necessary to do so. At the same time we are unable to accept that the case would fall under Sections 323 and 324 of the IPC but in the light of the statement of victim that he had remained in hospital for fifteen days due to the injuries caused to him, makes out a case of grievous hurt. Rakesh Bahal alone should thus be held guilty under Section 326 of the IPC simpliciter. We are told that he has already undergone almost one year of the sentence and in the light of the fact that the incident happened in the year 1987 when he was a young man of about 25 and now must be of middle age, we reduce the sentence to the period already undergone by him. *Neelam Bahal and Anr. vs. State of Uttarakhand*, 2010 (2) CrLJ 2100 (SC).

Attempt was to murder—Conviction under Section 307, I.P.C.—Revision petition was filed and the medical report does not show that act of throwing acid on the face and eyes of injured would have caused death. Therefore, the conviction is altered to one under Section 326, I.P.C. for grievous hurt from under Section 307, I.P.C. *Kulamani Sahu* v. *State of Orissa*, 1994 Cri LJ 2245 : (1994) 3 Crimes 250 (Ori).

Where the injury was found to be relatively minor and facts and circumstances also did not reveal intention and purpose of accused to murder victim, conviction of accused under Section 326, IPC was held proper. *State* v. *Dinesh Shastry*, 2004 CrLJ 332 ; AIR 2003 Kant HCR 3076 : 2004(1) All Cri LR 926 : 2003(4) KCCR 2565.

The accused had suddenly arrived at the site of incident and had given two blows from behind and had thereafter run away from the place of incident. The size of the blade of the knife was not such from which it could be said that the intention was to commit murder. The accused had inflicted two blows on the stomach of the victim who had to be operated for two hours and discharged after 9 days. It was held that that the accused committed the offence under Section 326, IPC and not under Section 307. *Prakash Chandrappa Channur* v. *State of Maharashtra*, 2005 Cr LJ 1085 (Bom) : 2005 All MR (Cri) 584 (Bom).

When injuries suffered by complainant were neither dangerous to his life nor capable of causing death, conviction altered from Section 307 to Section 326, IPC. *State of Maharashtra* v. *Hanshchandra*, 1997 Cri LJ 612 (Bom).

Offence was of attempting to commit murder of his wife—Acquittal appealed by State—Accused suspecting fidelity of his wife—Wife sustained grievous injuries—Accused husband living separately with his two children, only husband was in house when he assaulted his wife on her entering in house—Wife's evidence not direct but only circumstantial one—She not supporting prosecution case completely—*Held*, circumstantial one. Hence, circumstances strong enough to connect accused with offence, conviction under Section 326, I.P.C., justified. *State of Karnataka* v. *Krishnappa*, (1994) 1 Crimes 884 (Kant).

Offence under Section 307, I.P.C., conviction under Section 307—Revision—Petitioner gave blow by sharp cutting weapon on top of left shoulder joint of injured person assaulted from behind. Hence conviction altered from Section 307 to Section 326. *Guria* v. *State of Orissa*, (1994) 3 Crimes 226 (Ori).

On re-appraisal in an appeal by the State against the acquittal of the accused, P.Ws. 2 and 4 were held not tutored witnesses. Evidence of P.W. 4 fitted into the stream of events and presence of P.W. 2 was found established. Injuries to P.W. 5 were corroborated by P.W. 4. Evidentiary infirmities against P.Ws. 2, 4 and 5 were not material regards injuries caused by the accused who had as well caused an injury to P.W. 5. *Held*, the conviction of the accused should be under Section 326, I.P.C. (1986) 2 Crimes 524.

Where injuries suffered by complainant were neither found dangerous to wife nor capable of causing his death; conviction and sentence was altered from Sections 307 to 326. *State of Maharashtra* v. *Harish Chandra Tukaram Awatade*, 1997 Cri LJ 612 (Bom).

Though injury was caused by sharp weapon on vital part of body *i.e.* head yet said fact by itself, in absence of any fracture or X-ray report, not sufficient to declare said injury as dangerous to life and thus conviction under Section, 307 or 326 not proper. *State of Punjab* v. *Bant Singh*, 1996 Cri LJ 3886 (P & H).

When injuries suffered were neither dangerous to his life nor capable of causing death, conviction altered from Section 307 to Section 326, IPC. *State* of *Maharashtra* v. *Harish Chandra Tukaram Awatade*, 1997 Cri LJ 612 (Bom).

13. Sections 307 and 511.—The decision in 14 All 38 is now overruled in AIR 1961 SC 1782 ; *see* AIR 1932 Bom 279 ; ILR 56 Bom 434 : 33 Cr LJ 613 : 138 IC 503 : 34 Bom LR 571.

14. Sentence.—The sentence that the accused in no case be reduced till he has undergone a minimum period of 25 years in Jail is bad in law. 1982 Cr LJ 1762 : AIR 1979 SC 699 : 1979 Cr LJ 642 : AIR 1977 SC 1338 : 1977 Cr LJ 1007 : AIR 1982 SC 1765; 1982 Cr LJ (Supreme Court can reduce the sentence to period already undergone).

Appropriateness of Sentence. In this case we feel the High Court has erred in balancing the relevant factors. The High Court seems to have waived off the custodial sentence and let off the respondents with a modest fine mainly on two considerations

One, that the offence was committed in the year 1996 and it would serve no usefu purpose to send the respondents to jail after ten years of the occurrence. And two, th respondents being convicted of the offence of causing grievous hurt in place attempte murder. We are unable to agree with the High Court on both the counts. Any inordinat delay in conclusion of a criminal trial undoubtedly has highly deleterious effect on th society generally and particularly on the two sides to the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore, no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence. In this case there is nothing to indicate that the appellants or the prosecution were responsible for the delay in trial. We are, therefore, of the view that the High Court was not right in substituting the custodial sentence of the respondents to only fines of Rs. 3500.

Coming to the second reason weighing with the High Court, it is a mistake to think that as a rule all offences falling under Sec. 326 would be less serious than the offences falling under Sec. 307 of the Penal Code and would consequently attract lighter sentence.

From the injuries suffered by Appellant No. 2 it is evident that though the respondents did not intend to kill him altogether they surely wanted to leave him crippled for a lifetime. In our opinion, therefore, the High Court was not right in letting them off on completing sentence of imprisonment of merely four months and three months respectively. We accordingly restore the sentence of rigorous imprisonment given to the respondents 1 and 3 and direct that they must serve rigorous imprisonment for two years in addition to the fine of Rs. 3,500 imposed by High Court, in case of default in payment of fine the respondents would suffer simple imprisonment for six months. On realization of the amounts of fine Rs. 6,000.00 would be paid to Appellant No. 2. *Mangal Singh vs. Kishan Singh*, AIR 2009 SC 1535 : 2008 (12) JT 582 : 2008 (16) SCR 505 : 2008 (15) Scale 33 : 2008 (9) SLT 564.

Incident occurred over boundary dispute when in heat of passion appellant fired two shots inflicting grievous injuries to complainant not on vital part of body and incidence occurred about 10 years back and appellant being 70 years of age punishment for long period not justified. *Held*. sentence reduced to 3 years due to protracted litigation. *Joginder Singh* v. *State of Punjab*, (1995) 2 CC Cases 230 (P&H).

As pointed out the manner in which the alleged incident is supposed to have taken place does not fit in with the injuries received by the complainant. The most glaring inconsistency is the story of the complainant's having held the blade of the knife, alleged to have been used in the commission of the offence, with both hands and thereby suffering incised injuries on his left palm. The injury report shows that the complainant did not have any incised injury or any other injury on his left palm and the injury to his right palm was not of an incised nature, but a bruise which could have been caused by a blunt instrument. Moreover, the knife, which was seized and was alleged to have been used for the commission of the offence, was never sent for forensic examination so as to connect it with the offence. Furthermore, the other sharp-cutting implements, which were also seized, were also not sent for such examination. Even the mat which had blood stains on it was not sent for such examination and it could, therefore, not be proved as to whether the blood stains thereon were of human or animal origin. Coupled with the above is the fact that on going to the hospital in the night for medical treatment, the complainant did not even disclose to the doctor as to how he had sustained the injuries. The doctor was, therefore, not at all aware of any such incident, as presented by the prosecution, having been committed. Coupled with the above is the fact of the delay in lodging the FIR after consultation with the local villagers. Therefore, chances of fabrication in the FIR cannot be ruled out. *Prabir Mondal and Anr. vs. State of West Bengal*, 2010 (1) Cri LJ 444 (SC).

Death sentence—Rarest of rare cases. The murders were not only cruel, brutal but were diabolic. The High Court has held that those who were guilty of rape and murder deserve death sentence, while those who were convicted for murder only were to be awarded life sentence. The High Court noted that the whole incident is extremely revolting, it shocks the collective conscience of the community and the aggravating circumstances have outweighed the mitigating circumstances in the case of accused persons 1, 2 and 4; but held that in the case of others it was to be altered to life sentence. The High Court itself noticed that five members of a family were brutally murdered, they were not known to the accused and there was no animosity towards them. Four of the witnesses were of tender age, they were defenseless and the attack was without any provocation. Some of them were so young that they could not resist any attack by the accused. A minor girl of about fifteen years was dragged in the open field, gang raped and done to death. There can be no doubt that the case at hand falls under the rarest of rare category. There was no reason to adopt a different yardstick for A2, A3 and A5. In fact, A3 was the main person. He assaulted PW. 1 and took the money from the deceased.

Above being the position, the appeal filed by the accused persons deserves dismissal, which we direct and the State's appeal deserves to be allowed. A2, A3 and A5 are also awarded death sentence. In essence all the six accused persons deserve death sentence. *Ankush Maruti Shinde vs. State of Maharashtra*, AIR 2009 SC 2609 : 2009 (6) SCC 667 : 2009 (6) JT 358 : 2009 (7) SCR 182 : 2009 (6) Scale 388 : 2009 (3) Supreme 760 : 2009 (4) SLT 470.

While saving a blow of axe it caused an incised wound on the neck. This supported by witness. As this was second incident after some hours no right of private defence accrues. Considering the gravity of offence the three years' R.I. awarded is on lower side and will not justify further reduction. Hence, confirmed. *Ghunsal* alias *Lalee* alias *Ram Singh v. State of M.P.*, 1995 Cr LR 203 (MP) : 2003(2) ALD (CRL) 902 : 2004(2) Cri R 332 : 2004(1) DMC 693 : 2004(1) Hindu LR 332.

Where accused killed three police men without premeditation and without any motive, an indiscriminate killing can be an aggravating factor but an offset by other mitigating circumstances award of capital punishment altered to life imprisonment with a fine of Rs. 1000/-. *Gyasuddin Khan* v. *State of Bihar*, 2005 (3) East Cr C 41 (SC) : AIR 2004 (SC) 210 : 2004(1) Crimes 90 : 2003(8) Supreme 499.

The accused a member of police force took law into his hand and in public place fired shot at his colleague. Severe punished was required but in view of the peculiar circumstances of case custodial sentence of 5 years was considered sufficient. *Vasant Vithu Jadhav* v. *State of Maharashtra*, 2004 Cr LJ 1786 : AIR 2004 (SC) 2678 : 2004(2) Crimes 5 : 2004(9) SCC 31 : 2004(2) Supreme 351.

In a case of grievous hurt caused by minor, it was held that though Court concluded that accused was a minor and incident took place on the spur of moment, no attempt was made to take into account provisions of West Bengal Children Act, 1959 and that the passing of sentence had no sanction of law and accordingly liable to be set aside. *Uttam Ghosh* v. *State of West Bengal*, 2004 Cr LJ 440 (Cal) : 2003(1) All Cri LR 399 : 2002(2) Cur Cri R 154.

Where the incident occured 7 years' back and the accused was only aged about 20 years at the time of incident having no enmity with the complainant, sentence of 5 years was ordered to 3 years R.I. already undergone by accused. *Pappu alias Chandrabhan* v. *State of MP*, 2004 Cr LJ 1180 (MP).

When the sentence of seven years RI was imposed by the trial Court and there was satisfactory reason for reducing sentence to less than one year by the appellate Court. The Supreme Court held that order of the appellate was liable to be set aside. *State of MP* v. *Sangram*, 2005 Cr LJ 4642 (SC) : AIR 2006 (SC) 48 : 2005(8) Scale 503 : 2005(7) Supreme 315.

Attempt to commit murder is a serious offence and, therefore, the reduction of sentence to custodial sentence of six months 23 days that was already undergone on the ground that accused were illiterate persons belonging to lower income group and were of 23 years of age was held not proper. *State of MP* v. *Saleem*, 2005 Cr LJ 3435 (SC) : 2005(5) SCC 554 : 2005 SCC (Cri) 1329 : 2005(4) Supreme 733.

Where the accused was 65 years old not keeping good health, sentence was reduced to a period of more than five years which he had already undergone. *Varriyappala Naidu* v. *State*, 2005 Cr LJ 1459 (AP).

Injuries inflicted on right side of chest of victim—Guilt was proved and appeal was pending since 1986. *Held*, sentence of imprisonment reduced to period already undergone for one year and 10 months. *Manoj* v. *State of Haryana*, (1995) 2 CC Cases 469 (P & H).

When axe was used to cause grievous injury, accused to be convicted under Section 326 and not under Section 325, I.P.C. *Ananda Moharana* v. *State*, 1996 Cri LJ 2654 (Ori).

Where incident occurred nine years back and parties were real brothers. Sentence of imprisonment reduced to period already undergone. *Rup Singh* v. *State of Punjab*, (1995) 2 CC Cases 496 (P & H).

Accused compromised with complainant and filed joint pursis. Accused a youngman being first offender and not hardened criminal. *Held*, though offence under Section 307 is not compoundable, sentence reduced to already undergone with payment of compensation of Rs. 7,500/- to complainant. *Modan* v. *State of Maharashtra*, 1995 Cr LJ 1419 (Bom).

In the case under Section 307, I.P.C., the High Court reduced the term of substantive punishment from 3 years to 3 months which amounted to mockery in the eyes of justice. The quantum of fine was however enhanced. Criticising the action, Supreme Court expressed fears that if pockets are fill, crime in the circumstances even for an offence prescribing life imprisonment can be committed. Sentence of trial court restored. 1985 Cr LJ 1361 (SC) : AIR 1985 SC 1130 : 1985 Cr LR (SC) 290 : (1995) 3 SCC 225 : 1985 SCC (Cri) 241.

Victim suffered multiple injuries with spear and *lathies by* assault. Conviction which was challenged in appeal. Hence, the assailants were known to victim and he had adequate opportunity to identify them. The medical report of injuries corroborated prosecution case. Hence, prosecution case proved beyond doubt. Conviction sustained with modification in sentence. *Thakur Ram* v. *State of U.P.*, 1995 All LJ 848 (All).

Offence was made under Section 307—Conviction was not challenged—Only prayed for reduction of sentence of 10 years imprisonment—Accused threw acid on face of victim which was disfigured. Hence, it was held that on facts and circumstances sentence reduced to 5 years imprisonment and fine enhanced to Rs. 20,000/- payable to injured. *Gopal* v. *State*, (1995) 1 RCD 131 (Raj).

Conviction and sentence under Section 307/34, I.P.C. hence an appeal was filed. Accused, a youngman, apprehended at spot alongwith robbed articles and country-made pistol—Evidence of prosecution-witnesses corroborated with evidence of complainant—Accused also fired shot from pistol during police-chase. Hence conviction justified—However, considering protracted litigation and young age of accused, sentence reduced to period of 1-½ years, imprisonment already undergone. *Mukhtar Singh Mukha* v. *State of Haryana*, (1995) 2 CC Cases 337 (P & H).

F.I.R. was delayed which was not explained. There was pistol shot injury—Injuries showed shot was from very close range and shot was alleged to be made from some distance—Medical evidence corroborated the case and parties compromised to live peacefully—Quantum of sentence was reduced. *Sukhminder Singh* v. *State of Punjab*, (1994) 2 CC Cases 190 (P & H).

Attempt to murder and conviction under Section 307, I.P.C., and 307/34, I.P.C. of appellants and sentenced to five years R.I. respectively which was challenged in appeal. It was held that the appellants have been convicted and sentenced for non-compoundable offence under Section 307, I.P.C. for five years R.I. He has already undergone some imprisonment. In view of facts and circumstances of the case relating to compromise and betterment of relations between parties it is just and proper that imprisonment already undergone will meet ends of justice. *Inam* v. *State of U.P.*, 1994 (24) ALR 362 (All).

Where offence under Section 307 fully proved—As regard quantum of sentence, same reduced from 7 years R.I. to 4 'years' R.I. considering his age of 25 years, being of scheduled caste and being enraged at spur of moment. *Sukha s/o Ram Lal* v. *State* of *Rajasthan*, 1995 Cr LJ 554 (Raj).

Conviction under Section 307 and sentenced to R.I. for 4 years—Challenged in revision petition. Hence, the appellant repeatedly gave two blows on front of the neck and on left upper part of the chest of complainant. Hence, an inference can reasonably be drawn that appellant had the intention and requisite knowledge to commit murder which is sufficient for charge under Section 307, I.P.C. No interference warranted. *Nageshwar Shah* v. *State of Punjab*, (1994) 1 Recent Cr R 327 (P & H).

Tried and convicted on a charge for offence punishable under Section 307, I.P.C., which he challenged in appeal. The recovery of spear on the disclosure of the accused is unacceptable as the accused would not keep concealed spear in his hut at the risk of creating evidence. The prosecution has not led any evidence to prove that accused was sole occupant of that hut. Hence, there is no option but to accept the appeal and acquit the appellant of charge under Section 307, I.P.C. *Resham Singh* v. *State of Punjab*, (1994) 2 CC Cases 529 (P & H).

Charges framed under Section 307, I.P.C., was challenged in revision. Hence, the tractor was driven negligently which dashed against bicycle of injured who received grievous injuries. Hence, charges should have been framed under Section 338, I.P.C., instead of under Section 307, I.P.C. impugned order set aside. *Arun Kumar* v. *State of M.P.*, (1994) 2 Crimes 164 (MP).

When accused fired is hot at victim friend lies at spur of moment infiring his leg with no intention to kill and be suffered long detention as under-trial accused under Court-martial proceedings, sentence of imprisonment reduced to period already undergone. *Union of India* v. *Anand Singh Bisht*, 1996 Cri LJ 4435 (SC) ; *See* also *Ashok Kalyan Dass* v. *State of U.P.*, 2005 Cr LJ 1009 (All) : 2005 All LJ 130 : 2004(50) All Cri C 373 : 2004(3) All Cri R 2996.

15. Procedure.—Cognizable—Warrant—Not bailable—Not compou-ndable—Triable by Court of Session.

16. Charge.—I (*name and office of Sessions Judge, etc.*) here by charge you (*name of the accused*) as follows :—

That you, on or about the.............. day of.............. at.............. did an act, to wit..............with such intention (*or* knowledge), and under such circumstances, that if by that you had caused the death of A, B, you would have been guilty of murder under Section 302 (and that you thereby caused hurt to the said A, B, by the said act) and thereby committed an offence under Section 307 of the Indian Penal Code, and within my cognizance.

And I hereby direct you to be tried on the said charge.

The charge should contain previous accusation. The charge under one section and the conviction under another was held to be bad. AIR 1960 MP 11 : 1960 Cr LJ 79 : 1958 Jab LJ 634.

Where the accused with intention to cause death of deceased, gave three axe blows on him while co accused caused an injury from blunt side of axe and no material was on record for framing a charge under Section 307, IPC against co-accused. Charge framed under Section 307 against co-accused was set aside. *Prabhu Dayal* v. *State of MP*, 2004 Cr LJ 2990 (MP) : 2004(1) MPHT 30 : 2004(2) MPLJ 81.

Specific charges—Non-mentioning of specific Section 149 in charge—Effect of. A careful reading of Charge No. 4 and Charge No. 5 leaves no manner of doubt, since the transaction mentioned in Charge No. 1 has been made integral part thereof, that all the necessary ingredients of Sec. 149 IPC are implicit therein except mentioning of Sec. 149 IPC specifically. The particulars stated in Charge Nos. 4 and 5 are reasonably sufficient to give the appellants adequate notice of Sec. 149 IPC although not specifically mentioned. Is non-mentioning of Sec. 149 in Charge No. 4 and Charge No. 5 a fundamental defect of an incurable illegality that may warrant setting aside the conviction and sentence of the appellants? We do not think so. Non-framing of a charge under Sec. 149 IPC, on the face of the charges framed against the appellants would not vitiate their conviction; more so when the accused have failed to show any prejudice in this regard. The present case is a case where there is mere omission to mention Sec.

149 in Charge Nos. 4 and 5 which at the highest may be considered as an irregularity and since the appellants have failed to show any prejudice, their conviction and sentence is not at all affected. Tenor of cross-examination of PW-1 and PW-3 by the defence also rules out any prejudice to them. The offence, in the established facts and circumstances of the case, under Sec. 302 read with Sec. 149 IPC is implicit and applying the dictum laid down by the Constitution Bench of this Court in Willie (William) Slaney, the omission to mention Sec. 149 IPC specifically in the Charge Nos. 4 and 5 cannot affect their conviction. In no way their conviction is rendered bad as the appellants had assembled together armed with axes and eathapululu (sickle) and were parties to the assault on D-1 and D-2 and others. In a situation such as this it was not obligatory upon the prosecution to prove which specific overt act was done by which of the accused. *Anna Reddy Sambasiva Reddy vs. State of Andhra Pradesh*, AIR 2009 SC 2661 : 2009 (3) Crimes 17 (SC) : 2009 (12) SCC 546 : 2009 (5) JT 617 (SC) : 2009 (6) SCR 755 : 2009 (6) Scale 223 : 2009 (4) Supreme 506.

17. Probation.—The legislature has prescribed life imprisonment as maximum punishment for the offence u/S. 307 of IPC. Hence as per provisions relating to Probation of Offenders Act such benefit could not be extended to accused persons as they have been found guilty u/S. 307/34 of IPC. Even otherwise, the alleged offence was committed by the accused against State and the manner in which it was committed in open market, they cannot be extended such benefit otherwise it will give a wrong message to the society at large. *Ramesh and others v. State of M.P.*, 2006 CriLJ 3815 (MP).

Accused caused injury by firing gun with intention to commit murder. Offence under Sections 307/34, I.P.C., made out. There were no extenuating circumstances. Hence, benefit of First Offenders Probation Act cannot be granted. *Mohar Singh* v. *State of U.P.*, 1995 Cr LJ 649 (Alld).

Conviction under Section 307—No injury received from gun fire—Appellant being under intoxication—No intention or knowledge to cause death was there neither motive nor previous enmity. Hence conviction converted to Section 336. Appellant being aged 54 years and Government servant and only person to maintain his family, probation of good conduct allowed to him. *Divakar Mishra v. State of M.P.*, 1995 Cr LR 184 (MP).

No offence under Section 307 or Sections 307/34, I.P.C., is made out against accused-respondents who were convicted only under Sections 452 and 323/34, I.P.C. Hence, taking into consideration the age antecedents the fact accused had already undergone imprisonment for more than 2-1/2 years and over all circumstance the benefit of probation is granted. *Bhan Raj* v. *Rajesh*, (1995) 1 CC Cases 336 (P & H).

18. Conviction.—It was a broad day light incident. The eye-witness account inspires confidence and must be accepted as true. Evidence sufficiently clinched the guilt of the accused. Hence, no illegality in awarding conviction. *Ganpal* v. *State of U.P.*, 1995 (32) ACC 280 (All).

Because of treatment of husband-wife committed suicide—Conviction under Section 498-A, I.P.C., which was challenged in appeal—Prosecution case proved by dying declaration, statement to police and evidence of deceased's mother and brother. Medical evidence proved that death was due to burns as a result of pouring kerosene and setting fire to herself. Hence conviction for offence under Sections 306 and 498-A.

I.P.C. confirmed. *Kishan Bahadur* v. *State of A.P.*, (1994) 2 ALT 9 (NRC) : (1994) 1 ALT (Cr) 620 (AP).

Accused tried for attempting to commit murder of his real brother—Conviction under Section 307, I.P.C., and sentenced to R.I. for 5 years which was challenged in appeal. It was held that the court has to *see* is whether the act irrespective of its result was done with intention or knowledge and under circumstances mentioned in Section 307, I.P.C. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law if there is present an intent coupled with some overt act in execution thereof. Hence, conviction confirmed. *Sukhwinder Singh* v. *State of Himachal Pradesh*, (1994) 2 Sim LC 245 (AP).

Offence held under Section 307—Injury caused by dangerous weapon—The upper and middle region of the abdomen injured—offence under Section 307, I.P.C., made out. Conviction was held fully justified. *Arjun Thakur* v. *State*, 1994 Cri 3526 (1994) : CLR 234 (Ori).

Conviction under Section 307 is not permissible in absence of medical evidence. *Mala Yadav* v. *State of Bihar*, (1994) 1 East Cr C 299 : 1 BLJ 343 (Pat).

Where there was culpable homicide—It will be murder unless it can be brought within mischief of exceptions or ousted from all explanations in Section 302, I.P.C.—Evidence not sufficient to come to conclusion of guilt. Conviction cannot be held sustained. *Pati Ram* v. *State of U.P.*, (1994) 31 All Cr C 605 (All).

Belated F.I.R. lodged in the case was satisfactorily explained. Practising advocates were not interested witnesses who had corroborated evidence of the complainant. On the other hand evidence of D.W. 1 was unreliable. Yet untenable. Conviction upheld. (1986) 2 Crimes 553 (MP).

There was dispute over irrigation of fields. *Panchayat* called. Hot words exchange took place. Accused persons attacked other party including *panch*. Severe injuries caused to them. Accused persons reached spot with pre-planning of attack and assault and thus proved to be aggressors. It was *held*, that no right of private defence available. Injuries sustained by accused persons insignificant. Prosecution-case proved beyond doubt—*Held*, conviction upheld. *Pyare* v. *State of U.P.*, 1995 Cr LJ 2343 (All).

On the day of the occurrence P.W. 17 had found multiple punctured wounds with about 17 entry wounds in the middle part of the hand from the right side blow. The X-rays showed fracture of the right side unla. An attempt to murder, has therefore, to be read ultimate. *M.P. Khachai v. State of Gujarat*, 1996 Cr LJ 2465 (SC).

In absence of evidence that recovered knife only caused said injury, conviction not justified. Accused acquitted. *Rajbir* v. *State of Haryana*, (1995) 3 CC Cases 86 (P & H).

Complainant wife alleging that accused husband regularly beat her and once attempted to kill her and fact of cruelty proved but intention to kill not proved and, therefore, accused convicted for offence of cruelty only. *State* v. *Regulagadda Anandarao*, 1996 Cri LJ 4503 (AP).

Where victim sustained 11 injuries inflicted by four accused persons, which were not serious in nature then conviction of accused under Section 307 r/w Section 34 of IPC just and proper. *Girija Shankar* v. *State of UP*, AIR 2004 SC 1808 : 2004(3) SCC 793 2004(1) Supreme 876 : 2004 Cr LJ 1388 : 2004(1) Crimes 337 (SC).

It is sufficient to justify a conviction under Section 307, if there is present an intent coupled with some overt act in execution thereof and as such it is not essential that bodily injury capable of causing death should have been inflicted. *R.Prakash* v. *State of Karnataka*, AIR 2004 SC 1812 : 2004 Cr LJ 1391 (SC) : 2004(2) Supreme 78 : 2004(2) Crimes 72 (SC) : 2004(1) JCC 414.

In a case the victim was chased and assaulted but instead of original intended victim some-body else was also assaulted and killed. It was held that all will be held guilty under Section 302/149 but accused assaulting PW1 would also be liable under Section 307. Where accused caused injuries in an attempt to commit murder of a lady whose evidence was quite cogent and reliable the conviction of accused was upheld. *Ratan Lal* v. *State*, 2003 Cr LJ 4402 (Uttra) : 2003(2) UC 1351 UTR.

Where Courts below have concurrently found evidence of injured eye-witnesses that accused/appellant inflicted knife stab injury in abdomen of victims to be acceptable therefore conviction and sentence imposed warrants no interference. *Nasir Sikander Shaikh* v. *State of Maharashtra*, 2005 (2) Crimes 218 (SC) : AIR 2005 (SC) 2533 : 2005 Cr LJ 2621 : 2005(2) Crimes 218 (SC) : 2005(4) Supreme 49.

Where evidence of complainant, injured and eye-witnesses that accused shot complainant on his right leg was corroborated by medical evidence and gun shot injury found to be fatal, the conviction of accused under Section 307, IPC just and proper. *Bipin Bihari* v. *State of MP*, 2005 Cr LJ 2048 (MP) : 2005(1) MPHT 285 : 2005(2) MPLJ 514.

Where accused assaulted victim with knife on his vital part resulting in serious injury in nature therefore conviction warrants no interference. *Hari Mohan Mandal* v. *State of Jharkhand*, 2005 (3) East Cr C 57 (SC) : AIR 2004 (SC) 3687 : 2004(1) Crimes 434 : 2004(3) Scale 466 : 2004(2) Supreme 460.

The evidence of victim that the accused dealt blow by knife on his belly while he was sleeping in house of informant was corroborated by other prosecution witness. Doctor examining him proved that injury sustained by him was grievous in nature possibly caused by sharp cutting weapon, conviction held proper. *Sarjag Turi* v. *State*, 2003 Cr LJ 2270 (Orissa) : 2003(95) Cut LT 477.

19. Conviction and sentence.—When both Courts below have concurrently found prosecution's evidence regarding involvement of accused in incident to be acceptable then in absence of any material to probablise defence case, concurrent findings required no interference in special leave appeal. *Nasir Sikandar Shat* v. *State of Maharashtra*, 2005 (3) East Cr C 1 (SC) : 2005 Cr LJ 2621 (SC) : 2005(2) Crimes 218 : 2005(10) SCC 585 : 2005(4) Supreme 49.

Conviction under Secs. 307/110 instead of under Secs. 302/109—Validity. The High Court on appeal held that so far as conviction of Appellant No. 1 is concerned, he was the person who gave the order and after that a fatal blow was inflicted by Appellant No. 2 on the deceased. He has been rightly convicted under Sec. 302 read with Sec. 109 IPC and so far as Appellant No. 2 is concerned he was convicted under Sec. 302 IPC.

PW-4 is the informant *i.e.* wife of the deceased and PW-3 is the father of the deceased. From the evidence of PWs. 3 and 4 it is clear that there were physical fights abuses. At the time of abuses except PWs. 3 and 4 nobody else was there. The other persons came there just to stop the fight hearing noise on the road. On a close reading of the evidence is seen that the accused persons were armed. There was really no direct exhortation to kill but the same was to the effect that the deceased and others should not be permitted to run away and should be attacked. On hearing the exhortation accused No. 2 pierced the spear to the chest of the deceased. The evidence of PWs. 3 and 4 are different so as to the manner of exhortation. One says "Maro Sale Chintamani Ko" while the other said "Maro Sale Ko Jaan Se". The words "Jaan Se" appears to be entered later in the records. *Jaleshwar Singh vs. State of Bihar*, 2009 CrLJ 3995 : 2009 (2) Crimes 383 (SC) : 2009 (7) JT 572 : 2009 (7) Scale 219 : 2009 (8) SCR 130.

There was a dispute between wife of injured and sister of accused in which injured was stabbed by accused due to which he suffered grievous injuries as was proved by documentary evidence as well as evidence of wife of informant. However, since independent witness was not produced and weapon of offence was not produced, the conviction was upheld but sentence was reduced to the period already undergone. *Muna Jani* v. *State*, 2003 Cr LJ 3482 (Orissa).

On perusal of the statement of the complainant though he had not stated anything against the co-accused but by his statement for the involvement of the appellant/accused is found to be proved that he is the person who armed with a country-made pistol tried to cause injury to the complainant and also commit robbery by forcibly taken away the motor-cycle belonging to him. Moreover, the prosecution as discussed herein above also proved the seizure of the looted property, the motor-cycle from the possession of the appellant/accused and in such circumstances offence punishable under Section 307 of IPC and 394 read with 397 of the IPC is fully proved by the prosecution against the appellant.

In such circumstances, for the offence of robbery, the minimum sentence provided with the aid of Section 397 of IPC is of seven years and no grounds are available for any reduction of the aforesaid sentence. *Hariballabh K. Rawat vs. State of M.P.*, 2010 (2) CrLJ 2309 (Gwalior).

The accused had attempted to commit murder of own relative while living in adjoining house. They scuffled with each other and inflicted injuries to each other but how quarrel took place was not clearly explained by the prosecution. The accused pleaded right of private defence. It was held that in case where right of private defence is pleaded blows given by accused could not be measured in golden scales. Hence acquittal of accused was justified. *State* v. *Badri Prasad*, 2003 Cr LJ 4364 (MP) : 2003(2) MPHT 329.

Where in a case, the accused and the victim who had gone to cinema and were coming back by bicycle, suddenly got down form the bicycle, inflicted injuries on his back and abdomen and pressed his neck. It was held that accused in the circumstances was liable to be convicted under Section 307, IPC. The Court, however, considering the background facts and peculiar features of the case reduced the sentence of 10 years RI to custodial sentence of 5 years R.I. *Bappa alias Babu* v. *State of Maharashtra*, 2004 Cr LJ 3877 : AIR 2004 SC 4119 : 2004(3) Crimes 214 (SC) : 2004(6) SCC 485 : 2004 SCC (Cri) 1794 : 2004(5) Supreme 740

According to medical evidence, the accused had caused injuries to the victim which were sufficient in the ordinary course of nature to cause the death. The conviction of accused under Section 307, IPC was held proper. *Vinod Kumar* v. *State*, 2003 Cr LJ (NOC) 189 : 2002 All LJ 2464 : 2002 (45) All Cri C 602 : 2002 (3) All Cri R 2129 : 2002 (4) Crimes 156.

In an Allahabad case, where motive for crime was established from statements of informant and victim and nine injuries inflicted by accused to victim clearly indicated his intention, the accused was held liable to be convicted under Section 307. *State of UP* v. *Bhagirath*, 2004 Cr LJ 2405 : 2004 All LJ 1364 : 2004(1) All Cri R 545.

The accused, a notorious goose stabbed the victim who was chit-chatting with friends at a vegetable shop. No one from locality came forward to give evidence. Evidence of friends of victim was trustworthy and the conviction of accused under Section 307, IPC was held proper but keeping in mind that injuries inflicted were simple in nature, sentence of 10 years RI was reduced to 7 years RI. *Aravdily Shankar* v. *State of AP*, 2004 Cr LJ 4456 (AP) : 2004(2) ALD (Crl) : 2004(2) Andh LT (Cr) AP 629.

Where grievous injuries were inflicted on vital parts of body of the complainant by lethal weapons causing fracture of skull and all the witness had stated that accused persons attacked with deadly weapons with intention to commit murder. It was held that discharge of accused on the ground that the doctor had not opined that the injuries were sufficient in the ordinary course of nature to cause death was erroneous and that the accused was liable to be convicted of the offence. *Sechdeo* v. *State of Rajasthan*, 2004 Cr LJ (NOC) 316 (Raj) : 2004(1) Raj Cri C 125 : 2003(3) Raj LR 790 : 2004(1) WLC 68.

The accused was alleged to have inflicted bodily injury capable of causing death but evidence showed that accused had caused one injury on vital part of body and another on non-vital part of body. Injuries were caused despite the interference by five person. It was held that the accused was liable to be convicted under Section 307. *R. Prakash* v. *State of Karnataka*, 2004 Cr LJ 1391 : AIR 2004 SC 1812 : 2004(2) Crimes 72 : 2004(9) SCC 27 : 2004 SCC (Cri) 1408 : 2004(2) Supreme 78.

In a M.P. case, the timely intervention by injured witnesses saved the life of victim, otherwise the accused had a clear intention to kill him. His conviction under Section 307, IPC was held proper but sentence of life imprisonment was reduced to 4 years RI. *Amir* v. *State*, 2004 Cr LJ 3686 (MP) : 2004 All LT 1533 : 2004(48) All Cr C 839 : 2004(1) All Cri R 877.

The accused allegedly hurled vulgar abuses against ladies of house of prosecution witness. He then wielded *Aruvaal*, a sharp-edged weapon and armed at the neck of prosecution witness. A fracture injury was also caused to the other prosecution witnesses. It was held that the conviction of accused under Section 307 was proper. *Shankar alias Mysooram* v. *State*, 2004 Cr LJ (NOC) 353 (Mad).

The accused was nursing bad blood due to encroachment on his land by the complainant. The accused went to the house of complainant and the complainant seeing the accused started running. Accused fired at him with country made pistol on his back. It was held that conviction of accused under Section 307 was proper. *Babu Ram* v. *State of UP*, 2005 Cr LJ 165 (All) : 2004 All LJ 3665 : 2004(50) All Cri C 93 : 2004(3) All Cri C 93.

There was no evidence on record that the accused had received any injury.

Moreover there was no suggestion made to the prosecution witnesses that they had assaulted the accused as a result of which he had suffered any injury. The Court held that the conviction of accused was proper. *Nasir Sikander Sheikh* v. *State of Maharashtra*, 2005 Cr LJ 2621 (SC) : AIR 2005 (SC) 2533 : 2005(10) SCC 858 : 2005(5) Scale 81 : 2005(2) Crimes 218 : 2005(4) Supreme 49.

Conviction under Section 307, IPC on basis of statement recorded either under Sections 161 and 164, Cr PC, in absence of proper identification of accused not proper. *Bishnu* v. *State*, 1996 Cri LJ 3572 (Del).

The charge under Section 307/149, I.P.C., in about firing shots on the members of police force in the prosecution of the aforesaid common object. It is astonishing that there is allegation of firing shots by the accused in the prosecution of the aforesaid common object, but prosecution side (Police and Public witnesses) did not receive even a scratch on their bodies by the alleged firing in the prosecution of the common object and the accused—Appellant is said to have himself receive fire-arm injuries by the fires from due side of the police.

In the view of the above discussion, this criminal appeal ought to be allowed and the accused—Appellant deserves to be acquitted. *Ram Bharosey v. State*, 1996 Cr LJ 2023 (All).

Where there was *marpit* and both sides were injured—Conviction and sentence of appellants was challenged in appeal. Accused-side has two person as victims and has sustained 22 injuries one of whom died whereas prosecution has 3 victims none of whom died and only one of them was examined as witness. Hence, defence version was more than probable. Appellant acquitted and appeal allowed. *Bagoo Ram* v. *State*, 1995 UP Cr R 17 (All).

When investigating officer not examined and injury reports admitted at appellate stage but doctor not examined, conviction not sustainable. *Dusadan Bhoi* v. *State of Orissa*, 1996 Cri LJ 3806 (Ori).

Death sentence—Imposition of—When valid. Murder of six members of a family including helpless women and children having been committed in a brutal, diabolic and bristly manner and the crime being one which is enormous in proportion which shocks the conscious of law, the death sentence as awarded in respect of accused Sattan and Guddu was the appropriate sentence and the High Court ought not to have altered it.

Before dealing with the position in law as highlighted by this Court relating to rarest of rare categories where death sentence can be awarded, submissions made by learned *Amicus Curiae* to show existence of mitigating circumstances need to be noted. It is stated by learned *Amicus Curiae* that motive is not clearly established. This is contrary to the conclusions of the High Court. In fact, the High Court has treated that an entire family was eliminated and if the evidence of witness is considered reliable and trustworthy, the inadequacy and insufficiency of motive pales into insignificance and recedes behind the curtain. So far as the specific overt acts are concerned, it is to be noted that apart from the accused persons who faced trial, three of these persons, namely, absconding accused were described as accused. Six persons were killed. It is not expected that a lady witnessing such a massacre would note the details. *State of Uttar Pradesh vs. Sattan*, 2009 (4) SCC 736 : 2009 (2) Crimes 121 (SC) : 2009 (4) JT 347 : 2009 (3) SCR 643 : 2009 (3) Scale 394 : 2009 (2) Supreme 465 : 2009 (2) SLT 641.

Accused gave fist blow on stomach to injured. No grievous injury was found. The knowledge of causing injuries capable of causing death of victim cannot be inferred. Intention to cause death was not there. Hence conviction under Section 307, I.P.C. set aside. *Pawan Kumar* v. *State of Rajasthan*, 1995 Cr LR 261 (Raj).

In absence of any injury on vital part of body or endangering life, petitioner liable to be convicted under Section 326, IPC. *Tamilselvane* v. *U.T. of Pondicherry*, 1997 (1) Crimes 153 (Mad).

When there is an ample believable evidence about murderous occurrence minor discrepancy in FIR can not adversely affect the conviction. *State of Rajasthan* v. *Anr. @ Hanif and others*, 1997 (2) East Cr C 191 (SC).

Where the complicity of accused in the offences charged is proved by two eye-witnesses the fact that informant turned hostile would not adversely affect the conviction. *Parmeshwar Prasad Mehta* v. *State of Bihar*, 1997 (2) East Cr C 267 (Pat).

See also *Ashok Kalyan Dass* v. *State of U.P.*, 2005 Cr LJ 1009 (All) : 2005 All LJ 130 : 2004(50) All Cri C 373 : 2004(3) All Cri R 2996 ; *Varri Appalanaidu* v. *State*, 2005 Cr LJ 1459 (AP).

20. Acquittal.—Conviction for offence of attempt to murder—Injury inflicted by axe exposing lung and dangerous to life—Injury below neck and above shoulder on occipital protuberance—Seeing dimension of injury being 2-1/2 x 1-1/2 x 1-1/2, it could not be possible that such injury at such place would make lung visible—Medical report not corroborating prosecution version. Hence, prosecution case not established beyond reasonable doubt—Appeal allowed and conviction set aside. *Charna* v. *State of M.P.*, 1995 Cr LR 203 (MP).

Conviction on basis of *identification for the first time in* Court. None of the prosecution witness knew any of the accused-appellants. However, in of the FIR, not only their names but also their parentage and complete addresses were stated. It is, however, not clear as to whether the name of the accused Hemu was recorded in the said FIR or not. the translated version thereof has been placed before us.

Appellants herein admittedly were not known to the police officers. Only Sattey was known to them. Anoop Singh in his deposition categorically admitted that he did not know the assailants previously. After their arrest, no identification parade test was held. Although the first informant as also witnesses in their depositions proceeded on the basis that all the accused had been coming in a Maruti Car and they were heavily armed, no arm was recovered from any of them.

How their names could be taken is beyond anybody's comprehension. Even two persons, namely, Lilu and Vinod were called by their first names. How the Officer In-charge even could ascertain their actual names has not been disclosed. He admitted that apart from Sattey, he had not seen any accused persons on previous occasion. Why despite the same, identification parade was not held has not been explained. Appellants were identified only in Court.

It was contend that identification for the first time in Court is permissible in law. There cannot be any dispute so far as the aforementioned proposition of law is concerned. The said principle, however, should be applied having regard to the facts and circumstances of each case. Courts, as is well known, ordinarily, do not give much credence to identification made in the Court for the first time and that too after a long time.

Witnesses in their depositions admitted that they had not been knowing the accused from before the despite so, no test identification parade was held. The accused persons having been identified for the first time in the Court, it is difficult for any Court to rely upon the same and that too after such a long time.

As indicated hereinbefore, appellants were not known to the police officers; they were not involved in any other case. In fact, so far as the Hemu is concerned, no case at the relevant time was pending against him. Only because Sattey allegedly called them by their names, which appears to be wholly unlikely, they could not have been identified particularly in view of the fact that the incident had taken place in an isolated area and that too on a dark night.

Sattey furthermore could not have been instrumental in murdering Lasker Singh. Lasker Singh died of a firearm injury shot from a service revolver, *i.e.*, at the hands of the police party only. Such a revolver, thus, was not and could not have been used by any of the accused persons. *Hem Singh vs. State of Haryana*, 2009 (6) SCC 748 : 2009 (7) JT 433 : 2009 (6) Scale 784 : 2009 (7) SCR 888 : 2009 (4) Supreme 338 : 2010 (1) SLT 126.

Appeal against acquittal—F.I.R. was delayed and no proper explanation. No motive established and first aid was also not given—Acquittal was fully justified. *State of U.P.* v. *Udalbhan Singh*, 1994 LIC 248 (All).

There cannot be any attempt to murder in absence of intention or knowledge of accused respondent. It is settled law that mere fact that a gun had been used by accused for causing injuries will not necessarily prove the offence of attempt to murder and there can be no presumption that the accused intended to cause death of victim merely because he used firearms to cause him hurt. The intention of accused has committed by him or from other surrounding circumstances. In instant case no case, under Section 307, I.P.C., is made out against accused. Petition liable to be dismissed. *Surjan Singh. v. Suraj Pal*, (1994) CC Cases 348 (P & H).

Conviction under Section 307—Appeal—Case of free fight—Contradictions in statements regarding site of assault—Complainant claimed to be unarmed. But accused sustained grievous injuries—Claim falsified and injuries on complainant not fatal as opined by doctor. Prosecution case doubtful. Hence, conviction was held non-sustainable. *Sher Gir v. State of Punjab*, 1994 Cri LJ 38 (P & H).

Suppression of genesis of evidence—Discrepancy and inconsistency. The discrepancies coming on record in the evidence of witnesses in no circumstances can be termed to be minors in nature which in our view, are vital for disbelieving and discrediting the evidence of the eye-witnesses. The High Court discarded the important pieces of evidence on the basis of surmises and conjectures. On the day and time of the incident none of the eye-witness including injured witnesses had seen the appellant travelling on Bus. It is their evidence testimony that there were some more persons present at the bus stand, who took the luggage of the appellant after the same was unloaded from the rooftop of the bus. It has come in the evidence of these witnesses that one person hit PW-Laxman Dass. The Investigating Officer has not cared to find out the identity of those persons who were accompanying the appellant on the scene of occurrence and took his luggage or out of those persons who hit PW-Laxman Dass with a stone. It appears that the prosecution has suppressed the genesis of the evidence.

It is the evidence of Fire Arm Expert, that he examined rifle No. 243 of 302 bore which was deposited with the Scientific Branch of the Forensic Science Laboratory by Constable Ram Chhabile. It is clear from the evidence of the Ballistic Expert that the rifle of, 302 bore was sent to him for scientific analysis and not rifle of 315 bore which allegedly was used by the appellant at the time of commission of the offence and which later on was handed over to H.C. Sukhram Singh, who sealed the same in the Police Station. This discrepancy and inconsistency in regard to the use and recovery of the weapon of offence from the possession of the appellant is very vital to discard the truthfulness of the prosecution case. The prosecution has failed to prove that the same weapon of offence was sent to the Ballistic Expert which allegedly was handed over by PW-Vimal Kumar Tiwari or Shambhu Dayal Chaurasia to Head Constable in the Police Station. The contentions of the learned Counsel appearing for the State that such type of minor discrepancy has to be ignored from consideration cannot be accepted.

It is the case of the prosecution that single bullet was fired by the appellant from rifle of 315 bore which caused injuries to four persons.

Witness Tiwari deposed that on the day of incident the appellant fired one single bullet shot, which first hit Prahlad Babu and then Dhanna Lal and the bullet came out of the body of Dhanna Lal and in the process hit two other persons whom he did not know. It has come in his evidence that he could not tell whether all the injured persons were standing in a queue when they received bullet shot.

A Fire Arms Expert examined rifle and he also scientifically examined three live cartridges and one missed fire round. It is his opinion that two pieces of metal could have been fired from above rifle. He placed on record copy of the test report. In cross-examination this witness stated that he could not definitely point out whether pieces of metals *i.e.* EB2 and EB3 were the pieces of same bullet which was fired from same rifle. It is his opinion that rifle was of .302 bore and not of .315 bore. He also categorically stated that one bullet could cause only one entry wound to a person. *Mahendra Pratap Singh vs. State of Uttar Pradesh*, 2009 (11) SCC 334 : 2009 (1) Crimes 424 : 2009 (3) JT 120 : 2009 (2) SCR 1033 : 2009 (3) Scale 122 : 2009 (2) Supreme 175 : 2009 (2) SLT 520 : 2009 (2) JCC 1131.

Where plea of self defence of accused was presented by alleging that he was attacked by complainant party, it was appearing to be true in the absence of explanation from prosecution about injuries sustained by accused. Besides this, there were also medical papers of complainant in primary health centre where he had gone for treatment but there was not mentioned the names of assailant, though it was medico legal case, yet conviction of accused was liable to be set aside. *Rahmat* v. *State of H.P.*, 1997 Cri LJ 764.

Where genesis of incident averred by prosecution was not established by cogent and convincing evidence then adverse inference has to be drawn against authenticity of prosecution case. *Surendra Singh* v. *State of Bihar*, 2005 Cr LJ NOC 52 (Jhar) : AIR 2005 Jhar HCR 98.

Where there were inconsistencies in version of victim and witnesses, the conviction was set aside. *Ishwar Singh* v. *State*, 2004 Cr LJ 2774 (MP).

Where injuries caused by accused on eye-witness with sword were simple and not on vital part of body then in absence of any allegation that accused intended to assault him with a view to kill him, conviction of accused under Section 307, IPC not sustainable. *Govinda* v. *State of Orissa*, 2005 Cr LJ NOC 43 (Ori) : 2004(29) OCR 71.

Where the case against accused was based on sole testimony of injured and his evidence was afflicted by material contradictions and inherent infirmities and since prosecution, alleging motive of previous enmity failed to prove same, conviction was held not sustainable. *Shree Rai* v. *State of Bihar*, 2005 (2) Crimes 504 (Pat).

Where the prosecution failed to connect the accused with alleged offence, conviction was held not proper. *Bijay Singh* v. *State of Jharkhand*, 2004 Cr LJ (NOC) 223 (Jhar) : AIR 2004 Jhar HCR 2252 : 2003(3) East Cri C 530.

The injuries caused by *kassi* were not sufficient to cause the death and accused did not cause further injuries after the deceased had fallen down. It was held that there was no intention or motive to kill and conviction of accused under Section 307 was not proper. However conviction under Section 324/326 was held proper. *Raju* v. *State*, 2002 Cr LJ 1720 (Raj).

It was alleged that the accused persons armed with *lathis* and *farsa* inflicted injuries to complainant on his hand, head and other parts of the body. There were contradictions in the statement of the eye-witness from about the fact that which injury was caused at which place by which accused. There were material omissions in the testimony of eye-witnesses. The presence of the mother, wife and the brother of the complainant at the place of incident was highly unnatural. The incident had taken place in the field outside the village. Acquittal of accused persons was held proper. *State of MP* v. *Govindsingh*, 2005 Cr LJ 3421 (MP) : 2005(3) MPLJ 462 (MP).

Absence of explanation for delay in forwarding FIR to Magistrate and previous enmity and allegation of accused that their names in FIR afterwards, entitle accused to benefit of doubt. *Chhotu* v. *State of Haryana*, 1996 Cri LJ 4164 (SC) : 1996(7) JT 346 : 1996(6) Scale 80 : 1996(6) Supreme 380 : 1996(3) Crimes 178 (SC).

Conviction under Section 307, I.P.C., which was challenged in appeal. It was held that the testimony of Doctor, P.W. 12, was not trustworthy as he mentioned that injury was dangerous without examining the patient. Hence, accused entitled to benefit of doubt. *Marnu Lal* v. *State*, 1995 JCC 63 (Del).

After the infliction of the injury, he was unable to raise his voice, in those circumstances, it is difficult to appreciate as to how others were attracted to the scene, and they been so attracted, they could have at least, given the number of assailants and if possible, their names too, for they were no strangers but co-villagers of theirs. The identity of the assailants, thus the victim was definitely in a position to go about and he could have made signs and gestures, it not in writing to convey as to who was his actual assailant. Thus, in these circumstances, when there was delay hesitation in conveying to the investigation the names of the appellants, and the investigation took on its own to catentify appellants, it becomes difficult to maintain their conviction. *Chandrabhusan* v. *State of Maharashtra*, AIR 1995 SC 2406 at 2407 : 1994(5) SCC 479 : 1994(3) Scale 176 : 1994(4) SLR 464.

Both the sides received injuries and there was F.I.R. from both the side. It could not be established that appellants were aggressors. The testimony of witnesses are not helpful in finding out origin of the incident. Hence the appellants are acquitted of charges. *Bagoo Ram v. State*, (1994) 31 ACC 767 (All).

Now as far as the finding under Section 307, I.P.C. is concerned, it appears that there being three different versions appearing in three different statement made by victim while she was admitted in the hospital, the Additional Sessions Judge felt that it was not possible to rely on her statement made by her in the Court, corroborated by her statement made before the Special Judicial Magistrate that she was tried to be burnt by her husband the Original Accused No. 1. There is one significant fact which needs to be taken into consideration in respect of that. The first version of Sunita was that she had accidentally caught fire due to her *saree palloo* falling on the gas stove. The second version was that she had tried to burn herself due to ill-treatment metted out to her by her husband, the original accused No. 1, as well as her-in-laws and that she had tried to say that it was accidental because of the threats given by the original accused No. 1 *i.e.*, her husband. The third version is that she was actually tried to be burnt by original accused No. 1 after sprinkling kerosene on her. In the third version her statement in the Court is that he had tried to burn her after sprinkling kerosene with a cigarette lighter and while in her earlier statement recorded by the Special Judicial Magistrate she had stated that she was tried to be burnt by igniting her with the help of gas lighter after sprinkling kerosene on her. In view of this, the Additional Sessions Judge was right in concluding that the prosecution had failed to establish the guilt of the accused under Section 307 of the I.P.C. It is difficult to accept the last version of victim with which she had come out, resiling from the earlier statements. The Additional Sessions Judge has given cogent reasons for the conclusion arrived at in this respect. He has also taken into consideration the fact that as per the Chemical Analyser's report, it is difficult to accept that by a gas lighter which is normally used in the kitchen she could have been ignited alter sprinkling kerosene as the Chemical Analyser has reported that with the electric gas lighter which was found in the kitchen by the Investigating Authority igniting a person on whom the kerosene is alleged to have been sprinkled is not possible. The said fact according to the defence would be a significant fact which would be necessary to be considered while assessing the evidence of Sunita even in respect of the alleged ill-treatment at the hands of the husband and parents-in-laws and brother-in-law. The contention is that having realised the said situation that by gas lighter she could not be ignited after sprinkling kerosene on her she changed her version in the Court and tried to contend that the original accused No. 1 had ignited her with a cigarette lighter and this improvement made by her would necessarily be always required to be kept in mind while assessing her evidence in respect of the allegation of offence under Section 498-A also. There is a force in this contention and the said fact definitely would be required to be considered while assessing her evidence in respect of the allegations made by her in respect of offence under Section 498-A also. On behalf of the defence, it was contended that the Additional Sessions Judge has not considered this aspect at all while assessing the prosecution evidence and particularly that of Sunita and therefore, the entire appreciation of evidence has suffered. *Deepak Sunderlal Pardeshi* v. *State of Maharashtra*, (1995) 1 B Cr C 448 at pp. 454, 455 (Bom).

Where the possession of fire-arms and criminal object not proved, conviction and sentence not sustained. *Chandra Sen* v. *State of U.P.*, 1995 (32) ACC 661 (All).

Charge was for assaulting complainant—Conviction under Section 307/34, I.P.C.—Revision petition was filed out of six injuries caused, only injury No. 1 was grievous. There was no medical evidence to show that injury No. 1 was sufficient in ordinary course of nature to cause death. Hence, conviction and sentence cannot be sustained. *Anokhelal* v. *State of M.P.*, (1995) 3 CCR 166 (MP).

When none of eye-witnesses supported prosecution story of assaulting wife by accused and dying declaration of wife not reliable, accused entitled to acquittal. *Satwa Wakode* v. *State of Maharashtra*, 1996 Cri LJ 4028 (Bom).

Where prosecution evidence from an independent source is absolutely clear, cogent and consistent ; conviction can be based on it notwithstanding injury on accused remained unexplained. *D. V. Shanmugham* v. *State of A.P.*, 1997 (2) Crimes 41 (SC) : 1997(5) JT 4 : 1997(5) SCC 349 : 1997(3) Scale 638 : 1997(2) CCR 36 (SC) : 1997(4) Supreme 267.

21. F.I.R.—There was delay in filing the F.I.R. and as such anticipatory bail was granted. Under the circumstances anticipatory bail has only to be extended for which application should be made to the court of competent jurisdiction. (1986) 1 Crimes 153.

22. Bail.—In instant case, the applicant and co-accused not only expressed their opinion to kill but they also fired from their guns. Hence it is not a fit case for bail. *Rakesh Kumar* alias *Rakesh* v. *State of U.P.*, 1995 UP Cr R 40 (All).

23. Absence of proof of motive.—The accused threw acid on the victim but the fact that the acid was thrown was not disputed. It was urged that his presence at the time of occurrence at the railway station was doubtful. *Held*, there was no reason to disbelieve the P.W. Conviction was upheld. (1986) 2 Crimes 33 (Del).

Sequence of events in an acquittal case was found natural in an appeal. The accused had used a deadly weapon inflicting injuries to the victim. Evidence against him was categorical. *Held*. the offence under Section 514, I.P.C., was brought home. (1986) 2 Crimes 542.

A close scrutiny of the evidence of prosecution witnesses as highlighted above do not disclose that prosecution even made any attempt to prove such intention of the accused persons, far less to prove. Evidence of the Doctor as regards proof of ingredients, referring to the nature of injury but upon proper appreciation of the evidence of doctor, we find that no such intention to cause death could be proved by prosecution. Held, the prosecution could establish by clear, cogent and impeachable evidence the necessary ingredients of Sec. 307, I.P.C. against the accused. *Narayan Sarkar & Ors. vs State of Tripura*, 2010 Cri LJ 986 (Gauhati).

24. Mentally deranged accused.—The respondent, according to prosecution was abnormal in his conduct at the time of occurrence and immediately afterwards. The injured person was speared in the abdomen when he came back with *Bidis* he was required to purchase. During the trial, he was perfectly normal and nothing abnormal came to the notice subsequent to the occurrence. His plea of insanity was based on treatment undergone earlier for chronic alcoholism, perpherul, neuropathy and hansen's injection. *Held*, Section 84 cannot be called in aid to protect him as the diseases do not amount to legal insanity. (1986) 1 Crimes 43 (Ori).

25. Motive.—Motive assumes secondary role where evidence of eye-witnesses found truthful. *Murarilal Jivaram Sharma* v. *State of Maharashtra*, 1997 (1) Crimes 46 (SC) : 1997 (1) JT 317 : 1996 (9) Scale 451 : 1997 (1) Supreme 258 : 1997 Cr LJ 782.

26. Plea of alibi.—Accused cannot be acquitted merely on the reason that he produced a certificate from his employer to the effect that he was working in the Mill at the relevant time. Once alibi is pleaded by the accused it shall be proved by him. If such certificate is produced before the Court by the accused he must examine some person on behalf of his employer or should examine himself in order to mark the said document. *State v. Murugan*, 2002 CriLJ 670 (Mad) : 2001(2) Mad LW (Cri) 815.

27. Cruelty and attempt to murder.—Accused husband subjected victim, second wife, to physical and mental torture and attempted to kill her. Evidence of witnesses that accused used to beat victim under influence of liquor.

Initially the defence case was that the victim had herself poured kerosene oil. However, the suggestion was changed during the cross-examination of the victim. I have already mentioned earlier that the victim was given a suggestion that kerosene oil fell on her body accidentally in the midst of scuffle. Strangely, while giving statement under Section 313, Cr.P.C., accused neither pleaded that the victim had herself poured kerosene oil to make out a false case or that the said petroleum product had accidentally fell on her body.

Be that as it may a good number of independent witnesses from the locality have deposed in chorus that the victim came running to the house of P.W. 3 and was found terrified and reported that her husband had attempted to kill her by setting her afire. No prosecution witness was given any suggestion that he or she was giving a tainted testimony due to any enmity or grudge against the accused. At any rate, the suggestion given to the victim that kerosene oil fell on her body in the midst of scuffle is somewhat an admission of the accused and the same can be considered as corroborative evidence under Section 21 of the Evidence Act, 1872.

In the cross-examination, has deposed that she herself was tortured by her step-mother and that she did not have good relation with her. In my considered opinion, this might be the reason for giving a twisted testimony to defend her father. I am also of the view that the defence story of pouring kerosene oil just to teach a lesson to the husband, who was already in an angry mood and physically powerful, is inconceivable. In ordinary course, in such a situation, a battered and mentally week woman would run for cover instead of challenging a physically sound and intoxicated person.

Section 307, I.P.C. relates to the offence of attempted murder. Under this provision of law, if any act is done with such intention or knowledge that the act was likely to cause death, if not prevented or intercepted, it would constitute the offence of attempt to murder. In the case before me, large quantity of kerosene oil, was poured on the body of the victim woman. Had the appellant been successful to ignite the wearing apparels of the victim there would have been every possibility of her death. Hence, conviction of the appellant under Section 307, I.P.C., having based on evidence does not call for interference. *Sri Maran Nama vs. State of Tripura*, 2010 (2) CriLJ 1594 (Gau).

28. Injuries.—Accused inserted chhuri into abdomen of complainant. Medical opinion that injury was grievous in nature and dangerous to life. Identity of accused as a person causing injury to complainant was established beyond reasonable doubt. It is true that the appellant apparently had no intention to cause death but intention and knowledge are alternative ingredients of Section 307. In other words, the offence of attempt to murder can still be made out even where no intention to cause death has been established but knowledge as to imminently dangerous nature of the act can easily be attributed. As explained by the Apex Court in *Sarju Prasad vs. State of Bihar*, AIR 1965 SC 843 = 1965 (1) Cri LJ 766, if a vital organ is cut, the offence would fall under Section 307 of the IPC. *Ramesh Kumar vs. State of Madhya Pradesh*, 2010 (1) Cri LJ 494 (MP).

Murderous assault—Effect of—So far as accused No. 2 is concerned, we are of the opinion that the High Court, although should have dealt with the matter at some more details, but keeping in view the fact that it recorded a judgment of acquittal, it is difficult to opine that another view is not possible. He was arrested 15 days after the occurrence from a railway platform. The fact that he was the driver of the car was sought to be proved by witnesses, however, stated that he was arrested on the same day which was not a fact. PW-11 also could not testify the identity of accused. No identification parade was held, which could have been held, unlike the case of accused No. 1. He was not in the hospital or at some other place. No recovery has been made from him. The evidence of PW-9 is shaky as she stated that she had not seen the tenants, whom the accused used to visit by coming in an Ambassador car. *Pantangi Balarama Venkata Ganesh vs. State of Andhra Pradesh*, AIR 2009 SC 3129 : 2009 CrLJ 4144 (SC) : 2009 (10) Scale 69 : 2009 (5) Supreme 506 : 2009 (6) SLT 364 : 2009 (11) SCR 636 : 2009 (3) JCC 2470.

The spleen is a vital and important organ of the body and if it is ruptured or damaged then it is sufficient to cause death of victim in the ordinary course of nature. The same is covered by earlier part of Section 100 of IPC and, therefore, the trial Court has not committed any error in convicting the accused u/S. 307 of the IPC as the victim was survived on account of treatment within time. *Ramesh and others v. State of M.P.*, 2006 CriLJ 3815 (MP).

Simple injuries. It is sufficient to justify a conviction under Sec. 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The Sec. makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged under Sec. 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt

In *Sarju Prasad v. State of Bihar*, AIR 1965 SC 843 it was observed in para 6 that the mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not by itself sufficient to take the act out of the purview of Sec. 307. *Ratan Singh vs State of M.P. & Anr.*, 2009 AIR SCW 7170 : AIR 2010 SC 597

29. Chances of false implication.—Victim was conscious and coherent to make her statement and made her statement in in which not only she did not mention the name of the appellant but positively stated that she was attacked by an unknown person aged about 20 years. Be it noted that the appellant even at the relevant time was of 50 years and was well known to victim. She did not explain as to and under what circumstances she made the statement nor there is any explanation as to how she omitted the name of the appellant and described somebody else to be the assailant. On the other hand, she went to the extent of stating that she did not know whether the Magistrate had recorded her statement in the house or in the hospital.

The evidence of victim is completely at variance with what has been stated by her in her statement. This vital aspect of the matter has completely escaped the attention of the Courts below which resulted in miscarriage of justice. Enmity between her husband and the appellant may be one possible reason for her to implicate the appellant in the case after deliberations. *Gajula Surya Prakasarao vs. State of Andhra Pradesh*, 2009 (4) Crimes 199 (SC) : 2009 (13) Scale 656 : 2009 (14) JT 203 : 2009 (8) SLT 546.

30. Mischief of fire and causing injury.—Accused was one of terrorists, who put fire in informant house and caused injuries. Witnesses have turned hostile and they have not supported the prosecution case. The doctor has only proved the injury on the shoulder of the informant. No doubt that the terrorists fired upon him when crossing the river and he could not identify any of the terrorists, in that view of the matter, there is no evidence to hold the appellant for any of the offence charged. Since, Hiralal Uraon, in whose house, the informant was taking shelter and who was present there, has stated that he was not among the terrorists rather he stated that he was his neighbour, residing in the house just beside his house and he was drunk due to Jitiya festival and he was himself assaulted. Held; There is no evidence to hold appellant guilty of any of offences charged. Charges against appellant have not been proved beyond reasonable doubts. *Lalsahay Uraon vs. State of Jharkhand*, 2010 (3) CriLJ 3351 (Jhar).

* * * * *

Sec. 308. Attempt to commit culpable homicide.—Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both ; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven-years, or with fine, or with both.

Illustration

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide, not amounting to murder. *A* has committed the offence defined in this section.

Synopsis

1. Scope 1976
2. Sentence 1976
3. Procedure 1977
4. Charge 1977
5. Conviction 1977

6. Acquittal 1978
7. Compromise 1978
8. Intention 1978

1. Scope.—"Similar attempts may be made to commit culpable homicide in any of the mitigated forms which prevent that offence from amounting to murder. Here as in the proceeding section, the attempt must be carried to the point of completion, so far as the criminal is concerned ; but the complete effect is frustrated by accident or otherwise".—*Morgan and Macpherson.* A well merited rebuke cannot be described as a grave and sudden provocation, 1937 MWN 637. A number of head injuries with underlying fractures of the skull bone is sufficient to bring the case within this section for if injured men died, the accused would have been convicted under Section 304. AIR 1961 Raj 24. It should follow that ingredient of an attempt to commit culpable homicide amounting to murder should be the same as the ingredient of an offence to commit that offence under Section 511. AIR 1961 SC 1782.

Accused, in a sudden fight inflicted blow with iron pipe in spur of moment. There was no preplan or premeditation. Conviction under Section 308, IPC was held not sustainable. *Velu alias Javelu* v. *State,* 2004 Cr LJ 3783 (Mad) : 2004 Mad LJ (Cri) 988.

The accused during course of scuffle took out his revolver and fired at deceased hitting the shot on the thigh of another person who was standing nearby. He, therefore, repeated firing which thereafter hit the deceased. It was held that gunshots fired by accused could not be said to be the result of grave and sudden provocation but were fired in course of sudden quarrel. As such Exception 4 and not Exception I to Section 300 would apply. It was hence considered justified to convict the accused under Section 308. His conviction for causing death of deceased was also altered from under Section 304 Part I to one under Section 304 Part-II. *Sukhdev Singh* v. *State of Delhi,* 2003 Cr LJ 4315 (SC) : AIR 2003 (SC) 3714 : 2003(7) SCC 399 : 2003(6) Supreme 286 : 2003(4) Crimes 50 (SC) : 2003 SCC (Cr) 1649.

2. Sentence.—Where the offender acted with malice throughout full penalty allotted by law should be imposed. 141 Ind Cas 392 : 34 Cr LJ 147 : 1932 Cr C 810 : 26 SLR 302 : AIR 1932 Sind 207.

When there was causing of simple injuries with blunt object—Injuries was caused on exchange of hot words between parties and evidence of prosecution witness regarding weapon of offence found inconsistent with their statements to police as well as with medical evidence. Hence, provision of Section 308 not applicable and sentence reduced to period already undergone. *Ranjit Singh* v. *State,* (1995) 3 CC Cases 39 (Del).

From the medical report and supplementary medical report, it is clear that injury was inflicted on the left side head i.e. 7 cm above left eye-brow. There was a facture of left parital bone and according to doctor the bone of the head was found fractured. As per Section 323 IPC, whoever, except in the case provided for by Section 334, voluntarily causes hurt, shall be punished with the imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both. In the light of the evidence of the doctors' medical report, Section 323 is not at all applicable as argued by learned Counsel for the appellant.

In view of strong medical evidence in the form of oral and documentary, the injuries sustained by the injured comes under 'Seventhly' of Section 320 i.e. fracture or dislocation of a bone. Voluntarily causing hurt by dangerous weapons or means has been explained in Section 324 and punishment for voluntarily causing grievous hurt is with imprisonment which may extend to seven years and shall also be liable to fine. The trial Court as well as the High Court, taking note of the enmity and intention of the accused and nature of injuries, evidence of both oral and documentary and medical evidence, concluded and awarded punishment under Section 308, IPC.

In view of the materials placed by prosecution, analysed by the trial Court and approved by the High Court, we are not inclined to reduce the sentence. Court has already pointed out about the proof regarding enmity, intention and causing grievous hurt. *Jameel vs. State of U.P.*, 2010 (2) CrLJ 2106 (SC).

A number of accused person were charged under Section 308, read with Section 34. Common intention was however, not proved and who inflicted the fatal injury was not known. *Held*, that in these circumstances no one could be convicted under Section 308 or even under Section 325. 1957 All WR (HC) 149 : 1957 All LJ 308. While holding the accused responsible for their individual acts, it is not open to the Sessions Judge to have considered the cumulative effect of the head injuries and to have held these two accused responsible for offence under Section 308. AIR 1961 Raj 24 : ILR (1960) 10 Raj 1200 : (1961) 1 Cr LJ 155. Where there are a number of injuries including three serious head injuries with underlying fractures of the skull bone, it could be considered sufficient to bring the case of the accused under Section 308, because the injured had died, they could have been easily convicted under Section 304, I.P.C. AIR 1961 Raj 24 : ILR (1960) 10 Raj 1200 : 1961 (1) Cr LJ 155.

3. Procedure.—Cognizable—Warrant—Not Bailable—Not compou-ndable—Triable by Court of Session.

It was not proper for lower court to proceed further without disposing of the application presented by revisionist for not framing charge. Direction issued to decide application first and then proceed for trial. *Nisar Ahmad* v. *State of U.P.*, 1995 UP Cr R 16 (All).

4. Charge.—The charge should not thus :

I *(name and office of Session Judges, etc.)* hereby charge you (*name of the accused*) as follows—

That you, on or about the................day of.................. at............... did an act, to wit....................with such intention (or knowledge), and under such circumstances that, if by that act you had caused the death of *A, B* you would have been guilty of culpable homicide not amounting to murder (and that you caused hurt to said *A, B* by the said act), and thereby committed an offence punishable under Section 308 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by me on the above charge.

5. Conviction.—In a case of murder based on circumstantial evidence conviction is not proper where guilt of the accused is not proved beyond reasonable doubt. *Mala* v. *State of Rajasthan*, 1995 Cr LJ 1266 (Raj).

6. Acquittal.—When number of persons witnessed the scene of occurrence and witnesses were found to be interested witness. There were contradictions in version, prosecution case was not established and it was held that prosecution case doubtful. *Jote Ram* v. *State*, (1994) 54 DLT 648 (Del).

7. Compromise.—The fact of compromise cannot be considered in awarding a sentence under this provision. 1986 Cr LJ 1280.

8. Intention.—The evidence in the case showed that the accused did not intend to cause death or such bodily injury as is sufficient in ordinary course of nature to cause death. *Held*, such a case would fall under Section 308 I.P.C. 1986 Cr LJ 1280 (MP).

The date, time and place of occurrence is amply established by the prosecution evidence on record. It was a broad day light, occurrence which took place at the field of injured which he was ploughing. The injury report in respect of injured indicated that he was given repeated assaults and inflicted incised wound in his head and numerous blunt weapon injuries on his right arm, right side of back, right thigh, right leg and ankle, left leg and right ankle which resulted in fracture of his frontal bone; fracture of medical mallolus and fracture of fibula in his right leg and fracture of shaft tibia and fibula in the left leg. It showed clearly that it was not a case of hit and run and further that it could not be believed for a moment that all these injuries were inflicted on his body by just one assailant, particularly when the defence had itself tried to bring on record the existence of a *Khuluwa* in hands of injured at the time of occurrence. Obviously, the occurrence was a one sided affair in which the injured was surrounded and assaulted by a plurality of assailants. The defence did not make any suggestion at the trial in the cross-examination of even a single prosecution witness that accused snatched any *khuluwa* from the injured and used it for assaulting the injured. It was also not claimed that any plot was in actual physical possession of the accused. It was also not claimed by the accused that they assaulted and injured because he had encroached upon their land. Nor was there any plea taken by them at the trial that accused assaulted or threatened to assaulte them and apprehending danger to themselves they assaulted and injured him. The accused had no right of private defence of person or property available to them which they may be said to have exercised. On an appraisal of the evidence on record the only inference was that the accused assaulted injured with *khuluwa* and other accused assaulted him with *lathis* and intentionally inflicted the various simple and grievous injuries found on his body in medical examination. Considering the number, location and nature of the injuries inflicted on the injured, It was held that is any case those injuries were inflicted with the intention of causing such bodily injuries as were likely to cause death or with the intention that they were likely by such act to cause death and the victim having survived the offence under Section 308 read with section 34. I.P.C. must be held to have been committed by each one of them. *State of U.P.* v. *Ramesh*, 2000 Cri LJ 1354 (All).

From the medical report and supplementary medical report, it is clear that injury was inflicted on the left side head i.e. 7 cm above left eye-brow. There was a facture of left parital bone and according to doctor the bone of the head was found fractured. As per Section 323 IPC, whoever, except in the case provided for by Section 334, voluntarily causes hurt, shall be punished with the imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both. In the light of the evidence of the doctors' medical report, Section 323 is not at all applicable as argued by learned Counsel for the appellant.

In view of strong medical evidence in the form of oral and documentary, the injuries sustained by the injured comes under 'Seventhly' of Section 320 i.e. fracture or dislocation of a bone. Voluntarily causing hurt by dangerous weapons or means has been explained in Section 324 and punishment for voluntarily causing grievous hurt is with imprisonment which may extend to seven years and shall also be liable to fine. The trial Court as well as the High Court, taking note of the enmity and intention of the accused and nature of injuries, evidence of both oral and documentary and medical evidence, concluded and awarded punishment under Section 308, IPC.

In view of the materials placed by prosecution, analysed by the trial Court and approved by the High Court, we are not inclined to reduce the sentence. Court has already pointed out about the proof regarding enmity, intention and causing grievous hurt. *Jameel vs. State of U.P.*, 2010 (2) CrLJ 2106 (SC).

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Sec. 309. Attempt to commit suicide.—Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, "*or with fine, or with both*".

Synopsis

1. Amendment..1979
2. Principle..1979
3. Scope..1980
4. What is suicide ? Right to die..1981
5. Proof..1982
6. Conviction..1982
7. Delay in lodging FIR..1982
8. Abetment of unsuccessful attempt to commit suicide..1983
9. Procedure..1983
10. Charge..1983

1. Amendment.—The words within quotations have been substituted by the Indian Penal Code Amendment Act, 1882 (8 of 1882), Section 7.

2. Principle.—The same principle which forbids one to take the life of another prohibits equally the taking of his own life. Therefore, suicide like any other felonious homicide is at common law felony. *Bishop's Cr. Law*, Section 1187. In New York as in this country, an actual suicide is no offence, but it is a felony punishable by imprisonment to attempt it unsuccessfully. *Ibid.* The punishment which can be inflicted for actual suicide is to forfeit the property of the deceased, but in that case no punishment is inflicted on the guilt but on his innocent heirs. According to the Laws of England, at attempt to commit *fels-de se* is not an attempt to commit murder within the statute, 24 and 25 Vict., C. 100, Section 15, but is a misdemeanour at common law. *R.*

v. *Burgess*, 32 LJC 55. The question for the jury is whether the accused did intend to take his own life, and it is a material factor to determine whether the accused really meant to kill himself. *R.* v. *Doody*, 6 Cox 463. A lenient sentence should be given where on account of ill-treatment the woman jumped into a well. 26 PLR 581.

Where there is punishment for attempt to commit suicide. It provides punishment again to person who has suffered from agony and would be undergoing ignominy because of failure to commit suicide. Suicide or attempt to commit it causes no harm to others. It can not be said against religion, morality or public policy—*Held*, it is cruel and irrational permission and thus being void in violation of Article 21. P. *Rathinam* v. *Union of India*, 1994 SCC (Cri) 740.

Proceedings was initiated against petitioner under Section 309, I.P.C. and validity of Section 309, I.P.C. assailed and contending that same is violative of Article 14 of the Constitution. It was *held* that the act of suicide cannot be said to be against religion, morality and public policy and attempted suicide has no baneful effect on society. It is cruel and irrational provision and it may result in punishing a person again—Proceedings quashed. *P. Rathinam, Nagbhusan Patnaik* v. *Union of India*, AIR 1994 (SC) 1844 : (1995) 1 LW (Cr) 209 (SC) : 1994(3) JT 392 : 1994 (3) SCC 394 : 1994 CrLJ 1605 : 1994 (2) Crimes 228.

3. Scope.—"Any act which is a part execution of the criminal design, is sufficient to constitute abetment under this section. But the act is a beginning of the act of self-murder, or such an approach to it manifestly shows that there is a present intention to commit the crime".—*Morgan* and *Macpherson*. A deaf and a dumb person may be guilty under this section. 25 Bom LR 43. If accused attempts to commit suicide but causes death of child undelivered, she is not guilty under Section 307. 20 Cr LJ 395 : 17 ALJ 478 : 50 Ind Cas 1003. The law confers on the Court a very wide discretion in the matter of punishment under this section. 35 PLR 439 : 1934 Cr C 805 : AIR 1934 Lah 514. "Attempt" in this section involves conscious efforts. AIR 1940 All 486 : 42 Cr LJ 146.

The offence itself is not punishable when completed because the offender has gone out of the jurisdiction of all Courts here on earth. The attempt is only made punishable.

Where there was attempt to commit suicide. Act of attempt to suicide having no baneful effect on society—As such attempt causes no harm to others—Provision is held to be cruel and irrational. Hence, section deserves to be effaced from statute book to humanise penal laws. It violated Article 21 of Constitution. *P. Rathinam v. Union of India*, 1994 Cri LJ 1605 (SC) : (1994) 2 Crimes 228 : 1994 SCC (Cr) 740 : (1994) 2 East Cr C 101 : (1994) 3 SCC 394 : AIR 1994 SC 1844.

When attempt to commit suicide took place more than 11 years ago and accused suffering from schizophrenia, criminal case initiated against him deserve to be quashed. *State of Maharashtra* v. *Maruti Shripati Dubal*, 1996 Cr LJ 4457 (SC) : AIR 1997 (SC) 411 : 1996(6) SCC 42 : 1996(6) Scale 343 : 1996(6) Supreme 643.

In death of hanging opinion of doctor that strangulation "might be" homicidal in nature, does not necessarily exclude alternative situation of suicide. *Digambar Gope* v. *State of W.B.*, 1997 Cri LJ 2072 (Cal).

4. What is Suicide ?—The word suicide is not defined in the IPC : One must, therefore, look at the dictionary meaning of the word. As per New Webster's Dictionary of the English language, Deluxe Encyclopedia Edition, the word "suicide" appearing at page 980 means :

"One who intentionally takes his own life; the intentional taking of one's own life destruction of one's own interests or prospects v.i. suicided, suiciding. To commit suicide to kill (oneself)".

In the Concise Oxford Dictionary, 9th Edn, at page 1393, the word "suicide" is stated to mean as under :

"n and n.l.a. the intentional killing of oneself; be a person who commits suicide; 2.a. self destructive action or course (political suicide) 3. Designating a highly dangerous or deliberately suicidal operation etc. (a suicidal mission) intarcommit suicide."

In the Halsbury's Laws of England, fourth edn., ninth volume, page 686, paragraph 1124, the word "suicide" has been dealt with in the following words :

"A finding of suicide must be based on evidence of intention. Every act of self destruction is, in common language, described by the word "suicide" provided, it is the intentional act of a party knowing the probable consequence of what he is about. Suicide is never to be presumed. Intention is the essential legal ingredient."

The word 'Suicide' in plain English language would mean a person voluntarily putting an end to his life. It is obvious on a plain reading of the definition of 'Suicide' that the cause and circumstances leading one to take such a decision are wholly irrelevant for deciding the question as to whether the death was a suicide or not. A person who is frustrated or defeated in life, or considers himself to be frustrated or defeated in life, may on the spur of the moment or after proper deliberation, come to the conclusion that he needs to put an end to his life. On the other hand, a person who is otherwise happy and claims to be successful in life, and had led a contented life, may also take a conscious decision of putting an end to one's life. Such a decision may be taken on a full consideration of the relevant facts. Such a decision is state to have been based in one's own interest with a view to avoid any pain, or misery, or suffering in old age, to himself or one's dependents. Nevertheless, on a plain meaning of the word 'Suicide' it is difficult to say that the decision taken to voluntarily put an end to one's life, in the latter case where a person claims to be successful in life and happy, is not suicide. It cannot be accepted that voluntary termination of one's life is not suicide as understood in ordinary English language in the absence of any specific definition in the IPC. If that be so, voluntary termination of one's life for whatever reason, assuming that it is by persons like the petitioners, who say they are successful in life, and had led a contented life, and claim that their mission in life is ended, would nevertheless amount to suicide within the meaning of Sections 306 and 309 of the IPC. No distinction can be made between suicide committed by a person who is either frustrated or defeated in life. The question as to whether suicide was committed impulsively or whether it was committed after prolonged deliberation is wholly irrelevant. Similarly, the decision taken by persons like the petitioners to voluntarily put an end to one's life on the footing that one has led a successful life and the mission of his life was completed, would amount to suicide. *C. A. Thomas Master v. Union of India*, 2000 Cri LJ 3729 (SC).

5. Proof.—Death of wife caused by burning. It is also pertinent to note here that none of the prosecution witnesses in their testimonies stated about the possibility of the deceased committing suicide. It is also significant to refer to the opinion of doctor, who in his deposition stated that if a person pours kerosene on himself or herself over his or her head, it would spread over the back also. The presence of kerosene on the body of the deceased is established from the deposition of Doctor who, in the post-mortem report of the deceased, recorded an observation that the scalp hair of the deceased smelt of kerosene. Thus, Court is of the considered opinion that if it were a case of suicide by the deceased by pouring kerosene over her head, the kerosene oil would have certainly run down on the chest as well as on the back side of the body and the fire would have spread all over the body causing burn injuries both on the front as well as on the back side of the body. But that is not the case here. The post-mortem report revealed that there were no burn injuries on the back side of the chest, abdomen and right foot of the deceased. The body of the deceased was found to be in a lying position with a fresh injury mark on the left side of her forehead. A possible inference which can be drawn is that after hitting the deceased on her forehead, the appellant made her lie down on the floor inside the bathroom and thereafter poured kerosene oil on the body of the deceased, which on account of lying position of the body could be poured only on the front part of her body. As such, when the deceased was burnt, there were no burn injuries found on the back side of the body of the deceased. *Jayabalan vs. U.T. of Pondicherry*, 2010 (2) CrLJ 2234 (SC).

6. Conviction.—Pertaining to the conviction for the offence punishable under Section 306, IPC, suffice would it be to state that a charge of abetment to succeed would require the proof of some participative acts to facilitate the suicide by the person committing the suicide. There is no evidence that the appellant gave the sulphas tablets to deceased. There is no evidence that he facilitated or helped deceased in what she did.

Thus, the finding returned by the learned Trial Judge holding the appellant guilty for the offence punishable under Section 306, IPC is set aside. *Ashok Rai vs State*, 2010 Cri LJ 1105 (Delhi).

7. Delay in lodging FIR.—During investigation mother (PW-1) of deceased had not stated that he had seen the accused standing near the dead body of the deceased or that on hearing her cries her son Venkanna who has not been examined came there and informed the incident to the police by phone. She had also not stated that the accused had told her that he had cut the throat of the deceased with a knife which is available in the house. Interestingly, there was no effort made to match the blood group of the deceased with the blood found on the M.O.1. If the aforesaid aspects are considered, the inevitable conclusion is that the appeal is without merit, deserves dismissal which we direct.

The trial Court placed reliance on the evidence of mother (PW-1) of the deceased and recorded conviction. The High Court found that the evidence of PW-1 on whose evidence the conviction was recorded does not inspire confidence. It was also noted that the report was given to the police officer on telephone as admitted by the brother of the deceased at about 4.00 a.m. The same does not appear to have been recorded in writing and on the other hand the police officer claimed to have come to the place of occurrence and recorded the statement of the mother and converted it into the FIR. The High Court noted that it was not explained by the Investigating Officer as to why the telephonic message was not reduced into writing.

With reference to the evidence of PW-1 the High Court noted that she stated that her son had informed the police. It is not known as to what the son of PW-1 told the police *i.e.* whether he told about the details of the crime or that some crime had taken place. If it is former then the message was required to be reduced in writing. The police officer who received the telephonic message is PW-10. According to him he received a telephonic message that some murder had taken place. He categorically admitted that he did not reduce the information into writing. Added to that the High Court noted that the FIR reached the police station after about 7 hours. In the FIR it was noted the injuries which were of very serious nature on the person of the accused were not explained. It did not accept the stand taken that the accused tried to commit suicide. *State of Andhra Pradesh vs. V.V. Panduranga Rao*, 2009 CrLJ 2972 : 2009 (2) Crimes 425 (SC) : 2009 (7) JT 570 : 2009 (6) Scale 684 : 2009 (7) SCR 421.

8. Abetment of unsuccessful attempt to commit suicide.—Merely because S. 306 opens with the words "if any person commits suicide" it cannot be held that in a case of unsuccessful suicide there is no attempt to abet the commission of suicide. The abetment becomes complete only when suicide is committed and Section 306, IPC principally would come into operation only when suicide successfully takes place. The content and character of an offence of attempt to commit suicide is qualitatively different from the attempt to abet the commission of suicide. Suicide and its attempt on the one hand and abetment of commission of suicide and its attempt on the other are treated differently by law and, therefore, the one who abet the commission of an unsuccessful attempt to commit suicide cannot be held to be punishable merely under Section 309 r/w. 116, IPC, to implement the scheme of law he has got to be held to be punishable under Section 306 r/w. 511, IPC. *Berin P. Varghese and Ors. v. State of Kerala*, 2008 CriLJ 1759 (Ker).

9. Procedure.—Cognizable–Warrant–Bailable–Not compoundable–Triable by Magistrate.

10. Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

That you, on or about the.........day of.........at.........attempted to commit suicide and did an act, to wit...............towards the commission of such offence and thereby committed an offence punishable under Section 309 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 310. Thug.—Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child stealing by means of or accompanied with murder, is a *thug*.

***Notes.*—**"Act 30 of 1836, made it an offence punishable with imprisonment for life with hard labour to have belonged to a gang of *thugs*, either within or without the territories of the East India Company. This section explains what is a *Thug*. Gangs of persons habitually associated for the purpose of inveigling and murdering travellers or others in order to take their property, *etc.*, are so called.".—*Morgan and Macpherson.*

* * * * *

Sec. 311. Punishment.—Whoever is a *thug*, shall be punished with *imprisonment for life*, and shall also be liable to fine.

Synopsis

1. Amendment..1984
2. Procedure..1984
3. Charge..1984

1. Amendment.—The words "imprisonment for life" were substituted for the words "transportation for life" by Act 26 of 1955, Section 117 and Sch.

2. Procedure.—Cognizable — Warrant — Not bailable — Not compoundable — Triable by Court of Session.

3. Charge.—I (*name and office of the Sessions Judge, etc.)* hereby charge you (*name of the*) as follows :

That you, on or about the..............day of......:...... at.............. were a *thug*, and that you thereby committed an offence punishable under Section 311 of the Indian Penal Code. and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS

Sec. 312. Causing miscarriage.—Whoever voluntarily causes a woman with child to miscarry shall if such miscarriage be not caused in good faith for the purpose of saving the life of the woman be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both ; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A woman who causes herself to miscarry, is within the meaning of this section.

Synopsis

1. Miscarriage..1985
2. If the woman be quick with child..1986
3. Procedure..1986
4. Charge..1986
5. Sentence..1986
6. The Medical Termination of Pregnancy Act, 1971..1986
    (1) Short title, extent and commencement..1986
    (2) Definitions..1987

(3) When pregnanices may be terminated by registered medical practitioners....1987

(4) Place where pregnancy may be terminated....1988

(5) Sections 3 and 4 when not to apply 1988

(6) Power to make rules....1988

(7) Power to make regulations 1989

(8) Protection of action taken in good faith....1989

1. Miscarriage.—"Miscarriage is the expulsion of the child or foetus from the mother's womb at any period of pregnancy before the term of gestation is completed. The offence defined in this section can only be committed where the woman is in fact pregnant. For although there may be a guilty intention and attempt to commit it on the person of a woman believed to be, but who really is not pregnant—The offence, as here defined seems to require that the woman should be with child'.—*Morgan and Macpherson.* The Indian Law Commissioners observe ; "with respect to the law on the subject of abortion, we think it necessary to say only that we entertain strong apprehension that this or any other law on that subject may, in this country, be abused to the vilest purposes. The charge of abortion is one which, even where it is not substantiated, often leaves a stain on the honour of families. The powers of bringing a false accusation of this description is, therefore a formidable engine in the hands of unprincipled men. This part of the law will, unless great care be taken, produce few convictions, but much misery and terror to respectable families and a large harvest of profit to the vilest of society. We trust that it may be in our power in the Code of Criminal Procedure to lay down rules ; which may prevent such an abuse. Should we not be able to do so, we are inclined to think that it would be our duty to advise. His Lordship in Council rather to suffer abortion, where the mother is party to the offence, to remain wholly unpunished, than to repress it by provisions which would occasion more suffering to the innocent than to the guilty".

The term "miscarriage" is not defined in the Code. In its popular sense, it is synonymous with abortion, and consist in the expulsion of the embryo or, *foetus, i.e.*, the immature product of conception. The state of which pregnancy has advanced and the form which the *ovum* or embryo may have assumed are immaterial. This section requires proof that the woman is "with child" but it is enough if the fact of pregnancy and the intentional expulsion of the immature contents to the uterus are established. The words 'with child' means pregnant, and it is not necessary to show that "quickening" *i.e.*, perception by mother of the movement of *the foetus* has taken place, or that the embryo has assumed *a foetal* form. 9 M 269 : 1 Weir 331. *A foetus* not bigger than a man's finger, but having the shape of a child, is a child, within the meaning of Section 312, 5 CPLR Cr 21. The offence defined in Section 312 can only be committed when a woman is in fact pregnant. 15 WR Cr 4. Where a child was full grown, a conviction under Section 312, Penal Code, was set aside, and one under Section 511 for attempt to bring about miscarriage was maintained. 19 WR Cr 32. Intention to commit crime alone, or intention followed by preparation is not sufficient to constitute attempt. Intention followed by preparation and any act towards commission of offence is sufficient to constitute attempt. 37 CWN 1157 : AIR 1933 Cal 893.

A distinction is made in Section 312 between miscarriage to a woman "with child" and "quick with child" as a larger punishment is provided for the former. When the pregnancy has advanced beyond seven months for gestation, acts of doctors and nurses which facilitate or accelerate delivery can not be traced as offence under the section only because the delivery otherwise would have been delayed and particularly when the child is born alive and no injury is caused to the mother of the child. (*Vide* Modi's Jurisprudence). AIR 1955 Mys 27 : 1955 Cr LJ 372.

In absence of evidence that pregnancy of girl was terminated on instructions of accused he can not be held criminally liable for causing his) miscarriage. *Mohd. Sharif* v. *State of Orissa*, 1996 Cri LJ 2826 (Ori).

2. If the woman be quick with child.—Quickening, is the name applied to the peculiar sensations experienced by a woman about the fourth or fifth month of pregnancy. The symptoms are popularly ascribed to the first perception of the movements of the *faetus*. But quickening is not a constant uniform and well marked distinction of the pregnant *State*. The phrases 'quick with child" is here used probably merely to denote an advanced stage."—*Morgan and Macpherson.*

In an offence of causing miscarriage of a child, the date of the allege adultery was of no such significance. Hence, its omission in a complaint is of no consequence. 83 CWN 325.

Explanation.—"According to the explanation, a woman who caused herself to miscarry is within this section. But in awarding punishment, it will not be forgotten that the high caste young widow, who is to hide her shame, may at the risk of life cause herself to miscarry, does not under the circumstances in which she is placed by the institutions of society commit an offence of like criminality with that of the seducer of young girl to married woman who to cover his offence causes such woman to miscarry".—*Morgan and Macpherson.*

3. Procedure.—Non Cognizable—Warrant—Bailable—Not compoundable—Triable by a Magistrate of the first class.

4. Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows—

That you..........on or about the......... day of... ..at........ voluntarily caused one *X. Y. (name of the woman miscarrying)* then being with a child to miscarry, such miscarriage not being caused by you in good faith for the purpose of saving the life of said X, *Y* and thereby committed an offence punishable under Section 312 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by the said Court on the said charge.

5. Sentence.—A lenient sentence should be passed on an accused who was a young woman and was silent party to the commission of the offence at the instance of her parents. 3 DLR (Ajmer 51.

6. The Medical Termination of Pregnancy Act, 1971,—The Medical Termination of Pregnancy Act (No. 34 of 1971) has been passed to provide for the termination of certain pregnancies by registered Medical Practitioners and matters connected therewith on incidental therewith. The Act runs as follows;

(1) Short title, extent and commencement.—(1) This Act may be called the Medical Termination of Pregnancy Act, 1971.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may by notification in the Official Gazette appoint.

N.B.—The Act came into force on 1.4.1972.

(2) Definitions.—In this Act. unless the context otherwise requires—

(a) "guardian" means a person having the care of the person of a minor or a lunatic ;

(b) "lunatic" has the meaning assigned to it in Section 3 of the Indian Lunacy Act, 1912 ;

(c) "minor" means a person who under the provisions of the Indian Majority Act, 1875 (9 of 1875). is to be deemed not to have attained his majority ;

(d) "registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in clause of Section 2 of the Indian Medical Council Act, 1956 (102 of 1956), where name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be prescribed by rules made under this Act.

(3) When pregnancies may be terminated by registered medical practitioners. —(1) Notwithstanding anything contained in the Indian Penal Code 45 of I860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner.—

(a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twelve weeks, but does not exceed twenty weeks, if not less than two registered medical practitioners are of opinion, formed in good faith, that—

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health ; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped.

Explanation I.—Where pregnancy is alleged by the pregnant woman to have been caused by rape the anguish caused by such pregnancy shall be presumed to constitute grave injury to the mental health of the pregnant woman.

Explanation II.—Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably forceable environment,

(4) (*a*) No pregnancy of a woman, who has not attained the age of eighteen years, or who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

(*b*) Save as otherwise provided in Clause (*a*), no pregnancy shall be terminated except with consent of the pregnant woman.

(4) Place where pregnancy may be terminated.—No termination of pregnancy shall be made in accordance with this Act at any place other than—

(*a*) a hospital established or maintained by Government, or

(*b*) a place for the time being approved for the purpose of this Act by Government.

(5) Sections 3 and 4 when not to apply.—(1) The provisions of Section 4, and so much of the provisions of sub-section (2) of Section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

(2) Notwithstanding anything contained in the Penal Code (45 of 1860), the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under that Code, and that Code shall, to this extent, stand modified.

Explanation.—For the purposes of this section, so much of the provisions of clause (*d*) of Section 2 as relate to the provision, by a registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.

(6) Power to make rules.—(1) The Central Government may, by notification in the Official *Gazette*, make rules to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, rules may provide for all or any of the following matters, namely :—

(*a*) the experience or training, or both, which a registered medical practitioner shall have if he intends to terminate any pregnancy under this Act ; and

(*b*) such other matter as are required to be, or may be, provided by rules made under this Act.

(3) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

(7) Power to make regulations.—(1) The State Government may, by regulations,—

(*a*) require any such opinion as is referred to in sub-section (2) of Section 3 to be certified by a registered medical practitioner or practitioners concerned, in such form and at such time as may be specified in such regulations, and the preservation or disposal of such certificates ;

(*b*) require any registered medical practitioner who terminates a pregnancy, to give intimation of such termination and such other information relating to the termination as may be specified in such regulations ;

(*c*) prohibit the disclosure, except to such persons and for such purposes as may be specified in such regulations, of intimations given or information furnished in pursuance of such regulations.

(2) The internation given and the information furnished in pursuance of regulation made by virtue of clause (*b*) of sub-section (1) shall be given or furnished, as the case may be, to the Chief Medical Officer of the State.

(3) Any person who wilfully contravenes or wilfully fails to comply with the requirement of any regulation made under sub-section (1) shall be liable to be punished with fine which may extend to one thousand rupees.

(8) Protection of action taken in good faith.—No suit or other legal proceeding shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act".

* * * * *

Sec. 313. Causing miscarriage without woman's consent.—Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not shall be punished with *imprisonment for life,* or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Amendment....1989
2. Scope....1989
3. Procedure....1990
4. Charge....1990
5. Jurisdiction....1990
6. Cognizance of offence....1990

1. Amendment.—The words "imprisonment for life" were substituted for the words "transportation for life" by Act 26 of 1955, Section 117 and Sch. (with effect from 1.1.1956).

2. Scope—Section penalises voluntary causing of miscarriage of a' woman with child without her consent and person procuring abortion is punishable under the section. Allegation against the accused was that on hearing that she was pregnant he took her to doctor who caused abortion for which she willingly submitted herself. It was not clear whether accused only accompanied the lady at her request and whether he made a request to doctor to have abortion. *Held*, that offence under Section 313 not made out from allegations. 1987 Cri LJ 1106 (FB) : A1R 1987 Ker 184.

Where there was allegations of giving leg blow and fist blows on the abdomen which resulted bleeding in vagina—Charge was framed which had no illegality. *Parkash* v. *Roshni*, (1994) 1 CC Cases 272 (P & H).

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable—Triable by Court of Session.

4. Charge.—The charge should run thus :

"I (*name and office of the Sessions Judge, etc.,)* hereby charge you (*name of the accused) as* follows ;

'That on or about the..................day of.............at...............you voluntarily caused *AB (the woman who miscarried)* then being with child to miscarry without her consent, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said *AB*, and thereby committed an offence punishable under Section 313 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge".

5. Jurisdiction.—It is not possible to say that the offence under Section 313, I.P.C.; is a continuing one. Section 313, I.P.C.; being a distinct offence, which has no nexus with alleged kidnapping and rape. Hence, the order of discharge against non-applicant for want of territorial jurisdiction is perfectly correct. *State of Madhya Pradesh* v. *(Dr.) (Smt.) C.B. Subba Rao*, (1995) 2 CCR 257 (MP).

6. Cognizance of offence.—When prosecutrix, a maid servant in family appears to be helpless victim in face of inevitable compulsion and not a consenting party, cognizance of offence is proper. *Md. Naimatullah Habibi* v. *Sagra Bibi*, 1997 Cri LJ 706 (Ori).

* * * * *

Sec. 314. Death caused by act done with intent to cause miscarriage.—Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

if act done without woman's consent—and if the act is done without the consent of the woman, shall be punished either with *imprisonment for life*, or with the punishment above mentioned.

Explanation.—It is not essential to this offence that the offender should know that the act is likely to cause death.

Synopsis

1. Amendment..1991

2. Scope and applicability 1991
3. Procedure..1992
4. Charge 1992
5. Evidence 1992

1. Amendment.—The words "imprisonment for life" were substituted for the words "transportation for life" by Act 26 of 1955, Section 177 and Sch. (with effect from 1.1.1956).

2. Scope and applicability—The species of homicide may be committed involuntarily, this is, in the language of the Code, by a person who does not intend to cause or think it likely that he will cause, death by the act which he does. If *A* intending only to cause miscarriage to *Z*, involuntarily does an act which causes her death, he is liable to punishment under this section and he is thus liable whether he acts with caution in order to prevent the risk to *Zs* life, or whether he act rashly or negligently. Even if he takes such precautions and there is no reasonable probability that *Zs* death will be caused, and if the medicine is rendered deadly by some accident which no human sagacity could foresee, or by some peculiarity *Zs* constitution, such as there was no ground whatever to expect, *A* will be liable to punishment under this section for causing death by an act done with intent to cause miscarriage. The consent of the woman freely and intelligently given, is allowed to mitigate the offence. If *A* kills *Z* by administering abortives to her with knowledge that those abortives are likely to cause her death, he is guilty of culpable homicide which will be culpable homicide by consent, if *Z* agreed to run the risk, and murder, if she did not so agree".—*Morgan and Macpherson*.

'This is an offence which can, it seems, be committed only where the woman is actually pregnant".—*Ibid.*

A conviction under the Section can not be based on the uncorroborated testimony of accomplice, 74 CWN 378. The conviction of the appellant was set aside *inter alia* on the ground that the charge of abetment failed when the substantive offence against the principal was not proved. 1970 Cr LJ 511 : AIR 1970 SC 466.

Appellant accused charge under Section 314, I.P.C., for 'terminating pregnancy of a woman by abortion and causing miscarriage and death. There was acquittal by trial Court and High Court found him guilty and imposed 4 years' R.I. and fine of Rs. 5,000/- to be paid to son of deceased woman. Appeal was made to Supreme Court. Sentence was reduced to 2 months already undergone and a fine of one lakh directed to be paid as compensation to son of the deceased. *Jacob George (Dr.)* v. *State of Kerala*, (1995) 1 LW (Cr) 17 (SC) : 1994(3) SCC 430 : 1994(3) JT 225 : 1994(2) Scale 563 : 1994(2) Crimes 100 : 1994 Cr LJ 3851.

Where death was caused to a pregnant lady while undergoing surgical operation for abortion—Operation was performed by accused quack doctor (Homoeopathic) with the consent of lady—Death had caused due to perforation of her uterus—Conviction under Section 314 was upheld. Sentence of 4 years' R.I. imposed by the High Court reduced to two months imprisonment already undergone and instead fine of Rs. 5.000/- enhanced to Rs. One Lakh to be deposited in name of deceased's minor son. *(Dr.) Jacob George v. State of Kerala*, 1994 SCC (Cri) 774 : (1994) 2 Crimes 100 (SC) : 1994 (3) SCC 430 : 1994 (3) JT 225 : 1994 (2) Scale 563 : 1994 Cr LJ 3851.

In *Surendra Chauhan v. State of M.P.*, 2000 Cri LJ 1789 (SC) the doctor who caused abortion was not competent to terminate the pregnency of accused nor his clinic had the approval of the Government. Even basic facilities for abortion were not available in his clinic. Chauhan took accused to the clinic of Doctor with intent to cause her miscarriage and then her death was caused by the doctor while causing abortion which act was done by doctor in furtherance of the common intention of both doctor and Chauhan. Chauhan had been rightly convicted under section 314/34, IPC. Chauhan was convicted under section 314/34, IPC. Sentence imposed on him was, however, reduced from seven year's RI to 18 months R I and fine of Rs. 10,000 enhanced to Rs 25,000.

When conviction was under Sections 314/107, I.P.C. Appeal was made against 2-1/2 or 3 months old pregnancy—Deceased was having three issues, consulted for termination of pregnancy—Miscarriage tried by accused and death caused—offence was made out—Conviction was held fully justified, *Jangir Kaur v. State of Punjab*, 1994 SCC (Cri) 1479 : 1994 Supp(2) SCC 397.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compou-ndable—Triable by Court of Session.

4. Charge.—I *(name and office of Sessions Judge, etc.)* hereby charge you *(name of the accused)* as follows :—

That you, on about the................day of............ at........... with intent to cause miscarriage of *X, Y*, did a certain act, namely.........which caused the death of the said *X,Y* and you thereby committed an offence punishable under Section 314 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

5. Evidence.—When accused absconded and surrendered to Court and made extra judicial confession to three witnesses, conviction on circumstantial evidence is confirmed. *Maideen Sab* v. *State of Karnataka*, 1993 Cri LJ 1430 (Kar) ; *See* also *Ram Sharma Sai* v. *State of Bihar*, 2006 Cr LJ 297 (Jhar).

* * * * *

Sec. 315. Act done with intent to prevent child being born alive or to cause it to die after birth.—Whoever before the birth of any child does any act with the intention of thereby preventing the child from being born alive or causing it to die after its birth and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

Synopsis

1. Notes..1993
2. Death of unborn child..1993
3. Procedure...1993
4. Charge...1993

1. Notes—The causing of the death of a child in the mother's womb and before any part of the child has been brought forth is not homicide. *See* Section 299, Explanation 3.

This section punished offences directed against the life of an unborn child. Any act done with the intention here mentioned, which results in the destruction of the child's life, whether before or after its birth, is made punishable. Suppose a child's life is destroyed by poisons, or bruises which it receives in the womb, it is immaterial whether the child is born alive or afterwards dies by reason of them, or whether they cause it to be born dead. The offence is one which will ordinarily be committed where the woman is in an advanced stage of pregnancy. But the section is not expressly confined to causing the death of quick unborn children. The offence of causing miscarriage consists in procuring the expulsion of the child or *foetus*, by criminal violence or other means, from the mother's womb before the term of gestation is completed. The offence which the present section punishes is the injury to the child's life—The child may be born in proper time, or if born before due time, the miscarriage may happen by natural causes and not by criminal means.

"Act done in good faith to save the mother's life are excepted. Cases of negligent treatment by doctors and others, where due care and attention have not been used, though not protected by this exception, are not reached by the words of the section, which apply only to acts done with the intention of destroying the child's life".—*Morgan and Macpherson.*

2. Death of unborn child.—So far as offence punishable under Section 315 of the IPC is concerned, it is rightly observed by the learned Sessions Judge that it was not case of anybody that death had occurred due to some intentional act. Intention is one of the major ingredient of Section 315. Wording of Section 315 of the IPC itself shows that whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother be punished with imprisonment. In this case the patient was admitted for delivery. During course of delivery there was rupture of uterus which led to bleeding and subsequent death of the patient and the child. So, it is not case of any prosecution witness that the respondent deliberately committed offence punishable under Section 315 of the IPC. *State of Maharashtra vs. Dr. Rajendra Ramkishan Jaiswal*, 2010 (3) CriLJ 3603 (Bombay) (Aurangabad).

3. Procedure.—Cognizable—Warrant—Not Bailable—Not compou-dable—Triable by Court of Session.

4. Charge.—I (name *and office of Sessions Judge, etc.,)* hereby charge you (*name of the accused)* as follows :

That you, on or about the.................. day of............. at......... did an act, to wit........to *X.Y.* before the birth of her child with the intention of thereby preventing the child from being born alive (*or* causing it to die after its birth) and by that act did prevent that child from being born alive (or caused it to die after its birth) and said act was not done in good faith for the purpose of saving the life of the mother, and thereby committed an offence punishable under Section 315 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by the said Court on the said charge.

Sec. 316. Causing death of quick unborn child by act amounting culpable homicide.—Whoever does any act under such circumstances, th if he thereby caused death he would be guilty of culpable homicide, a does by such act cause the death of a quick unborn child, shall be punish with imprisonment of either description for a term which may extend to t years, and shall also be liable to fine.

Illustration

A, knowing that he is likely to cause the death of a pregnant woman, does an a which, if it caused the death of the woman, would amount to culpable homicide. T woman is injured but does not die ; but the death of an quick unborn child with whi she is pregnant is thereby caused. *A* is guilty of the offence defined in this section.

Synopsis

1. Notes 1994
2. Scope 1994
3. Procedure 1995
4. Charge 1995

1. Notes.—This section punishes offences against children in the womb where t pregnancy has advanced beyond the stage of quickening, and where the death is caus after quickening and before the birth of the child. Any act or omission of such a natu and done under such circumstances as would amount to the offence of culpab homicide, if the sufferer were a living person, will, if done to a quick unborn chi whose death is caused by it, constitute the offence here punished. If a person strikes pregnant woman and thereby caused the death of her quick unborn child he will guilty of the offence here defined, if the blow was intended by him to cause the woma death or was one which he knew or had reason to believe to be likely to cause it.

"The act done to the woman, if the death of her child is not thereby caused, w probably be punishable as an attempt to commit culpable homicide under t proceedings sections.

"Cases of gross ignorance or rashness in the treatment of a pregnant woman w be punishable under this section, if in these circumstances they would amount to t offence of culpable homicide if the woman's death had been the result".—*Morgan a Macpherson.*

2. Scope.—When an accused person shoots one with a pistol and thereby caus hurt to which he is liable to conviction under the latter part of Section 307 and h conviction under Section 326 for the same offence is not warranted (obitter) 1953 K LT 340 : 1953 Cr LJ 1551 : AIR 1953 TC 374. Accused sentenced under Section 302 f causing death of pregnant woman. Even if a conviction under Section 314 is n objectionable, separate punishment offends Section 71. *Ibid.*

Where deceased was carrying pregnancy of about 7 to 8 months. Lady dying due strangulation and baby dying due to asphyxia consequent to strangulation. Henc ingredients of Section 316 of the I.P.C. made out. *Mohd. Nizamuddin* v. *State of Bih* (1995) 1 East Cr C 662 (Pat).

The Court is not required to go into the weight of prosecution evidence. The strong suspicion leads the Court to presume the commission of the offence. Evidence of the doctor is to be weighed by trial Court. There were enough matter to frame the charge. Hence no error was committed by the trial Court in framing charge. *Rajabai v. State of M.P.* 1994 Cr LR 256 (N) (MP).

3. Procedure.—Cognizable—Warrant—Not bailable—Not compound-able—Triable by Court of Session.

4. Charge.—I *(name and office of Session Judge etc.)* hereby charge you *(name of the accused)* as follows :—

That on or about the.............day of.............at.............you did an act, to wit.........under circumstances.........that if you thereby caused death, you would be guilty of culpable homicide, and did by such act cause the death of a quick unborn child of *A*, *B* and you thereby committed an offence punishable under Section 316 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 317. Exposure and abandonment of child under twelve years, by parent or person having care of it.—Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.—This section is not intended to prevent trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure.

Synopsis

1. Notes..1995
2. Being the father or mother..1997
3. Shall expose or leave, etc..1997
4. Procedure..1998
5. Charge..1998

1. Notes.—The offence consists in the desertion by the parent, or other person who has undertaken parental duties, of an infant or child or such tender age that it is not able to provide for and to take care of itself. This offence is complete notwithstanding that no actual danger or risk of danger arises to the child's life. Thus, suppose a mother leaves her illegitimate infant child at a hospital or at some place where it is certain that the child will be seen or cared for, she has committed this offence, if she intended to abandon the child. It is true she has committed the offence under circumstances greatly mitigating it, as compared with a desertion on a barren heath or in an un-frequent place where the consequence of desertion is great danger or risk of danger to life. The explanation shows that a desertion under such circumstances that death is the result of the exposure, may amount to murder or culpable homicide ; and though the death of the child may not ensue, the offence may amount to an attempt punishable under Section 307".—*Morgan and Macpherson.*

Where a woman immediately after giving birth to an illegitimate child and throwing it into a thorn bush, walked nearly a mile and a half, gave a false account of her condition to her companions, dispensed with any assistance even after she reached home, denied having given birth to a child when questioned by the head man next morning, and never asked after the child's welfare at any time or showed any solicitude on the subject ; *Held*, that the woman was guilty of the offence under Section 317. UBR 1914 1st Qr 5 : 24 Ind Cas 837 : 15 Cr LJ 525. Where a woman abandoned her newly borm child, but left it in a place which was quite close to the village and also near a public road where in fact, the child was shortly discovered, *held*. that the mother could not be rightly convicted of an attempt to murder, but should rather be convicted of the offence described in Section 317. AWN 1903, 43. Under Section 317, Penal Code, the only intention required to complete the offence is an intention of wholly abandoning the child. It is not necessary that there should be an intention to abandon the child so as to endanger its life. 1 Weir 331. The manner of exposure or leaving and the consequences likely to ensue from it are not essential ingredients of the offence under the Indian law, though they may often be properly taken into consideration in estimating its gravity and apportioning the sentence. 24 M 662 : 1 Weir 331 ; *see* also 1970 Cur LJ 332. The real object of Section 317, Penal Code, is the prevention of the abandonment or desertion by a parent of his or her children of tender years in such a manner that children not being able to take care of themselves may run the risk of dying or being injured. 16 WR Cr 12. A mother would be liable to be punished under Section 317, and not under Section 307, Penal Code, although she left her child in a place which was quite close to a village and also near a public road where it was, in fact, shortly discovered. AWN 1933, 43. A newly born child was left by its mother in an enclosure near a road not far from the village, was there discovered by a passer by and shortly after breathed its last. *Held*, that the mother could not be convicted of murder, the child not having been left on a barren heath or in an unfrequented place, but of an offence under Section 317, Penal Code. 23 PR 1886 Cr ; *see* also 10 WR Cr 52. But where a mother exposed an infant child, knowing that such abandonment by her was likely to cause its death, and death ensued in consequence thereof, *held*, that she could properly be convicted of culpable homicide under Section 304 and not under both Section 304 and Section 317. 2 All 349. Accused must be clearly shown to have intended to abandon the child completely. 21 Cr LJ 253 (Nag) : 55 Ind Cas 205. Whoever has custody of the child other than the mother, is liable to conviction ; and if mother. handed it over with such purpose both are guilty under Section 317 and Section 109, 18 Bom LR 834 : 18 Cr LJ 98 : 41 Bom 152 : 37 Ind Cas 306. In case of offence under Section 317 by woman of 18 who is not weak, Section 562, Cr PC, should not be applied. AIR 1935 Pesh 48.

Where the child is exposed alive, if the child is dead or if the person exposing remains with the child till it is dead or if the person exposing murders the child and there leaves its body, a case under Section 317 is not made out but it may fall under Section 302 or Section 304. AIR 1951 Raj 123.

2. Being the father or mother.—"Both are equally bound by ties of duty, and this equally whether the child be born in wedlock or be illegitimate. An infant requiring nature, or a child of tender years, will ordinarily be in the immediate charge of the mother the father's duty being that of providing for both mother and offspring. The person who has the immediate care of the child is the person contemplated. A parent who is absent, but who has provided duty for the maintenance and protection of his child, would not be criminally answerable for its abandonment by the person in whose charge he had left it. The offence consists in the desertion of the child, by a person who is bound by nature to support and protect it, or who has taken on himself that duty, whether by adopting the child, or by way of contract with the parent, or in some other way".—*Morgan and Macpherson.* The mother of an illegitimate child, aged 6 months, made over the child to a blind woman in whose company she was, and promised to return with food which she said she was going to buy ; she went-off to another village and probably had no intention whatsoever of returning. *Held,* that she was not guilty of an offence under Section 317, 18 All 364 : AWN 1896, 117. A married woman, who eloped leaving her suckling baby a month and a half old in the house of her husband, was held not to be guilty of an offence under Section 317, Penal Code as she knew that her husband would surely take care of it. 5 PR 1878 Cr. A married woman quarrelled with her husband and left for her parents' home when he had gone out leaving her child six months old in his house. The husband took charge of the crying infant on his return home ; *held,* that the woman was not guilty of an offence under Section 317, Penal Code. 4 PR 1879 Cr.

3. Shall expose or leave, etc.—"Exposure or leaving the child with the intention of wholly abandoning it is an essential part of the offence".—*Morgan and Macpherson.* Upon the question of intention, the previous treatment, as well as the circumstances of the particular case, will throw light. Thus previous neglect or ill-treatment of the child may add to the probability of the exposure being with intent wholly to abandon it. In a time of famine, a child may be deserted, not because those who have the care of it intended wholly to abandon it, but from mere destitution and inability to support it. *Ibid.*

When a woman left her daughter's newly born baby with the sister of her son-in-law, who was then absent from the place, saying that it was her brother's child and the infant died shortly after her departure, *held,* that the woman was not guilty of an offence under Section 317 and that her daughter had not abetted any such offence. 33 PR 1872 Cr. An accused person who caused the death of her infant child by deliberately starving it, but did not either abandon or part with it, was held to have been wrongly convicted under Section 317, Penal Code, and it was pointed out that the Sessions Judge, in convicting the mother under Section 304, ought to have specified the exception under Section 300, which covered the case. 18 PR 1870 Cr. Where the jury doubted whether a woman had abandoned her child at all, or whether she was the mother of it, although the Sessions Judge had no reasonable doubt from the evidence of those points, it was pointed out that it was his duty in summing up the evidence to lay before the jury all the facts requiring to be examined by them. 1 WR Cr Letters 10. In a case which was one of abandonment of child. the circumstances which were revealed in evidence precluded the idea that appellant intended to do more than abandon her illegitimate child, and even this was done in a way to give the child every chance of being rescued. *Held*, that under such circumstances, the finding and sentence of the Sessions Judge must be modified. 23 PR 1886 Cr. The exposure as contemplated by Section 317 must be one, by which some danger to the life of the child may ensue. AIR 1951 Raj 121 : 52 Cr LJ 511.

4. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by a Magistrate of the first class.

5. Charge.—I (*name and office of Magistrate, etc.)* charge you (*name of the accused*) as follows :

That on or about the.............day of...........at..........you, being the father (*or* mother *or* having the care) of your (*or* a certain) child named........which was then of the age of........years, exposed (*or* left) it in a certain place, to wit.......with the intention of wholly abandoning it, and thereby committed an offence punishable under Section 317 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by the said Court on the said charge.

* * * * *

Sec. 318. Concealment of birth by secret disposal of dead body.—Whoever, by secretly burying or otherwise disposing of the dead-body of a child whether such child dies before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine of with both.

Synopsis

1. Scope 1998
2. Conceals or endeavours to conceal birth, etc....................1999
3. Evidence 1999
4. Section 318 and Section 34....................2000
5. Procedure....................2000
6. Charge 2000

1. Scope.—The offence under this section cannot be committed unless the child had arrived at the stage of maturity, at the time of birth, and that it might have been a living child, 4 MHC App 33 ; 2 CPLR 153 ; 3 Cr LJ 432 ; 1 Bom LR 155 ; 1 Weir 333 : 1 Weir 334 ; Rat Un Cr C 721.

In order to constitute an offence under this section, there must be a secret burial or other disposal of the dead-body. The disposal must clearly be *ejusdem generis* with the secret burial. The disposal need not necessarily be a final disposal. It is sufficient if the body be temporarily concealed with the intention of removing it elsewhere when opportunity occurs. 13 CPLR Cr 188 ; Rat Un Cr C 961 ; 5 CPLR Cr 29 ; AIR 1935 Cal 489 : 62 Cal 1127 : 158 Ind Cas 761 : 36 Cr LJ 1460. This section is designed to punish a person for intentionally concealing the birth of the child from all and sundry though she will not escape the consequence of her act if she merely discloses the fact of the birth to some confident. AIR 1935 Cal 489. A necessary ingredient of this offence is intentional concealment. 8 CPLR Cr 5 ; 1 NLR 89 ; *see* also 25 PWR 1913 ; 12 Ind Cas 650 : 1 CPLR 163 Cr ; Rat Un Cr C 775; Rat Un Cr C 607.

'The concealment of the birth of child is not in itself an offence, but only a circumstance of suspicion which may form part of the evidence of an offence. This circumstance the law has thought fit to enact by the definition of a substantive offence. Such enacted, and the temptation to take it away in cases of bastard children.

'The prosecutor must first establish, to the satisfaction of the Court, the fact of the birth of the child. And the secret of burying or other disposal of the dead-body must be proved.

"Whether the father, mother or a stranger, does the act, regard must be had to the doer and the person who orders it be done. Suppose the mother is passive giving no directions, but another near her directs the burial or other disposal it seems she cannot be punished. If there is no act of concealment or disposal of the body after the child is dead, the offence is not committed. A mere denial of its birth is not sufficient".—*Morgan and Macpherson.* Where the birth took place in the Medical School Hospital and was attended by nurse and others in the hospital who were well aware that she had given birth to twins and it was known to two women whom the nurses endeavoured to persuade to adopt the children and further, it was known to third accused and that there was no evidence that the twins died. *Held,* that there was no concealment of the birth and that case did not come within Section 319. 62 Cal 1127 : 158 Ind Cas 761 : 36 Cr LJ 1460 : 62 Cr LJ 260 : 39 CWN 990 : 1935 Cr C 881 : AIR 1935 Cal 489 ; 1960 MPLJ (Notes) 227 (intention not given effect to).

Section 318 is designed to punish a person from intentionally concealing the birth of child from the public. 1960 Ker LJ 1497 : 1961 (1) Ker LR 49 ; AIR 1952 MB 124. The section lays down two essential ingredients of the offence. They are as follows ; (1) secret burial or disposal in any manner of the dead-body of a child whether such child died before, during or after its birth, (ii) intention to conceal the birth of such a child by such act 1958 ALJ 703 : 1958 All Cr R 518. Section 318 requires that the child should be dead at the time when participation in its secret burial or disposal should have been taken place. If child is living at the time and the girl merely consented at the instance of the father of the said child being delivered to a third person or otherwise disposed of the offence under Section 318 I.P.C. would not be made out. 1958 ALJ 703 : 1958 All CR 518 : 1955 All WR 761.

The necessary ingredient of the offence is that the accused secretly bury or dispose of the dead-body of the child, if he disposes of a living child. 1973 Raj LW 684.

2. Conceals or endeavours to conceal birth, etc.—"Not the concealment of the fact of pregnancy, or the death, but the birth, *i.e.*, the delivery of a child dead or living is made punishable by this section. There must be, it seems, a disposal in some secret place, whether the place is intended only as a place of temporary deposit or as a place of permanent deposit. Merely putting the body in an open exposed position, as on a bed, would not be such a place. But if it be put in a case, or under a bed, pillow, mattress *etc.*, this will be a sufficient disposal.—*Morgan and Macpherson.*

3. Evidence.—Where the birth of the child was known to most of the villagers no inference can be drawn that the disposing of the body was with the intention of concealing the birth of a child within the meaning of Section 318. AIR 1952 MB 124

1952 Cr LJ 1187 : BLR 1952 MB 100. When the conduct of the girl in wrongly trying to conceal the birth of the child is capable of a number of explanations which might be the offsprings of innocent intention, the mere fact she subsequently tried to conceal the birth of a child would not be enough to bring the charge home to her. 1958 All Cr R 518 : 1958 ALJ 703 : 1958 All WR (HC) 761 (benefit of doubt).

Where the only allegation against the accused was that he was found with the dead-body of the child at the bus stand and the statement of a class witness and the statement of taxi driver, who was not believed regarding the recovery of the child, it was held that the offence was not made out. 1952 Cr LJ 27 : (1981) 83 Punj LR 412 ; *see* also 1981 Cr LJ 522 (conviction not sustained on the facts of the case).

4. Section 318 and Section 34.—An accused charged under Section 318 read with Section 34, may be convicted under Section 318 simpliciter where no prejudice is caused to the accused. 1972 All LJ 958.

5. Procedure.—Cognizable–Warrant–Bailable–Not compoundable–Triable by a Magistrate.

6. Charge.—I (*name and office of Magistrate, etc.)* hereby charge you *(name of the accused)* as follows :—

That on or about the..........day of........at........you intentionally concealed (or endeavoured to conceal) the birth of a certain child, to wit........ (the *child of A, B)* by secretly burying it (or disposing of its dead-body) and thereby committed an offence punishable under Section 318 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by me of the above charge.

* * * * *

OF HURT

Sec. 319. Hurt.—Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

***Notes.*—**"Many of the offence within this division, will also fall under the head of assault. A stab, a blow which fractures a limb, the flinging of boiling water over a person, are assaults, and also acts which cause bodily hurt. But bodily hurt may be caused by many acts which are not assaults. A person, for example, who mixes a deleterious portion and places it on the table of another ; *(vide* 21 ALJ 844) : a person, who conceals a scythe in the grass on which another is in the habit of walking ; a person, who digs a pit in a public path, intending that another may fall into it;—all these may cause serious hurt, and may be justly punished for causing such hurt. But they cannot, without extreme violence to language, be said to have committed assaults. All bodily hurts, not only those which are serious but also those which are slight, are within the provisions inserted under this division. But a distinction is made between "hurt" and "grievous hurt". It may not be possible to draw a line between the two, with perfect accuracy. But it is better that some such line should be drawn, though rudely, than that offences, some of which approach in enormity to murder, while others are little more than frolics which a good natured man would hardly present, should be classed together. The several penal provisions which are here made for these offences, are intended to mark by corresponding degrees of punishment the different degrees of bodily injury caused. Still more they mark the mischievous intentions with which such injuries have been perpetrated. For it is the intention or knowledge with which the hurt is inflicted that must chiefly be regarded in the award of punishment. Where a wicked intention is shown to the satisfaction of the Judge, the severity of the hurt inflicted is not a circumstances which ought to be mainly considered in apportioning the punishment ; though it is undoubtedly by a circumstance which is important as evidence when the intention is not clearly established.—*Morgan and Macpherson*. An act which causes death unintentionally is tantamount to "hurt", *vide* Rat Cr C 673 ; 3 Cal 623 ; 18 WR Cr 29 ; 21 Bom LR 1101 ; 162 PLR 1913 ; 157 PLR 1923 ; 2 All 522, 19 All 295 ; 2 All 776 ; 5 All 507. Hurt need not be caused by direct physical contact between accused and victim. AIR 1944 Sind 19 : 45 Cr LJ 247. Where the accused had common intention to cause hurt with others, he can be convicted of the offence of causing hurt. AIR 1938 Lah 543 : 39 Cr LJ 781 : ILR 1938 Lah 608. The pain caused by a blow across the chest with an umbrella was held not to be of such a trivial character as would come within the meaning of Section 95 of the Penal Code, but to be hurt under Section 319. 24 WR Cr 67. Where an infactuated young man administered *dhatura* under the impression that it was a love *philtre*, there is no intention to cause hurt. The offence falls under Section 319 and not under Section 328. 21 ALJ 844 : ILR 4 All 229 Cr. A person can be convicted for grievous hurt only when the effect of the injuries inflicted by him actually lasts for 20 days but not when the sufferer dies before the period expired. 84 Ind Cas 438 : 26 Cr LJ 294 : AIR 1925 Lah 297. Where the accused dazed by a blow, kicked the prostrate man and pressed his head into ground, he was guilty of simple hurt only. AIR 1928 Oudh 282 : 5 OWN 391 : 30 Cr LJ 173 : 13 Ind Cas 481. When though the complainant had to be kept treated in the hospital as indoor patient for 45 days as a result of motor injuries, the medical witnesses stated that after 14 days this complainant could have been discharged and that after the said period he was in a position to attend to his ordinary avocation in life, the criminal act or the act would fall under Section 337 and not under Section 338 as it naturally would have been as the result of 45 days stay in the hospital. AIR 1958 Ker 8 : ILR 1957 Ker 781 : 1958 Cr LJ 33 ; 25 Cut LT 391 : ILR 1959 Cut 662 : (1959) 1 Ori JD 235, sufficient to constitute offence under Section 328 as these was hurt caused within the meaning of Section 319.

Where a person was dragged by the hair and also fisted it was held that part was caused irrespective of the fact whether any visible injury was caused to the victim. AIR 1967 AP 206 : 1967 Cr LJ 840 ; *see* also (1965) 1 Mys LJ 647.

* * * * *

Sec. 320. Grievous hurt.—The following kinds of hurt only are designated as "grievous" :—

First.—Emasculation.

Secondly.—Permanent privation of the sight of either eye.

Thirdly.—Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member of joint.

Fifthly.—Destruction or permanent impairing of the powers of a member or joint.

Sixthly.—Permanent disfiguration of the head or face. *Seventhly.*— Fracture or dislocation of a bone or tooth.

Eighthly.—Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Synopsis

1. Scope 2002
2. Hurt or grievous hurt 2002
3. Emasculation 2003
4. Sixthly 2003
5. Seventhly 2003
6. Eighthly 2004
7. Evidence 2004
8. Acquittal 2004
9. Conviction 2004
10. Sentence 2004
11. Attempt to murder. 2005

1. Scope.—Allegation of cutting leg and wrist—Offence under Section 320 was made out and covered by Section 320, I.P.C. (fourthly). *Ramchandra v. State of M.P.*, 1995 Cr LR 11 (MP).

2. Hurt or grievous hurt.—In cases of hurt, it is for the Magistrate to classify and to come to a finding of his own, as to whether the hurt was grievous or simple and for this purpose the Magistrate should examine the medical officer to ascertain whether the injuries are of any of the kinds specified in this section. It is not the business of the medical officer to decide whether a wound is grievous hurt or not, but to describe the fact from which the Magistrate will decide. 4 Cr LJ 202.

"Some hurts which are not like those kinds of hurts which are mentioned in the first seven classes, obviously distinguished from a slight hurts, may nevertheless be most serious. Thus a wound may cause intense pain, prolonged disease, or lasting injury to the constitution, although it does not fall within any of these classes. Again a beating which does not mean the suffer or break his bones, may be so cruel as to bring him to the point of death. It is clear that such hurts should be classed with those which are grievous and not with hurts, all traces of which disappear in a few days. Accordingly the 8th clause provides for them. Three circumstances are mentioned in the clause, any one which can make a hurt a grievous hurt of that kind ; (1) if life is endangered by it, or (2) if severe bodily pain is caused for twenty days, or (3) if the sufferer is unable to follow his ordinary pursuits for that length of time. The length of time during which he is in pain or deceased, or incapacitated for pursuing his ordinary avocations, though a defective criterion of the severity of the hurt is the best that can be devised. And it is one which may be employed, not merely in cases where violence has been used, but in cases where hurt has been caused without any assault, as by the administration of drugs, the placing of ropes across a road, *etc.*"—*Morgan and Macpherson.* Wounds which, though not likely to cause death, must be held to have endangered life within the meaning of Section 320. AIR 1923 Oudh 97 : 9 OLJ 490 : 26 OC 18 : 24 Cr LJ 513 : 73 Ind Cas 49 ; *see* also AIR 1930 Lah 305 : 21 Cr LJ 7 : 11 LLJ 519 : 120 Ind Cas 431 ; AIR 1942 Pat 376 : 43 Cr LJ 511 ; 1941 MWN 953 ; AIR 1939 Pat 611 : 41 Cr LJ 191. Where there was no doubt a deep injury, deep to the bone, but there was neither a cut in the bone nor was there any fracture, it cannot be said that there was any grievous hurt within the meaning of Section 320. 1951 AWR (HC) 107. An injury may be called grievous only if it endangers life. 1963 (1) Cr LJ 387 ; (1964) MLJ (Cr) 601 : (1964) 2 MLJ 437 : 1964 All Cr R 376 : 1965 (1) Cr LJ 48 : AIR 1965 Mad 10 ; A blow on the head with an axe which penetrated half an inch into the head is an instance of injury which endangers life. AIR 1955 SC 216 : 1955 Cr LJ 572 ; 1982 Cr LJ (NOC) 98 (injury inflicted by means of knife is grievous hurt) but *see* (1980) 17 Delhi LT 242 (where first blows on abdomen held to be not culpable homicide amounting to murder.

Plea of grievous hurt cannot be raised where death was due to injuries developing into gangrene. 1964 (1) Cr LJ 426 : AIR 1964 Pat 158 ; AIR 1956 Raj 39 : ILR (1956) 6 Raj 90 : 1956 Cr LJ 270 ; 1962 Raj LW 70 (injury must actually endanger life to be grievous one) ; (1979) 81 Punj LR 1151, the expression would have been dangerous to life indicating that the injury may or may not be dangerous to life ; *see* 1980 Cr LJ 1126.

Where there was allegation of whether there was grievous or simple injury—Outer table or skull was cut—Doctor found injury visible—Injury not measured. Hence, it was held injury not grievous. *State of Punjab* v. *Jiwan Singh*, (1994) 2 Recent Cr R 373 (P & H) (DB).

3. Emasculation.—*Vide* 19 M 356 ; 22 PR 1878 ; 1978 Pun Re (Cr) No. 22, page 59.

4. Sixthly.—*Vide* 1 BHCR 101 ; AIR 1950 Ajmer 13 (1) ; AIR 1983 Raj 597 : (1974) 40 Cut LT 465.

5. Seventhly.—*Vide* 5 WR 12 ; Rat Un Cr C 558 ; 170 Ind Cas 753 : 38 Cr LJ 960 : AIR 1937 Rang 253 ; *see* also 77 Mad LW 347 : 1964 All Cr R 376 : (1964) 2 Mad LJ 437 : AIR 1965 Mad 10 ; AIR 1955 Raj 36 : ILR (1955) 5 Raj 1 : 1955 Cr LJ 579 (fracture what is).

Wherever a doctor describes an injury as dangerous to life and the nature of injury is such to be treated as grievous hurt of the first part of clause (8) of Section 320. 1980 Cr LJ 1226 : (1980) 82 Punj LR 719. A disability for twenty days which causes the sufferer severe bodily pain or makes him unable to follow his ordinary pursuit constitute grievous hurt. 1974 Cr LJ 1239. *See* 1969 Cr LJ 1493.

If there is a break by cutting or splintering the home or there is a rupture of figure, it would amount to a fracture within clause 7 of Section 320 what the Court has to *see* is whether the cuts in the bones noticed in the injury report are only superficial or do they effect a break in there. AIR 1970 SC 1971 : 1979 Cr LJ 1665 (*overruling* AIR 1942 Pat 196 ; AIR 1937 Rang 253 ; AIR 1953 Raj 36 and 1951 All WN 197); *see* (1978) 80 Punj LR 326 : 1980 All Cr R 497 ; 1978 Cr LJ (NOC) 283 : (1979) 81 Punj LR 37.

6. Eighthly.—*Vide* 19 Bom 247 : 84 Ind Cas 438 : 26 Cr LJ 394 : 1925 Lah 297 1953 Cr LJ 104 : AIR 1953 Kutch 7. The mere fact that the sufferer did not attend his duty for the statutory period or that he remained in the hospital for that period is r indication of his inability to do so. The opinion of the doctor is important. 1961 Mad L (Cr) 494 : 1961 Ker LT 362 : 1962 (1) Cr LJ 652 : 1962 (2) Cr LJ 147 (for proof of) 196 Ker LT 362 : 1961 Mad LJ (Cr) 594 : 1962 (1) Cr LJ 652 : 1980 Cr LJ 1226.

Wounds which though not likely to cause death must be held to have endangere life. 1979 Bom CR 507 : 1980 Cr LJ (NOC) 121 ; (1974) 2 Mys LJ 402 (court is to giv his opinion on finding a part from the medical evidence).

7. Evidence.—Trial for offence under Section 320 and there was appreciation c evidence—It proved close relationship of witnesses with injured. All this was found to b not sufficient to discard their evidence. Question of severe scrutiny arises only when i is shown that there was likelihood of an attempt to falsely implicate an accused *Bibhisan Barik* v. *State*, 1995 Cr LJ 390 (Ori).

8. Acquittal.—Where there was offence of grievous hurt which was charge unde Section 333. IPC—Conviction was of two years RI and fine of Rs. 2,000—Only blow on the face of injured and benefit of Probation Act was given and sentence reduced t period undergone. *V.R Murthy* v. *State*, (1994) 2 CHN 372 (Cal).

9. Conviction.—Conviction was under Section 326. Injury inflicted in abdomen o victim with knife of sassor. There was alteration of finding from Section 326 and injure remained in hospital for 20 days is without any severe bodily pain or unable to follow his ordinary pursuits. It was held, that merely remaining in hospital for 20 days no sufficient to attract Section 320 (8). Conviction altered to one under Section 324. *Prita Singh* v. *State*, (1995) 2 CC Cases 519 (Delhi).

Where circumstantial evidence not inspiring confidence and there was false explanation of the appellant which was not to be made basis of his conviction. Weakness of the defence. Not to be interpreted a favourable circumstances for the prosecution. It was made out that prosecution to stand on his own legs. *Bhalinder Singh* v. *State of Punjab*, (1994) 1 CCR 26 (SC) : 1994 JIC 153 : (1994) 1 SCC 726 : (1994) 1 Crimes 294 : 1994 SCC (Cr) 462 (SC).

10. Sentence.—Where there was many deaths and loss of eye-sights of others due to consumption of such *arrack*. Hence there was maximum sentence to be awarded. *E.K. Chandrasenan* v. *State of Kerala*, 1995 Cr LJ 2060 (SC) : 1995 SCC (Cr) 329 : (1995) 2 SCC 99 : (1995) 1 Crimes 421 : (1995) 1 ALT (Cr) 464 (SC).

From the medical report and supplementary medical report, it is clear that injury was inflicted on the left side head i.e. 7 cm above left eye-brow. There was a facture of left parital bone and according to doctor the bone of the head was found fractured. As per Section 323 IPC, whoever, except in the case provided for by Section 334, voluntarily causes hurt, shall be punished with the imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both. In the light of the evidence of the doctors' medical report, Section 323 is not at all applicable as argued by learned Counsel for the appellant.

In view of strong medical evidence in the form of oral and documentary, the injuries sustained by the injured comes under 'Seventhly' of Section 320 i.e. fracture or dislocation of a bone. Voluntarily causing hurt by dangerous weapons or means has been explained in Section 324 and punishment for voluntarily causing grievous hurt is with imprisonment which may extend to seven years and shall also be liable to fine. The trial Court as well as the High Court, taking note of the enmity and intention of the accused and nature of injuries, evidence of both oral and documentary and medical evidence, concluded and awarded punishment under Section 308, IPC.

In view of the materials placed by prosecution, analysed by the trial Court and approved by the High Court, we are not inclined to reduce the sentence. Court has already pointed out about the proof regarding enmity, intention and causing grievous hurt. *Jameel vs. State of U.P.*, 2010 (2) CrLJ 2106 (SC).

11. Attempt to murder.—When complainant party protested against abuses, accused person took out sword and assaulted them causing injuries on various parts of their body. Evidence of witnesses supported prosecution case narrating in detail as to the manner in which victims were assaulted. Although doctors have not specifically stated regarding injuries sustained by victims to be serious in nature. But, fracture or dislocation of a bone or tooth are designated as grievous hurt in view of Sec. 320(7). *Mukesh Rathore vs State of Chhattisgarh*, 2010 Cri LJ 1289 (Chatt).

* * * * *

Sec. 321. Voluntarily causing hurt.—Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

Synopsis

1. Scope 2005
2. Intention 2005
3. Conviction 2005

1. Scope.—"Both the extent of the hurt and the intention of the offender must be considered. His intention may, in this, as in all other cases, usually be inferred from the act which he has done. It should be observed that the definition now under consideration will include a case in which a person, intending to cause hurt to *A*, or knowing it to be likely that he will cause such hurt unintentionally, hurt B".—*Morgan and Macpherson*. Causing bodily pain is the essential element of hurt. 38 Cr LJ 442 : 167 IC 748.

2. Intention.—The intention or knowledge of the accused can only be inferred from the nature and extent of the injury. UBR (1897-1901) Vol. 1, 316. This offence is caused when the blow is intended for another. 2 CLR 304. Causing grievous hurt with the intention to cause such hurt or with the knowledge that such hurt is likely to be caused, constitutes the offence under the section. AIR 1958 Pat 452 : 1958 Cr LJ 1077 (there must be correspondence between the result and the knowledge of the accused).

3. Conviction.—When evidence of ocular witnesses is affirmed by medical evidence, conviction is proper. *Rajendra* v. *State*, 1997 Cri LJ 171 (Mad).

* * * * *

Sec. 322. Voluntarily causing grievous hurt.—Whoever voluntarily caused hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt".

Explanation.—A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind. he actually causes grievous hurt of another kind.

Illustration

A, intending or knowing himself to be likely permanently to disfigure *Z*'s face. gives *Z*, a blow which does not permanently disfigure *Z*s face, but which causes *Z* to 4 suffer severe bodily pain for the space of twenty days. *A* has voluntarily caused grievous hurt.

Synopsis

1. Scope 2006
2. Cases 2007

1. Scope.—The provisions of this section are very precise and incapable of misconstruction. A Magistrate dealing with a charge under this section must decide and consider not only whether grievous hurt has been caused, but, if it has been caused, whether the accused intended or knew himself to be likely to grievous hurt. If he intended or knew himself to be likely to cause simple hurt only, he cannot be convicted under Section 325, 28 Ind Cas 1907. "It is requisite not only that the hurt itself should be grievous, but also that the offender should intend or know himself to be likely to cause a grievous hurt. A man who means only to inflict a slight hurt may, without intending or expecting to do so, cause a hurt which is exceedingly serious. A push which to a man in health is a trifle may, if it happens to be directed against a diseased part of an infirm person, occasion consequences which the offender never contemplated as possible. A blow designed to inflict only pain for a moment, may cause the person struck to lose his footing, to fall from a considerable height and to break a limb. But it would be unjust to punish the offenders in such cases for results which could not reasonably be expected or intended to follow their acts. But if grievous hurt of any kind was contemplated, it is immaterial (as the explanation and illustration show) whether the hurt caused is the hurt contemplated, provided only it is grievous. The result and the intention must to this extent correspond.

The offender's intention may be reasonably proved from his acts. But now, it may be asked, are we to discover what degree of hurt the offender knows himself to be likely to cause ? It is not necessary that there should be any hurt of which it could with truth be said, this and this alone is the degree of hurt which the offender knew himself to be likely to cause. A person who ties a rope across a road by night, may know himself to be likely to cause grievous hurt, even though he thinks it on the whole more probable that he will only cause hurt not grievous. He may contemplate both at the same time. The duty of the Judge in such a case will be, not to seek for direct proof of the precise degree of hurt which the offender thought himself likely to cause, but to draw a conclusion from the nature of the act and the evidence generally as to whether, among other consequences, grievous hurt might not reasonably have been thought likely to ensue from it. If the fair conclusion at which he arrives is that nothing more than simple hurt was probably to be anticipated, then although grievous hurt may unexpectedly have ensued it will be his duty to convict the offender of causing simple hurt only"—*Morgan and Macpherson.*

The Law Commissioners say. "We agree with *Mr. Bacon* what we conceive to be his meaning as to the duty of the Judge that is to say, that he is not to trouble himself with seeking for direct proof of what the offender thought was likely to happen, but is to infer it from the nature of his act, taking him to have intended grievous hurt, or at least to have contemplated grievous hurt as likely to occur, when he did what everybody knows is likely to cause grievous hurt, and the more certainly drawing this conclusion where there is evidence of previous enmity against the party who has suffered. If the act was such that nothing more than simple hurt could reasonably be thought likely to ensue from it, then although grievous hurt may unexpectedly have ensued, it would be his duty to convict the offender of simple hurt only.....judging that grievous hurt was not in his contemplation for according to clause 317 (this section) a person can be convicted of grievous hurt only when the result and the intention correspond, or when grievous hurt has been suffered from an act which was intended to cause grievous hurt, though it may be of a different kind". *First Report*, Section 377.

The requirement of explanation, Section 322, will be satisfied if offender had the knowledge that by his act was likely to cause grievous hurt. 1952 Ker LT 156 : 1953 Cr LJ 706 : AIR 1953 TC 129 ; *see* also AIR 1958 Pat 452 : 1958 Cr LJ 1077.

2. Cases.—Where *B*, the accused was much enraged at being turned out of the shop whether he had gone for drink and intended to revenge himself on the man who turned him out, and where *B* hit that man over the head with a stick, hard enough to fracture his skull. *Held*, that, in circumstances, *B* must be presumed to have intended either to cause grievous hurt or known that he was likely to cause it, within the meaning of this section. UBR 1911 4th Qr 105 : 15 Ind Cas 311 : 13 Cr LJ 471. Where a person intends to inflict injury upon one person, but actually inflicts injury upon another, his act constitutes the offence of hurt or grievous hurt, within the meaning of Section 321 or Section 322 of the Penal Code, according to circumstances. 3 Cal 623 : 2 CLR 304. The provisions of Section 322, Penal Code, are very precise and incapable of misconstruction. A Magistrate or Court dealing with a charge of voluntarily causing grievous hurt must consider and decide not only whether grievous hurt has been caused, but, if it has been caused, whether the accused intended or knew himself to be likely to cause grievous hurt. If he intended or knew that himself to be likely to cause simple hurt only, he cannot be convicted under Section 325. UBR (1914), 4th Qr 35 : 28 Ind Cas 1007 : 16 Cr LJ 431. *Held*, where facts and circumstances are consistent with the guilty of the accused that he was the author of the fatal injury and since the motive is surrounded with mystery, lesser sentence would meet the ends of justice. (1964) 6 Orissa JD 257.

* * * * *

Sec. 323. Punishment for voluntarily causing hurt.—Whoever, except in the case provided for by Section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Synopsis

1. Scope. 2008
2. Sections 323, 302, 320 and 326. 2014
3. Sections 323 and 342, IPC 2014
4. Evidence and proof. 2016
5. Headmaster. 2018
6. Assault by Master/Supervisor of School. 2018
7. Right of private defence 2018
8. Application of the section. 2019
9. Common object and intention. 2019
10. Procedure 2023
11. Charge. 2023
12. Sentence. 2024
13. Acquittal. 2026
14. Conviction 2028
15. Conviction for substantive offence 2028
16. Self-defence 2029
17. Probation 2029
18. Jurisdiction 2029
19. Compromise 2029
20. Non–Explanation of injuries 2029
21. Voluntary causing heart 2030
22. Principles of unlawful assembly—Applicability. 2031
23. Outraging modesty of woman and hurt. 2032
24. Death of complainant. 2033
25. FIR 2034
26. Cognizance of offences 2035

1. Scope.—A criminal prosecution under this section does not abate by reason of the death of the person injured. 81 Ind Cas 719.

The intention or knowledge of the accused can only be inferred from the nature and extend of the injury. UBR (1897-1901) Vol. I, 316. In executing a writ of possession, a bailiff can use a reasonable degree of force in order to effect the removal of persons bound by the decree and refusing to vacate. So he cannot be convicted under this section where he acts within his right. 19 CWN 273 : 42 Cal 313 ; *see* also 164 Ind Cas 99 : 37 Cr LJ 892 : 1936 OWN 601 : 1935 Cr C 938 : AIR 1936 Oudh 379. A bailiff can also call upon the decree-holder to help him in removing the judgment-debtor, and the decree-holder cannot be prosecuted under this section for helping the bailiff. 5 Bom LR

977. Where an accused caused hurt intending to cause simple hurt and thereby death is caused he is punishable under this section. 1888 AWN 236 ; 5 CPLR 69 Cr ; 1 PWR 1913 (1) Cr : 18 Ind Cas 644 : 14 Cr LJ 104 : 163 PLR 1913 ; 4 Bom LR 879 ; 2 PWR 1908 (1) Cr : 77 PLR 1908 : 7 Cr LJ 321 ; 41 PWR 1914 (1) Cr : 16 Cr LJ 93 : 26 Ind Cas 1005 ; LBR (1872-1892), 179 ; Rat Un Cr C 67 ; 11 PR 1880 (1) Cr : 5 WR 1913 : 157 PLR ; 18 WR Cr 19, No offence is committed by a passer by when he prevents a boy who was raising clouds of dust in the street or chastises him or beats him. AIR 1944 Mad 168 : 45 Cr LJ 524. Where an accused caught by a constable inflicted a wound on his chest with a knife, he should be convicted under this section. AIR 1943 Nag 145 : 44 Cr LJ 512 : ILR 1943 Nag 411 : 206 IC 382. When the nature of the act itself is the only means of judging the intention, the agent must be presumed to intend only the natural consequence of the act. *Ibid* ; *see* also 43 Cr LJ 742 : AIR 1942 Pat 319 : AIR 1942 Cal 426 : 43 Cr LJ 455 ; AIR 1939 All 91 : 39 Cr LJ 364. Where it is not certain that which two of the accused caused grievous hurt, they cannot be convicted under Section 325 but only under Section 323. AIR 1940 Mad 586 : 41 Cr LJ 923 ; *see* also AIR 1941 Nag 10 : 42 Cr LJ 203 : ILR 1941 Nag 139.

Where an accused has caused both simple hurt and grievous hurt to some person on some occasion he should be convicted only under Section 325 and not also under Section 323 separately. 41 Cr LJ 775 : AIR 1940 Oudh 419. Where the accused is not a proclaimed offender, his rescuers are not guilty either under Section 325 or Section 225 for rescuing him from the custody of a village *chaukidar*. AIR 1940 Pat 696 : 42 Cr LJ 199. Section 71 of the Penal Code does not apply where all the accused were convicted under Sections 147 and 323 and separate sentence under each section has been awarded. AIR 1940 Oudh 419 : 41 Cr LJ 775. Where the fight was in connection with the possession of a field, the Court should decide as regards possession before convicting anyone of the accused. 1939 OWN 1105. An accused can be convicted under this section only for beating a constable very severely. AIR 1940 Cal 321 : 41 Cr LJ 774 ; AIR 1939 Nag 95 : 40 Cr LJ 905. Where an accused has been convicted for offences both under Sections 323 and 452, committed on one and the same occasion, separate sentence can be passed for each offence. AIR 1938 Rang 114 : 39 Cr LJ 487. An accused may be charged under Section 147 in addition to charges under Sections 323 and 325. 39 Cr LJ 341 : AIR 1938 Oudh 95. The question whether a *lathi* used by the accused is or is not an instrument likely to cause death is one of fact in each case. AIR 1950 East Punjab 209. Causing momentary physical pain is sufficient to constitute offence. AIR 1950 Kutch 41.

Neither case of suicide nor of harassment for demand of dowry made out. Held, Sec. 498-A(b) has no application. For bringing in application of Sec. 306 IPC, suicide has to be established. In the instant case, the trial Court and the High Court have categorically held that no suicide has been established. So far as Sec. 498-A(b) is concerned, there must be an evidence of demand of dowry. There is no evidence in that regard adduced by the prosecution. That being so, as rightly contended by learned counsel for the appellant Sec. 498-A(b) has no application.

The crucial question is whether the appellant can be convicted in terms of Sec. 323 IPC. Even if it is so as contended by learned counsel for the respondent, considering the fact that the appellant has already suffered custody of about 6 months, we do not consider it necessary to go into that question. The appeal is allowed. *Gopal v. State of*

Rajasthan, AIR 2009 SC 1928. : 2009 (2) SCR 423 (SC) : 2009 (11) SCC 314 : 2009 (2) JT 419 (SC) : 2009 (2) Scale 704 (SC) : 2009 (2) SLT 193 (SC) : 2009 (2) JCC 920 (SC).

The charge under Section 323 should distinctly deny the existence of circumstances constituting a special exception, as the terms of Section 237 of the Cr PC, should prevail in preference to any direction which may be inferred from the forms of charge contained in Section 239. Rat Un Cr C 20. In the absence of a charge for an offence voluntarily causing hurt and the common object charged for causing rioting not specifying the intention to cause hurt, there can be no conviction for voluntarily causing hurt under Section 323 of the Penal Code. 13 CLJ 329 : 38 Cal 293 : 9 Ind Cas 965 : 17 Cr LJ 169. Person beating public servant is guilty under Section 323 irrespective of Section 99. AIR 1927 Lah 851 : 28 PLR 290 : 28 Cr LJ 972 : 105 Ind Cas 684. Offence of causing bodily pain includes the use of force. AIR 1928 Mad 18 : 53 MLJ 653 : 28 Cr LJ 982 : 105 Ind Cas 806. Where death was cuased by simple injuries without knowing of a deceased's spleen, offence is only under Section 323. AIR 1924 Lah 218 : 24 Cr LJ 421 : 72 Ind Cas 533 ; *see* also AIR 1929 Lah 531 : 30 Cr LJ 300 : 114 Ind Cas 442. Where accused commits different offences in respect of injuries caused to different persons in the same transaction separate convictions are proper. 149 Ind Cas 231 : 11 OWN 680 : 35 Cr LJ 935 : AIR 1934 Oudh 244.

The act on which an accused person must be punished under Section 323 is the hurt which he intended to cause or might be reasonably held likely to cause, by the act done, and not an unfortunate and an entirely unforeseen result of that act. 11 PR 1897 Cr ; *see* also 18 WR Cr 29. If in evidence, there is nothing to show that the accused was rash, and death has resulted from the rupture of a greatly enlarged spleen, caused by a slight kick with bare foot, no offence is committed except that of voluntarily causing hurt. UBR (1892-1896) Vol. I, 217 ; 8 WR Cr 29 ; 5 WR Cr 97. Where a person intends to inflict injury upon one person, but actually inflicts upon another, his act constitutes the offence of hurt or grievous hurt, within the meaning of Section 321 or Section 322 of the Penal Code, according to circumstances. 3 Cal 623 : 2 CLR 304. Causing disability for a fortnight is punishable as voluntarily causing hurt. In order to constitute grievous hurt. the disability must be for 20 days. 1 WR Cr 9. A person who is tried and discharged for the offence of assult under Section 352, Penal Code, cannot again, upon the same complaint be tried for causing hurt. 7 BLR App 25 : 16 WR Cr 3. If the prosecution could establish that hurt was caused and that the causing of hurt was a common object of the accused, and the persons who caused the hurt were less than five in number, the persons who caused hurt would be liable to punishment under Section 323, Penal Code. 14 Cr LJ 142 : 18 Ind Cas 894 : 155 PLR 1913 : 16 PR 1913 Cr : 20 PWR 1913 Cr ; 14 Cr LJ 66 : 18 Ind Cas 402 : 40 Cal 511.

Where a charge under Section 147 has been framed but no charge has been framed under this section against an accused he cannot be convicted under this section. 18 CWN 1276 : 15 Cr LJ 704 : 26 Ind Cas 152 ; *see* also 18 CWN 1274 : 16 Cr LJ 42 : 26 Ind Cas 634 ; 30 Cal 288 ; 13 Cr LJ 593 : 16 Ind Cas 161. But where there has been no failure of justice and the accused is not prejudiced, such conviction was upheld. 1881 AWN 28. Conviction under Section 323 on charge under Section 148 is not illegal. AIR 1923 Lah 326 : 26 Cr LJ 591 : 85 Ind Cas 822. Section 149 creates no substantive offence but Section 147 does. The moment one injury is inflicted, force is used and conviction for Section 147 can be given; if none are inflicted Section 323 also applies. AIR 1926 All 225 : 24 ALJ 178 : 92 Ind Cas 463 : 27 Cr LJ 287 ; *see* also 145 Ind Cas 913 : 1933 ALJ 1178 : 1933 Cr C 1417 : AIR 1933 All 819 : AIR 1921 Pat 432 : 2 PLT 91. So in conviction under Sections 147 and 323, separate sentence is illegal. 142 Ind Cas 31 : 1933 MWN 254 : 64 MLJ 314 : 15 Cr LJ 273 : 56 M 481. AIR 1933 Mad 338. Offences of assault or causing hurt involve breach of peace and order under Section 106, Cr PC, can be passed without separate finding as to breach of peace. 144 Ind Cas 954 : 1933 Cr C 981 : 1933 ALJ 1345 : AIR 1933 All 609. Where accused gave only kicks without any intention to cause death, offence is only under Section 323. 21 Cr LJ 666 : 57 Ind Cas 826 ; *see* also AIR 1925 All 126 : 26 Cr LJ 470 : 84 Ind Cas 150 ; AIR 1923 All 87 : 20 ALJ 921 : 45 All 142 : 71 Ind Cas 503. Where a police constable asked the complainant not to create any disturbance on a public road, upon the complaint's declining to do so, he demanded his name and address which were not given. The constable thereupon abused, arrested and dragged the complainant to the Police *Chowkey* and detained him there till his name and address were ascertained. *Held*, that he can not be convicted under Sections 220 and 323, IPC, but a conviction can be made under Seciton 504. 5 Bom LR 597.

In this case, the accused person struck a man one blow on the head with a bamboo yoke and the injured man died afterwards in hospital, principally from the excessive use of opium surreptiously administered by his friend. *Held*, that as there was no intention to cause death, and as the blow in itself was not of such a nature as was likely to cause death, the offence committed was that of voluntarily causing hurt. LBR (1872-1892), 179 ; *see* also 2 PWR 1908 Cr : 77 PLR 1908 : 7 Cr LJ 321 ; 1 PWR 1913 Cr : 18 Ind Cas 664 : 14 Cr LJ 104 : 16 PLR 1913 ; *see* also 1925 All 126 ; 21 Bom LR 1101. Where death was caused by throwing acid but it was not possible to hold that *A* knew that his throwing acid on *B* was likely to cause *B*'s death, he can be convicted under Section 324. AIR 1950 Ajmer 21. A conviction for hurt under Section 323, IPC, must be based on some evidence apart from the presence of injuries on the person of the accused. 169 Ind Cas 453 : 38 Cr LJ 797 : 39 PLR 7.

Where, being insulted in a drunken brawl, the accused threw down the deceased stampeded his feet on his body and death ensued within twenty days, the offence was one under Section 323 of the Penal Code, and not under Section 304-A. Rat Un Cr C 67. A conviction is not sustainable where death was resulted from violence intentionally directed against the deceased by the accused. 11 PR 1880 Cr. The accused, after a trivial domestic quarrel beat his wife with a light stick, with the result that she fell down and expired. *Held*, that as all the physical injuries sustained by the deceased were simple hurts, the prisoner should properly have been convicted of an offence under Section 323, IPC. 5 PWR 1913: 157 PLR 1913. Where the accused approaches the prostrate body of a dying man, kicks him on neck and then presses with his foot the dying man's head into the ground so that it becomes buried in earth, it is a serious from of simple hurt for which maximum sentence ought to be awarded. AIR 1928 Oudh 282. Separate sentences cannot be passed under Sections 323 and 326 of the Penal Code in the case of an assault upon a single person. 103 Ind Cas 198 : 28 Cr LJ 662 : 1 Luck C 199 : AIR 1927 Oudh 313. It is by no means uncommon for an offence punishable under Seciton 323 to require, and set as much heavier sentence than one punishable under Section 325. 97 Ind Cas 1053 : 27 Cr LJ 1229 : AIR 1927 Nag 49. A conviction under Section 147, IPC, cannot be altered into one under Section 323 in the absence of a charge under that section. 87 Ind Cas 842 : 26 Cr LJ 1018.

Where a police constable is guilty of the offence of wrongful confinement, the accused person is entitled to exercise against him under his right of private defence. He cannot, therefore, be convicted under Section 323 for assaulting the constable. 85 Ind Cas 44 : 26 Cr LJ 428 : AIR 1923 All 34. A school master cannot be convicted under this section for giving a boy 8 or 9 strokes with a cane inasmuch as he must be taken to have an implied authority delegated to him by the parents or the guardians of the school boy to the infliction of such reasonable punishment as may be necessary for the purpose of school discipline. 94 Ind Cas 412 : 3 Rang 661 : AIR 1926 Rang 107 : 27 Cr LJ 636. A criminal prosecution under Section 323, IPC, does not abate by reason of death of the person injured. 22 ALJ 520 : 81 Ind Cas 719 : 25 Cr LJ 1007 : AIR 1924 All 666 ; *see* also AIR 1921 Mad 278 : 44 M 417 : 40 MLJ 351 : 23 Cr/LJ 117 : 65 Ind Cas 549 ; but *see* 25 PR Cr 1919 : 52 Ind Cas 797 : 20 Cr LJ 717 ; 36 PR 1917 Cr. Where the accused were tried for an offence under Section 325 for inflicting an injury of the knee-cap of the complainant and for no other offence an Appellate Court is not justified in altering the conviction under Section 325 to one under Section 323, IPC, inasmuch as the accused had not been given an opportunity of answering the charge in the first instance of inflicting injuries other than the injury to the knee-cap. 72 Ind Cas 72 : 24 Cr LJ 312. Where a complainant did not mention of assault, conviction under Section 323 is illegal. 17 Cr LJ 111 : 1 PWR 1916 Cr : 32 Ind Cas 847 ; *see* also 20 Cr LJ 303 : 50 Ind Cas 351.

If accused's dog bite complainant, he is guilty under Section 289 only. AIR 1923 Rang 147 : 26 Cr LJ 565 : 81 Ind Cas 53. When the accused only threw stones at a house and injured an inmate, he should be convicted under Section 323 and not under Section 336 as the hurt was the probable consequence of his act. 17 Cr LJ 465 : 36 Ind Cas 145. Where a police constable is guilty of the offence of wrongful confinement the accused person is entitled to exercise against him under his right of private defence. He cannot, therefore be convicted under Section 323 for assaulting the constable. 1923 All 34. Where a constable pursuing some rioters wounded one of them by a gun shot whereupon the other assaulted him in the course of an attempt to snatch away his gun and thus prevent further harm being done, *held*, at that state they were acting in self-defence and could not be guilty of an offence under Section 323 of the Penal Code. AIR 1922 Lah 75. Wuless the evidence is good enough to warrant a clear finding as to the fact and as to the guilty of the accused no conviction under Sections 323 and 325, IPC, can be arrived at simply on the ground that enmity has been proved and that serious injuries have been caused in the fight. 3 Lah LJ 97 : 3 UPLR Lah 11 : 60 Ind Cas 55 : 22 Cr LJ 199.

Where some injuries have been inflicted by the accused he was liable to conviction under Section 323, I.P. Code. 59 Ind Cas 321 : 22 Cr LJ 65. An order of an Appellate Court, maintaining conviction for causing hurt under Section 323 of the Penal Code, is illegal, and liable to be set aside in revision after it finds "that there was probability of an alteration and squabble between the parties". 50 Ind Cas 351 : 20 Cr LJ 303. A prosecution under Section 323, IPC, is essentially a personal action and the right to carry on prosecution under this section does not survive to the legal representative of the deceased complainant. 26 PR 1917 Cr : 31 PWR 1917 Cr. Removing by force a person other than judgment debtor in decree for ejectment and possession is assault within the meaning of Section 323. AIR 1930 Cal 720. Where there are serious irregularities in connection with house search and the person whose house is searched assaults and beats a constable, the offence falls under Section 323 and not under Section 332. AIR 1930 Pat 387 : *see* also 13 Rang 754. Where a police constable who is present at a fair not in pursuance of any duty simply as a spectator, an assault on him does not fall under Section 332, IPC, but falls only under Section 323. 18 NLJ 118. The accused was prosecuted under Section 334 on the allegation that he gave two blows with a stick to *G*, who was moving along the road and snatched away his purse. The Magistrate framed charges under Section 323 and convicted the accused under it. *Held*, that in the absence of any plea that he acted under grave and sudden provocation (Section 334), the conviction was held to be good. 1967 Nag LJ 184. Where the accused gave only one blow with his open hand on the neck of the deceased, while they were facing each other, causing fracture of vertebrae, unconciousness resulting in death and the blow was not followed by other acts of violence nor was any weapon used. *Held*, that so long as the intention or knowledge to cause grievous hurt has not been proved, the offence was only under Section 323, even though death ensued. AIR 1960 Ker 197 : 1960 Cr LJ 827.

Accused persons armed with deadly weapons went to house of victim and inflicted farsa blow on his head and injuring to others.

A close scrutiny of the statements of all the prosecution witnesses reveal that there was a free fight amongst the Complainant Party and the present appellants, during which complainant and his mother sustained injuries and the appellants also sustained injuries, therefore, in such a situation, it would not be a safer course, for the Court to apply the principles of Sections 147, 148 and 149 of IPC to sustain the conviction of the present appellants under Sections 147, 148 and 149 of IPC in view of the specific overt acts of the appellants, however, they can safely be convicted under Section 323 of IPC. Consequently, the present appellants are convicted only under Section 323 of IPC. *Babla and Anr. vs. State of Madhya Pradesh*, 2010 (3) Cri LJ 3061 (MP) (Gwalior).

Causing hurt by teeth bite is not punishable under this section. (1972) 13 Guj LR 843 but *contra*. AIR 1970 Pat 322 : 1970 Cr LJ 1235. *See* also 1978 WLN 222 : 1983 Bom LR 362 : (1983) 1 Cr LJ 535 ; 1981 Raj Cr C 7 ; 1981 Bom CR 27.

Where there was challan of only accused—Against the other complainant—Whether on the ground of inconsistencies, proceedings was not quashed—Inconsistencies shall be determined by trial court during trial. *Deepak* v. *Chander Kanta*, (1994) 2 Recent CR 55 (P & H).

School Principal inflicting punishment on pupils—Complaint and investigation was held, Police submitted report to Magistrate—Petition for quashing of the same was filed and it was held that he may inflict punishment but it must be for welfare of the child and reformative and informative. *Rev. Father Jerome D'Souza* v. *State of Maharashtra*, (1995) 2 Bom CR 283 (Bom).

Where there was eye-witness of the incident and had unexplained—Delayed in examination of the incident. It vitiates the prosecution. *Ganeswar Bhola* v. *State*, (1995) 1 Crimes 80 (Ori).

Offence under Section 323, was made—Quashing of FIR prayed and was held that Court may not interfere in statutory powers of police to investigate matter and quashing of FIR—FIR disclosing commitment of some offence by petitioner. It was finally held, FIR cannot be quashed. *Teja Sinah* v. *State*, (1995) 1 RCD 280 (Raj).

Where there was prosecution of the accused under Section 323, IPC, hence convicted and sentence—Revision against the same was filed *state*ment of the injured witness supported by quick FIR and corroborated by injury report.—Hence, no interference called for in revision. *Khem Chand* v. *State of U.P.*, 1995 JIC 426 (All).

Offence under Section 324, registered in April 1979, charges under Sections 323, and 324, framed in April 1980—Additional charge under Section 326, IPC, framed in 1984—Petitioners not responsible for such inordinate delay—*Held*, such belong to cause prejudice to petitioners—Hence, charges must be quashed—Petition allowed. *Md. Siddique* v. *State of Bihar*, 1994 (1) Crimes 927 (Pat).

Testimony of eye-witnesses corroborated by medical evidence can not be rejected merely because they are related to victim. *Habil Mia v. State of Tripura*, 1997 Cri LJ 1866 (Gau).

A quarrel developed from the influence of liquor where the victim received a bleeding injury. The appellants who belonged to the Scheduled tribe were rebuked by village Rakhi who intervened in the fighting as a result of which he too was given a blow causing a fracture and rendering him unconscious. The appellants then took a *lota* and assaulted the victim. Evidence showed that he was given a *lathi* blow and not a *lota* one. *Held*, the appellant was guilty of causing grievous hurt to the Rakhi. The appellants were not guilty of giving any blow with *lota*. The offence fell under Section 335, and not under Section 323, IPC. Grievous hurt was under excitement, grave and sudden provocation. (1986) 1 Crimes 192 (Ori).

2. Sections 323, 302, 320 and 326.—The accused, a boy of 16 years, and the deceased was students in VIth standard. As a result of a boyish quarrel between them, the accused hit the deceased from behind with a granite stone on the right temple near the ear, as a result of which the deceased died some time afterwards in the hospital. First the injury was supposed to be simple, but on post-mortem, it was found that there was a depressed fracture and that the injury was sufficient in the ordinary course of a nature to cause death. *Held*, that the offence committed was grievous hurt falling under the seventh category of Section 320, IPC, and considering that the granite stone which was used as a weapon of offence was likely to cause death, the offence fell under Section 426, and not under Section 323 or Section 302. AIR 1960 Ker 301 ; 1960 Cr LJ 1213 ; 1960 KLT 430.

3. Sections 323 and 342, IPC.—The victim was allegedly wrongfully confined and beaten ruthlessly with belt and iron rod. The medical evidence showed that complainant suffered simple injuries that could have been caused by blunt object. There was no fracture of bones or lacerated injury. It was held that the offence was not punishable under Sections 327 and 347, IPC and that the charges under Sections 323 and 342 were not improper. *D. Chinnagurappa* v. *K. Gopal Reddy*, 2004 Cr LJ 3158 (AP) : 2004(1) ALD (Crl) 796 : 2004(2) Andh LT (Cri) AP 351.

Sufficient material for Conviction. Thus, it is quite clear that eye-witnesses to the occurrence have fully proved the incident and corroborated the statements mentioned in the FIR and there is no inconsistency in the statements of all the three witnesses. There is no material contradiction in the cross examination and the entire facts of the FIR which has been fully supported by the statements of all the three aforesaid witnesses.

From the perusal of the post mortem report and the statement of the doctor it is clearly evident that the injuries on the deceased persons were found to be on the chest which is a vital part of the body and the death was natural as the bullet had hit them. According to the statement of PW-7, the cause of death was the gun shot ante-mortem injury on the vital part of the body and from excessive bleeding and shock. According to the statement of PW-7 at the time of firing of the gun its barrel must have been at a distance of 3 to 6 feet from the dead bodies. As a result of which the deceased Brijesh and Rajesh had suffered injuries from the gun shots fired within 6 feet from the place where they were hit by the bullet and the same caused their instant death.

The defence towards the end of the trial tried to put up a version that the two deceased came there to the petrol pump to commit robbery by hurling bomb and in the process also caused damage to the petrol pump. Unfortunately, however, no proof in support of the said contention could be produced by the defence. There is nothing on record which can even remotely suggest that the act of the accused persons was in exercise of their right of private defence. The investigation, at the place of occurrence soon after the incident did not reveal any remains of bomb or recovery of any firearm from the hands of the deceased or any damage to the petrol-pump. No injury was also found on the bodies of the accused. It is pertinent to mention here that no suggestion regarding recovery of any bomb materials or detection of any signs of damage to the petrol pump by the deceased persons and PW-2, was put by the defence to either PW-10 or PW-11, both of whom were present at the place of occurrence at the time when the showroom of the accused persons was searched and weapons, cartridges and other articles were seized. Thus, the submission of the defence with regard to the alleged exercise of right of private defence by the accused persons being without any basis, the same also fails.

Another submission which has been advanced by the learned Counsel for the accused is that the story of Accused No. 1 and Accused No. 2 locking the PW-2 in the showroom is completely unbelievable. As discussed hereinbefore, on altercation having taken place for petrol, PW-2 was assaulted by the accused persons and forcibly taken to the showroom and locked in there immediately thereafter. On being asked by PW-1 not to do the same, the gun shot was fired at him but he retreated to safety. Thereafter, when both deceased, Rajesh and Brijesh, the two sons of PW-1 reached the spot, two consecutive shots were fired at them which resulted in their death and thereafter again gun shot was fired towards PW-1. This fact is quite clear not only from the evidence of PW-1 but has also been fully corroborated by the evidence of PW-2 and PW-3. It is quite evident from the record that a big crowd gathered at the spot. Under the said circumstances, it was quite natural for the accused persons to keep PW-2 in their custody. Making PW-2 captive, a fact to which PW-11, the SSI who was investigating the case was also a witness, could well protect the accused persons from the crowd which had come to the place of occurrence after hearing the gun shots. Making PW-2 captive could also protect the petrol tank from being damaged by the pressure of the agitated crowd. The injuries were found on the body of PW-2 by the doctor who had examined him soon after the incident at 1.50 pm on the same day.

In view of the aforesaid discussion, facts and circumstances of the case, we are of the considered view that the High Court clearly erred in reversing the order of conviction recorded by the trial Court. Accordingly, we set aside the judgment and order of the High Court and restore the judgment and decision of the trial Court. *Raj Narain Singh vs. State of Uttar Pradesh*, 2009 (10) SCC 362 : 2009 (12) JT 342 : 2009 (12) Scale 627 : 2009 (14) SCR 755 : 2009 (8) SLT 160.

4. Evidence and proof.—The evidence showed that the injury cannot be attributed to one accused, the conviction under Section 323 cannot be maintained. 1959 Raj LW 35 ; 1956 Madh BLJ 89 ; Madh BLR 1955 Cr 481. Where there is over whelming evidence in support of an assault with sticks by three accused on a person amounting to an offence under Section 323, IPC, much importance cannot be attached either to the fact that the name of one of the accused was not mentioned in the first information report or to the fact that the place of occurrence was mentioned approximately. Madh BLJ 1955 (HCR) 1829 ; Madh BLR 1955 (Cr) 370. For appreciation of evidence *see* AIR 1979 SC 1494 ; 1979 Cr LJ 1126 ; 1983 Cr App R 117 ; AIR 1979 SC 1010 ; 1979 Cr LJ 883 ; AIR 1974 SC 541 ; 1974 Cr LJ 475 (conviction unjustified) ; 1979 Cr LJ (NOC) 156 (doubtful) ; 1982 Cr LJ 1821 (incident occurred eight years before). (1984) 1 Bom LR 486 (no medical evidence is required to prove an offence under Section 323) ; 1982 Cr LJ 1821.

Offence of grievous injuries was made, Medical evidence not properly proved since Doctor has not examined conviction liable to be set aside. *Suresh Kumar and Sushil Kumar* v. *State of U.P.*, (1995) 1 CCR 188 (Alld).

Non-joining of Independent witnesses—When not fatal. The homicidal nature of death of Jagbandhan and Randhir is also not in dispute. The occurrence started as the accused were said to be cutting soil from the ridge of their field to which Deceased No. 1, Jagbandhan, objected. The deceased Randhir also intervened. All the accused persons then went to the village and came variously armed. They not only assaulted Jagbandhan but after his death they went back to the village and done away with Randhir. Evidence of the informant, Suresh Chand, was supported in material particulars by Mithan, who is an injured eye witness. He was taken to the primary hospital. He was given treatment there.

We do not see any reason to disbelieve the medical evidence that Mithan suffered an injury. If he was an injured witness his presence at the place of occurrence cannot be doubted. Even otherwise his evidence inspires confidence and has rightly been accepted by both the Courts below. Similarly evidence of Ajab Singh also is reliable.

The second part of the prosecution case has been proved witness, who was sitting on the roof of his house. According to him, seeing the accused persons Randhir tried to run away but was surrounded by the accused persons and was murdered. He furthermore stated that the widow of deceased Kishan Devi and Harbai were present there. Presence of Kishan Devi at the place of occurrence was natural. That Dhum Singh had been living near the gher of the deceased is neither denied nor disputed. He otherwise is an independent witness.

It is now a well settled principle of law that only because the witnesses are not independent ones may not by itself be a ground to discard the prosecution case. If the prosecution case has been supported by the witnesses and no cogent reason has been shown to discredit their statements, a judgment of conviction can certainly be based thereupon. Furthermore, as noticed hereinbefore, at least Dhum Singh is an independent witness. He had no animus against the accused. False implication of the accused at his hand had not been suggested, far less established. *Satbir Singh vs. State of Uttar Pradesh*, AIR 2009 SC 2163 : 2009 (3) JT 293 : 2009 (3) Scale 439 : 2009 (3) SCR 406 : 2009 (3) SLT 161.

When allegation of assault of Pharsa not finding corroboration with version of doctor who opined that injury was manufactured are if one could take risk, conviction not sustainable. *Ramashish Rai* v. *State of Bihar*, (1995) 2 Crimes 457 (Pat).

Neither X-ray report, nor X-ray plate or the concerned doctor examined—Absence of such materials of record, it cannot be said that the injury was grievous in nature and it was held that earlier order recalled in view of the glaring mistake in findings of the court below. *Trilochan Dhal* v. *State*, (1995) 8 OCR 57 (Ori).

There was nothing to draw an inference against the prosecution case in which the evidence of P.Ws. 5, 6, 7 and 8 was reliable and could be acted upon and the presence of P.Ws. 5, 7 and 8 at the situs at the time of occurrence was not doubtful. (1986) 2 Crimes 44 (Ori).

Conviction was under Section 323, IPC, revision filed under Sections 397 and 401, Cr PC. It was held that there was no evidence that all the times the victim was assaulted at the instance of the petitioner. The prosecution failed to prove the case against petitioner beyond all reasonable doubts. Hence, petitioners entitled to benefit of doubt. *Ramashish Roj* v. *State of Bihar*, (1995) 1 BLJ 399 (Pat).

Trial for offence under Sections 341, 325 and 379/34, IPC, and sentenced order was set aside by Sessions Judge—Revision directed against the same and High Court in revision may decline to interfere with order of acquittal passed by Appellate Court if the same is based on cogent reasons and reasoning of Appellate Court as well as appreciation of evidence appears to be sound. Hence, revision application at instance of informant of criminal case dismissed. *Sheo Prasad Singh* v. *State of Bihar*, (1995) 1 PLJR 348 (Pat).

Related witnesses. Full of contradictions. The High Court has also attached unnecessary importance to the fact that one witness stated that the assault continued for 8 to 10 minutes while another said it was around three minutes. The doctor's evidence was discarded on the ground that his testimony was of poor quality and does not inspire confidence. The injury appeared to be manufactured one. The judgment is full of contradictions. As stated above, the High Court at one place noticed that it is improbable that the accused person who was cousin of PW. 4 tried to molest her. In the same breath the High Court in another place has held that the accused persons to molest PW. 4 at a particular moment took her to the Arhar field and this was done with her prior consent. The High Court goes further to say that there was no planning in the act and had appeared to be chance meeting which led to it. The absurdity of the High Court's conclusions can be gauged from the fact that the High Court found it unnatural that two girls of almost of the same age group were walking and as to why one of them would move ahead and the other would come behind is unnatural. The High Court further has held that PW. 3 stated in Court that PW. 4 on her return told him that accused persons has teased her in the field. The High Court found fault with the statement on the ground that he did not tell before the police that the girl did not tell PW. 3 that the accused persons held her hands. So far as the High Court's conclusions that there was non-mention of the source of light in the FIR it needs to be noted that the accused persons were not strangers to the witnesses. They were closely related. *State of Uttar Pradesh vs. Sheo Lal,* AIR 2009 SC 1912 : 2009 CrLJ 1162 : 2009 (1) Crimes 388 : 2009 (11) SCC 513 : 2009 (3) JT 540 : 2009 (2) SCR 343 : 2009 (2) Scale 582.

In family dispute over land when prosecution case is supported by evidence of independent eye-witness and medical evidence, contradiction between evidence of eye witness and Investigating officer is immaterial. *Gendom Lal* v. *State of U.P.*, 1996 Cri LJ 4252 (Alld).

In case of total inconsistency between medical evidence and ocular evidence on a given set of facts. Court may reject ocular evidence. *Auwar* v. *State of Haryana,* 1997 (1) Crimes 232 (SC) : 1997(3) JT 1 : 1997(2) Scale 322 : 1997(2) Supreme 569.

5. Headmaster.—A principal or a Headmaster of a school is not liable to be convicted under this section for punishing a student for inflicting moderate and reasonable corporal punishment to a pupil with a view to maintain school discipline. If he does so in good faith, he is protected under Section 88, I.P. Code. AIR 1949 Bom 226 ; 4 DLR (Bom) 43 ; 50 Cr LJ 789.

6. Assault by Master/Supervisor of School.—The law does not give any sanction to a master to commit assault on his servant. (1963) 5 Ori JD 65.

Corporal punishment to child, in present days is not recognized by law. It is an archaic notion that to maintain discipline, child can be punished physically by the teaching staff because of implied consent by the parents or guardian. Now it is recognized social principle that even parents of the child are made to understand the basic human rights of the child and instead of corporal punishment, correctional methods are recognized in law. Apart from mere indiscipline in school, by virtue of Juvenile Justice Act, if the child under the age of 18 commits any crime, and even it convicted, the child for juvenile cannot be subjected to any sentence. Where, therefore, the accused School Supervisor is found guilty of administering slap to deceased student for sitting on his scooter, his conviction u/S. 323 is appropriate and he cannot take a defence that his action is covered by exceptions as mentioned in Ss. 88 and 89. *Hasmukhbhai Gokaldas Shah v. State of Gujarat,* 2009 CriLJ 2919 (Guj).

7. Right of private defence.—Where a charge is under this section, it is for the accused to show that he had a right of private defence. AIR 1943 Mad 590 ; 44 Cr LJ 783 ; *see* also AIR 1940 Pat 696 ; 42 Cr LJ 189 ; AIR 1943 Pat 6 ; 44 Cr LJ 172 ; AIR 1969 SC 1259 ; 1979 Cr LJ 1073.

In instant case, there was a sudden fight in which a person was shot at and killed and another two persons were injured. The scrutiny of the prosecution evidence and the attending circumstances wholly demolished the defence version of two accused persons. One injured person filed F.I.R. immediately after the incident and thereafter the two injured persons were sent for medical examination. The Investigating Officer immediately proceeded to the spot and recovered one DBBL gun and one countrymade pistol. Such recovery was made immediately after the lodging of the F.I.R., lending credence to the prosecution version. F.I.R. itself had been lodged with promptitude with no time gap for concoction or deliberation. The injuries found on person of accused were superficial and simple. The fact that they were caused by a person of prosecution side did not mean that aggressor was prosecution side. The accused persons had also.

after their arrest, filed an F.I.R., in which ultimately final report was submitted. The accused did not thereafter file a private complaint. One accused shot dead the deceased and another accused caused firearm injuries to another person. The murder was not premeditated. Thus conviction of one accused under Sec. 304, Part I, Penal Code and another accused under Sec. 323, Penal Code was proper. Since another accused used illicit countrymade pistol, he was also liable to be convicted under Sec. 25 of the Arms Act. *Budh Singh and another v. State of U.P.*, 2005 CriLJ 2005 (Allahabad).

8. Application of the section.—Where the injuries are of a simple nature inflicted with a knife on accused should be convicted under this section. AIR 1942 Pesh 21 (2) ; 43 Cr LJ 595. It is not proper to award one sentence for all the offences, when the accused are convicted of offences under Sections 324, 325 and 326. AIR 1942 Oudh 444 ; 43 Cr LJ 781. The fact that the accused is a student is no mitigation of the offence of causing hurt with a *bhala*. AIR 1941 Pat 129 ; 42 Cr LJ 361. Where there was no intention to cause such injury as is likely to cause death the offence does not amount to culpable homicide. An accused should be convicted under this section where the injury inflicted by the accused on the head of the deceased was not such as to entail serious consequences to a man of normal health. AIR 1941 Rang 141 ; 42 Cr LJ 591. Where evidence as regards attack is doubtful a conviction under this section is not proper. AIR 1940 Mad 43 ; 41 Cr LJ 337. Where only injury that has been inflicted by the accused is on the right arm, an offence, this section has been committed. AIR 1950 Pepsu 50. Causing hurt to a public servant while he is acting in the discharge of his duties is punishable under Section 332. AIR 1970 Mad 359 ; 1970 Cr LJ 1238. Where the deceased had received two injuries which were simple and were only a remote cause of death, the offence is under Section 323, and not under Section 304. 1983 Cr LJ 229 ; AIR 1983 SC 172 (but contra 1933 (1) Crimes 645).

Applying the principle of appreciation to this case, it is seen that the informant does not complain that the present petitioner aimed the blow to her breast. Rather, she has very categorically stated that the petitioner pressed the Lathi (Katha) on her neck and stood on it. Then the petitioner's wife dragged him. The injury was caused to her breast for the action of the accused persons. It thus, appears that the injury to her breast was caused accidentally. The injury, which was sustained by the injured on her breast has not been attributed particularly to the present petitioner in the sense that she has not stated that due to his assault she sustained the injury. Rather she has stated that due to the assault of the accused persons, she sustained the injury. In this case, this Court comes to the conclusion that applying to the standard laid down by the Apex Court in *Rupan Deol Bajaj vs. Kanwar Pal Singh Gill*, AIR 1996 SC 309 = 1995 SCC (Cr) 1059, it cannot be held to be an affront to the normal sense of feminine decency. It is further noted that in this case there is no suggestive overtuous regarding sex. Therefore, the offence under Section 354 is not made out. The conviction of the petitioner under Section 354, IPC is not sustainable. As far as offence under Section 323 is concerned, learned trial Court as well as the learned appellate Court has come to a concurrent finding of fact which requires no interference. *Kelu Cheran Behera vs. State of Orissa*, 2010 (2) CrLJ 2280 (Orissa).

9. Common object and intention.—The common object and intention of the assembly were fully established by the prosecution evidence in the case. The common object of the five assailants were to cause hurt to various persons and grievous hurt to one. *Held*, that the offences committed were under Sections 323 and 325 and all the assailants were, by virtue of Section 149, guilty of the offence of grievous hurt. 1958 Raj LW 505 ; 1962 Ker LJ 868 ; (1962) 2 Ker LR 466 ; Madh BLR 1955 Cr 162 ; Madh BLJ 1955 HCR 1055 ; *see* also 1965 (1) Cr LJ 73 ; AIR 1965 Pat 45 ; 1965 BLJR 278 (participation of other accused was not proved and so charges under Sections 147 and 380 must fail). Accused can still be held guilty of the minor offence under Section 323, for individual acts of assault) ; AIR 1976 SC 199 ; 1976 Cr LJ 201 (Section 323 and Section 34). AIR 1976 SC 2623 ; 1976 Cr LJ 1883 ; AIR 1971 SC 335 ; 1972 Cr LJ 288 (there can be no common objects in case of mutual fights) ; AIR 1979 SC 1259 ; 1979 Cr LJ 107 ; AIR 1970 SC 219 ; (no proof of common object and no proof as to who caused the injuries) ; AIR 1983 SC 172 ; 1983 Cr LJ 229 ; AIR 1977 SC 619 ; 1977 Cr LJ 433 (where hurt is in furtherance of the common object of unlawful assembly, proof not necessary that one of members to have struck the victim).

The High Court has noted that from the side of the complainant which includes deceased also, five persons have received in total as many as 15 injuries. The main injury on the head of the deceased has been attributed to A1. Similarly, Gulam Rasul, Jan Mohammad son of Sultan and another Jan Mohammad, have also received wounds on the head. Injury on the head of Gulam Rasul was an incised wound caused by a Farsa. Jan Mohammad son of Sultan had received an incised wound on the head. The other Jan Mohammed had received lacerated wound on the head. The other injuries on the persons of all the other injured persons are in the shape of bruises or lacerated injuries most of which have been caused by lathies.

The prosecution evidence clearly shows that the common object of the unlawful assembly was to commit the murder of Habib and it was not just an assembly at a particular point of time where the accused persons had assembled with Frasa and lathis in order to cause injury on the complainant including Habib-deceased who had gone for filing nomination papers for the Panchayat election.

The High Court found that the purpose of the unlawful assembly was to stop Habib, his brother Gulam Rasul and their supporter from either contesting the election or supporting the persons who filed the nomination. They were all present near the gate of the school where the nomination papers were to be filed. Both the trial Court and High Court have on analyses of the evidence come to hold that all the accused persons had formed an unlawful assembly armed with weapons which were likely to cause death and, therefore, conviction under Sec. 148 IPC and application of Sec. 149, IPC does not suffer from any infirmity.

In the background facts, it is clear that the conviction as done is appropriate. *Siri Kishan vs. State of Haryana*, 2009 (12) SCC 757 : 2009 (8) JT 305 : 2009 (6) SCR 1184 : 2009 (6) Scale 438.

Absence of Common intention.—The deceased went to his field on hearing the barking of his dog. It was a dark night. There is nothing to show that all the accused persons were waiting for him or had come to assault him with any common intention. According to the prosecution, a dispute arose with regard to laying down of a pipeline three months prior to the date of occurrence. It, however, appears that the matter was settled through the intervention of the panchayat. Allegedly, as noticed hereinbefore, the accused had abused PW-1 at the time of marriage of his nieces in his village.

Nothing has been brought on record to show that there existed any enmity between the deceased and the accused. We have noticed hereinbefore that cause of his injuries was disclosed by the deceased himself. He put his left thumb impression. He did not name the respondents therein. As he had put his left thumb impression, it may be presumed that he was conscious at that time.

According to PW-2, after assaulting Lamber Singh, the accused persons were standing at some distance and all of a sudden Sarwan Singh came and assaulted him. Why the accused who were taken to custody on 01.04.1993 but were shown to have been formally arrested on 02.04.1993 is not known. Both the prosecution witnesses stated that the handle of the gandasi had broken down. Why the broken part of the gandasi was not seized was not disclosed.

If Sarwan Singh and others had any intention to cause the death of Lamber Singh, he could have used his gandasi from the sharp end. In the statement before the medical officer by the deceased, assault by gandasi also had not been mentioned.

It is wholly unlikely that when a large number of villagers, as stated by witnesses had assembled, other circumstances and in particulars assault by Sarwan Singh upon PW-2 would not be testified by any other independent person. In this situation, it is difficult to comprehend as to how a common intention was formed to cause murder of the deceased. *State of Himachal Pradesh vs. Nazar Singh*, 2009 CrLJ 3984 : 2009 (12) SCC 89 : 2009 (7) SCR 1117 : 2009 (13) JT 415 : 2009 (7) Scale 666.

Prosecution has not brought on records any evidence to show that the accused persons had a common intention to commit the murder of deceased. It has not been shown that even otherwise they were bearing any common grudge against the deceased. Evidently, both the accused and the deceased were customers of the said Wine shop. They might have picked up some quarrel. At the time when the occurrence took place, appellant being an employee of the said shop the question of his coming to the place of occurrence together with the other accused did not arise. The evidence of prosecution witnesses, particulary P.Ws. 1 and 2, on which both the Courts below have relied upon, even if taken at their face value, would merely show that it was the accused who had assaulted the deceased with an iron rod; appellant was said to have only kicked the deceased.

A general statement was made that about a month prior to the incident, when the deceased had gone to Nandi Wine shop, quarrel between him and the accused persons took place. According to PW. 1, at that point of time, accused persons had threatened the deceased. From whom he had heard thereabout has not been disclosed.

Indisputably, P.W. 1's house was situated at about one furlong from the place of occurrence. He came to the place of occurrence in search of his brother. He failed to bring any material on record as to on what basis he arrived at the conclusion that accused persons had formed a common intention.

Ms. Shenoy may also not be correct in contending that all the accused persons ran away together. PW. 2 deposed that they went in different directions. Appellant, according to PW. 1, ran towards the Wine shop. Thus, it is not a case where all the accused came together and ran away together. A bald statement said to have been made by him that the accused while assaulting the deceased had exhorted that they would not leave him till he died, cannot be a ground to hold that the same by itself is demonstrative of the fact that accused No. 3 also had a similar intention. Admittedly, no weapon was recovered at the instance of appellant. He was wholly unarmed. On the basis of the voluntary statement made by the Accused alone, an iron rod was recovered.

We are not concerned herein as to whether the said iron rod was the weapon of assault. Having regard to the quality of evidence that the prosecution had led, in our opinion, it is difficult to come to the conclusion that all the accused persons had a common intention to commit the murder of the deceased.

The prosecution has failed to establish why and how a quarrel had started. The prosecution even has not proved as to why the Accused No. 1 was carrying the iron rod even before the quarrel with the deceased started or as to whether the appellant was aware of this. It has also not been shown that he along with other accused persons came to assault the deceased. Appellant ordinarily was expected to be at his work place only. His presence at the spot, therefore, has sufficiently been explained.

For the aforementioned reasons. we are of the opinion that appellant cannot be held guilty for commission of offence punishable under Sec. 302 read with Sec. 34 of the IPC. The very fact that the appellant was unarmed and must be presumed to have been performing his duties at his place of employment, it cannot be said that he had formed any kind of common intention at the spot to murder the deceased. Some incident might have taken place and he might have formed a common intention to teach a lesson to the deceased. He might be guilty for commission of offence punishable under Sec. 323 of the IPC and not for commission of offence punishable under Sec. 302 read with Sec. 34 of the IPC. He is sentenced to the period already undergone. *Nagaraja vs. State of Karnataka*, AIR 2009 SC 1522 : 2009 (1) Crimes 278 (SC) : 2009 (1) JT 48 : 2008 (16) Scale 380 : 2008 (17) SCR 1127 : 2009 (1) Supreme 94.

Accused persons carrying various weapons like Axe, handle of Axe and handle hoe came to house of deceased in morning. Accused armed with axe dealt Axe blow on head of deceased, resulting he fell down after sustaining bleeding injuries. Witnesses- family members, when came to intervene were given blows on their heads by accused carrying handles of Axe and hoe. Some other accused kicked, fisted and prevented witnesses from intervening in quarrel. Accused convicted under Secs. 34, 143, 144, 148, 323, 302 and 149. *Jagan Shravan Patil vs. State of Maharashtra*, 2009(11) SCC 517 : 2009 (3) Scale 615 : 2009(3) JT 284 : 2009(2) Supreme 352.

Absence of intention or knowledge. To constitute an offence under Section 307 I.P.C. two ingredients have to be established namely (i) intention or knowledge relating to commission of murder and (ii) the doing of act towards it. For an offence under Section 307 I.P.C. presence of intention or knowledge is material and not the consequence of the actual act done for the purpose of carrying out the intention. In the absence of intention or knowledge there can be no offence of attempt to murder. The injured witnesses have not stated that the accused intended to kill them. The evidence showed that they received simple injuries. In the absence of intention or knowledge which is necessary ingredient of Section 307 I.P.C, the accused cannot be held guilty for the offence under Section 307 I.P.C. The accused appellants having voluntarily caused simple hurt to the witnesses in furtherance of their common intention, they are liable for the offence under Section 323/34 I.P.C. *Om Prakash and Ors. v. State of U. P.*, 2009 CriLJ 1677 (All).

All the four accused were convicted by the learned trial Judge. The High Court, however, having regard to the fact that the other accused had not been named in the FIR and no test identification parade was held thought it fit to extend the benefit of doubt in favour of three of them. That would not mean that on the same analogy, a judgment of acquittal should have been recorded in favour of the appellant also.

Keeping in view the place of occurrence, it will not be hazardous to presume that the incident had taken place within a very short time. P.W. 2 in his evidence stated that three persons came from behind. He might not have been able to remember their names at the time when the FIR was lodged. But, in our opinion, as the offence must have been committed by more than one person and the appellant having been named in the FIR and specific overt act having been attributed to him by P.W. 2 in his deposition, we are of the opinion that no case has been made out to interfere with the impugned judgment. *Subhash Kumar v. State of Uttarakhand.*, AIR 2009 SC 2490 : 2009 (7) SCR 1182 (SC) : 2009 (6) SCC 641 : 2009 (7) JT 575 (SC) : 2009 (7) Scale 502 (SC).

Accused persons carrying various weapons like Axe, handle of Axe and handle hoe came to house of deceased in morning. Accused armed with axe dealt Axe blow on head of deceased, resulting he fell down after sustaining bleeding injuries. Witnesses- family members, when came to intervene were given blows on their heads by accused carrying handles of Axe and hoe. Some other accused kicked, fisted and prevented witnesses from intervening in quarrel. Accused convicted under Secs. 34, 143, 144, 148, 323, 302 and 149. *Jagan Shravan Patil vs. State of Maharashtra*, 2009(11) SCC 517 : 2009 (3) Scale 615 : 2009(3) JT 284 : 2009(2) Supreme 352.

10.Procedure.—Not cognizable—Summons—Bailable—Compounda-ble—Triable by any Magistrate and may be tried summarily.

11. Charge.—I (*name and office of Magistrate, etc.)* hereby charge you (*name of the accused)* as follows :—

That you, on or about the.......day of.....at........voluntarily caused hurt to *A*, *B* and thereby committed an offence punishable under Section 323 of the Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Framing of charge. The deceased was a patient of asthma which could cause asphyxia which was ultimately said to be the cause of death. It is also clear that notwithstanding his serious respiratory problem, the deceased was kept in a windowless room which was full of dust and cobswebs which are known allergens for triggering an asthma attack, which can be fatal, as in this case. The injuries found on the body of the deceased may have been caused during attempts at resuscitation, but all the said circumstances can only be considered during a proper trial and not on the basis of surmises at the time of framing charge where on the strength of the charge sheet only a *prima facie* satisfaction about the commission of an offence has to be arrived at by the trial Court. Therefore, while rejecting the submissions made that there were no materials on record to frame charge against the accused persons even under Sec. 323/34 IPC, we cannot but observe that on a *prima facie* view of the matter, there is ground to proceed against the accused persons even under Sec. 304 Part II IPC. The High Court had erred in quashing the charge framed against the accused persons under Sec. 304 Part II and observing that in view of the materials on record only a charge under Sec. 323 could be brought against the accused persons. *Indu Jain vs State of Madhya Pradesh*, AIR 2009 SC 976 : 2009 CrLJ 951: 2008 (15) SCC 341 : 2008 (12) JT 524 : 2008 (14) SCR 1137 : 2008 (15) Scale 168 : 2009 (2) SLT 72.

12. Sentence.—An offence under Section 323, would ordinarily be triable in the ordinary course by a third class Magistrate and the punishment would normally not exceed one month. 1937 MWN 743. But in case of attack of a brutal nature, severest sentence is called for AIR 1938 All 92.

Separate sentence under Sections 323 and 452.—Where a person is convicted for the offences under Section 323 and Section 452, committed on one and the same occasion he can be sentenced separately for each. AIR 1938 Rang 114.

Sections 323, 327 read with Section 109—The victim received injuries from a blunt weapon and the conviction of the accused under Section 323, IPC, was correct. Where a promissory note appeared to be according to part dealings, held conviction under Section 327, read with Section 109, IPC, was not maintainable. Sentence reduced to one already undergone but fine was not disturbed. (1986) 2 Crimes 81 (Raj).

From the medical report and supplementary medical report, it is clear that injury was inflicted on the left side head i.e. 7 cm above left eye-brow. There was a facture of left parital bone and according to doctor the bone of the head was found fractured. As per Section 323 IPC, whoever, except in the case provided for by Section 334, voluntarily causes hurt, shall be punished with the imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both. In the light of the evidence of the doctors' medical report, Section 323 is not at all applicable as argued by learned Counsel for the appellant.

In view of strong medical evidence in the form of oral and documentary, the injuries sustained by the injured comes under 'Seventhly' of Section 320 i.e. fracture or dislocation of a bone. Voluntarily causing hurt by dangerous weapons or means has been explained in Section 324 and punishment for voluntarily causing grievous hurt is with imprisonment which may extend to seven years and shall also be liable to fine. The trial Court as well as the High Court, taking note of the enmity and intention of the accused and nature of injuries, evidence of both oral and documentary and medical evidence, concluded and awarded punishment under Section 308, IPC.

In view of the materials placed by prosecution, analysed by the trial Court and approved by the High Court, we are not inclined to reduce the sentence. Court has already pointed out about the proof regarding enmity, intention and causing grievous hurt. *Jameel vs. State of U.P.*, 2010 (2) CrLJ 2106 (SC).

Accused assaulted the deceased, his uncle, by giving two kick blows, one on his chest and another on his testicles leading to spontaneous death. Conviction, it was found that under Section 323, IPC—Challenged in revision petition—The incident occurred on spur of the moment and there was no premeditation. Conviction under Section 323, IPC, is confirmed. The sentence is, however, reduced to period already undergone. *Baiu Dnyanoba Chandere* v. *State of Maharashtra*, 1994 B Cr C 319 (Bom).

Conviction and sentence under Section 323, IPC, there was pendency of trial and appeal for more than 7-1/2 years. Convict already undergone 3 weeks sentence and had already paid fine. Sentence reduced to period already undergone. On behalf of the petitioners it was contended that the petitioners have under went agony during the trial as well as during the proceedings before the appellate court and they have undergone more than three weeks of sentence and that the sentence may be reduced to the period already undergone. He further submitted that the petitioners have already paid the fine imposed by the trial court. Taking on account all these facts as well as the fact that the petitioners had already undergone agony of proceedings in the trial court for more than 7-1/2 years, the substantive sentence of imprisonment under each head is reduced to the period already undergone. *Ram Murti* v. *State of Haryana*, (1994) 1 CC Cases 430 at p. 431 : (1994) 1 CCR 13 ; (1994) 1 CC Cases 193 : (1994) Recent Cr R 33 (P & H).

Where revision petition for modification of sentence. The accused remained in jail for one month. Hence, sentence of 3 months reduced to period already undergone and fine of Rs. 200/- enhanced to Rs. 500/- which was made payable to injured as compensation. *Jagpal Singh* v. *State of U.P.*, 1995 JIC 603 (All).

Death has not caused—Intention was not proved—Conviction under Section 323 was not justified—Offence will fall under Section 323, sentence already gone sufficient. *Atmaram Sitaram Dhulap* v. *State of Maharashtra*, 1994 Cr LR (Mah) 126 (Bom).

Where the petitioner has already undergone agony of trial for sufficiently long period. the ends of justice would be fully served if the sentence awarded to him is reduced to already undergone. *Baldev Singh* v. *State of Haryana*, (1994) 3 CC Cases 232 (P & H).

Offence under Sections 323 and 342, 14 years passed of litigation and has undergone 7 days imprisonment. Imprisonment gone was held sufficient. *Bhanwar Lal* v. *State of Rajasthan*, 1994 Cr LR 467 (Raj).

Conviction was under Sec. 323/34, IPC, which was challenged in appeal. Hence, the defence theory of sudden fight was not believable. There were no evidence stating who was author of either of the injuries on deceased. Accused was having knowledge that injuries caused were likely to result in grievous hurt to the victim. Charges under Section 326, IPC were made out, the sentence of imprisonment is reduced to period already undergone. *Guzari Lal* v. *State of U.P.*, (1994) 2 Crimes 390 (All).

Petition was filed for reduction of sentence. Appellate court already reduced the sentence after taking into consideration the plea. Hence there is no scope for further leniency. Revision dismissed. *Kailash* v. *State of U.P.*, 1995 JIC 704 (All).

Conviction was under Section 323, IPC, reduction in sentence to period already undergone rayed. Incident took place in 1987. Sentence already undergone for 26 days. Hence, considering nature of offence, sentence reduced to period already undergone. *Bana Ram* v. *State*, (1995) 1 RCD 461 (Raj).

Where the occurrence more than thirty years back and the accused. who was released on probation, was not involved in any subsequent offence during the period of probation, the plea that sentence ought to have been awarded instead of releasing accused on probation was rejected by the High Court. *Shashi Kamal Rai* v. *State of UP*. 2004 Cr LJ 3536 : 2004 All LJ 2089 : 2004(49) All Cri C 291 : 2004(2) All Cri R 1813.

In a Jharkhand case 14 years had elapsed since occurrence and it was first offence of accused. The trial Court below denied privilege under Section 360. Cr PC or Section 3 of Probation of Offenders Act but no reason was assigned for denial of the said privilege. The High Court modified the sentence of 1 year imprisonment and released the accused on due admonition. *Mahesh Rajbhar* v. *State of Bihar*, 2004 Cr LJ (NOC) 139 (Jhar) : AIR 2004 Jhar HCR 1359 : 2003(3) East Cri C 492 : 2003(4) JLJR 273.

In another Jharkhand case, the assault of injured persons by three accused persons due to previous enmity between them was established. However, taking into account that the said offence was the first offence of accused persons, the accused were given benefit of Section 360, Cr PC and the provisions of Probation of Offenders Act. *Charan Hansda* v. *State of Bihar*, 2004 Cr LJ (NOC) 189 (Jhar) : Air 2004 Jhar HCR 1610 : 2003(3) East Cri C 152.

There is nothing on the record to show that the accused has any bad antecedents or criminal history. After a lapse of more than 12 years, socio-economics conduction of the caused must have gone redial changes. To rend him to gail save out imprisonment of year after this long gap would be doing great injustice to the accused. The ends of gusset will supperently be met of the sentence of imprisonment is reduced to a peeved heady indigene plus a fine of Rs. 1000/- which shall be held to victim. *Bhirng v. State of U.P.* 2002 CriLJ 271 (All : 2001 All LJ 2337 : 2004(43) All Cri C 268 : 2001(2) All Cri R 1404 : 2002(1) Rce Cri R 51.

Revision petition was filed accused persons brutally injured by *lathies*, FIR was made without delay. The eye-witnesses fully supported the prosecution version. Hence, conviction and sentence was legal. But accused were not professional criminals and there was a lapse of 20 years the period undergone will meet the ends of justice and there is no justification in sending him to jail. *Ram Gopal* v. *State of U.P.*, 1995 (32) ACC 275 (All).

When wife lodged complaint against husband and his close relatives—Conviction by Magistrate—Appeal was filed against Additional Sessions Judge—Compromise petition filed signed by parties—The appellate court considering factum of compromise while upheld the order of conviction modifying sentences by allowing accused the benefit of doubt under Section 360, Cr PC, read with provisions of Probation of Offenders Act. High Court may not interfere with impugned order in absence of any infirmity therein. *Santosh Prasad* v. *State of Bihar*, (1995) 1 PLJR 800 (Pat).

Prosecution was for causing grievous hurt hence conviction was of sentence. Accused being a member of backward class and not having any antecedent. Hence sentence reduced to period already undergone. *Pandit* v. *State of Madhya Pradesh*, 1995 Cr LJ 226 (MP).

There was no delay in FIR and there was difficulty in identifying accused as the accused and witnesses belonged to same locality. Hence conviction need no interference. As regards sentence since injuries caused was without any provocation mere fine will not do and 6 months RI will meet the ends of justice. *Ramesh Chandra* v. *State of U.P.*, 1995 (32) ACC 505 (All).

13. Acquittal.—Complaint of offence under Section 322, IPC, there was acquittal and appeal against acquittal was filed. It was held that after perusal of the statement of the witnesses produced by complainant, High Court has no hesitation in saying that Magistrate has properly appreciated the evidence on record and has come to a correct conclusion that complainant has failed to prove the commission of offence under

Section 323, IPC. Hence acquittal justified and appeal is dismissed. *Rudra Nath Mishra* v. *State of U.P.*, 1994 (31) ACC 746 (All).

Conviction was under Section 323/34, IPC, which was challenged in appeal. The parties had filed compromise. They want to live peaceful life like neighbours. Hence the permission to file compromise accorded. Accused acquitted of all charges against them. *Mohendra Singh* v. *State*, 1995 UP Cr R 34 (All).

Offence under Section 323, IPC was made alleged assault with *Bhala*. Same not supported by either informant or by witness whose versions are as assault by rod and allegation of assault by *Pharsa* not finding corroboration by the version of doctor who opined that the injury was manufactured one if one could take the risk. Hence conviction not sustainable. *Ramashish Rai* v. *State of Bihar*, (1995) 2 Crimes 457 (Pat).

Convicted under Section 323/34—Revision petitioner was filed. It is very old incident. The accused and injured belong to same locality and are living like peaceful neighbours. The permission to file compromise accorded and case decided in terms of compromise. Hence accused acquittal of all charges. *Mohendra Singh* v. *State*, 1995 (32) ACC 99 (All).

Conviction of petitioner under Section 323.—Identification was made in dark night. Investigation Officer was not examined—Non-examination of I.O. would not vitiate prosecution case unless prejudice is caused to accused which cannot be cured. Evidence of witnesses being not definite to identification in dark night. Conviction was held liable to be set aside. *Babulal Sahu.* v. *State of Orissa*, (1994) 1 OLR 240 (Ori).

In appeal, accused acquitted but held that accused committed offence under Sections 307/34 and 394/397, IPC and thus remanded case to trial court—Offence under Sections 394/397 and 307/34 not made out. Incident occurred 14 years back there being no ground for fresh trial now. Remand order set aside and accused stand acquitted. *Jang Bahadur Singh* v. *State*, (1994) 1 CCR 69 (All) : 1994 UP Cr R 112 (All).

Conviction under Section 323 and had acquittal in appeal—Evidence appreciated rightly. No illegality or infirmity in impugned order giving cogent reasons for acquittal. Hence no interference called for. *Batra Ram* v. *State*, (1995) 1 RCD 480 (Raj).

When there was material contradiction in FIR and statement given in court by author of FIR and there is delay in filing FIR and evidence of other witnesses not reliable, accused entitled to acquittal. *State of Rajasthan* v. *Hajarilal*, 1996 Cri LJ 3675 (Raj).

Where the accused was alleged to have assaulted complainant with weapon "Dasta" and neither enquiry report nor any corroborating evidence in support of assault was available, it was held that conviction under Sec. 323, IPC was not proper. *Babulal Sao* v. *State of Bihar*, 2004 Cr LJ 2465 : AIR 2004 Jhar HCR 1314 : 2003(3) East Cri Cr 140

Accused persons allegedly beat the complainant by kicks and fist blows. No independent witness was produced by the prosecution. There was material contradictions in statements made by the complainant, his son and his wife. Presence of one of the accused at the place of occurrence was not proved. Acquittal of accused person was held proper. *Nawal Ram* v. *The State of Rajasthan*, 2005 Cr LJ 4726 (Raj) 2005 Cri R (Raj) 1590 Raj ; *See* also *State of Maharashtra* v. *Udhao Pandurang Aglawe*, 2005 Cr LJ 989 (Bom) : 2005 All MR (CRI) 907.

14. Conviction.—Conviction under Section 323/34, which was confirmed by Sessions Judge and revision petition was challenged of. A broad assessment of evidence shows that respondent was physically assaulted by the petitioner and as a result of which he has sustained an injury on his forehead. Hence conviction is upheld. *Caetano Pacheco* v. *Antonio Borges*, 1994 B Cr C 323 (Bom).

Appellant had intention to commit murder as he threw full glass of acid on body of injured informant, causing extensive injury. Prosecution proved case beyond reasonable doubts against appellant. He has rightly been found guilty under Sections 341, 323, 326 and 307/34. *Amar Soni & Anr vs State of Jharkhand*, 2010 (4) CriLJ 4003 (Jhar).

Co-accused of 60 years old having eight children—Injury inflicted with *lathi*—Released on probation—Petitioner injured on vital part was not entitled to be released—Conviction was fully justified. *Ganpat* v. *State of Haryana*, (1994) 2 CC Cases 200 (P&H).

When there was several accused persons and there is no proof that fatal blow or grievous injury was caused by appellant accused, appellant can only be convicted for offence under Section 323, IPC. *Babu Bhika Yaahau* v. *State of Maharashtra*, 1996 Cri LJ 3952 (Bom).

When victim had two injuries one by sharp edged weapon and other by blunt weapon and only blunt weapon was recovered from accused, sharp edged injury can not be attributed to accused who is thus liable for conviction under Section 323. *Jai* v. *State of Rajasthan*, 1993 Cri LJ 2572 (Raj).

Simple injuries sustained and both sides convicted. But both found guilty of committing offence separately one under Section 323 other under Section 324. Imprisonment was set aside and fine imposed accordingly. *Rajaram* v. *State of U.P.*, 1995 Cr LR 130 (MP).

Where the incident occurred at the spur of moment where the accused used *danda* which caused simple injuries and that was the first offence of accused, he was held entitled to the benefit of Section 4 of the Probation of Offenders' Act, 1958. *Sitaram Paswan* v. *State of Bihar*, 2005 Cr LJ 4135 (SC) : 2005(4) Crimes 22 : 2005(6) Supreme 358 : 2005(7) Scale 333 : AIR 2005 (SC) 3534.

The homicidal death was caused in a sudden fight in a dispute over a piece of land. The deceased was assaulted with fists and slaps but only three abrasions were found on the person of deceased and accused had no intention or the knowledge that assault would result in death of victim who had died after five days of occurrence. It was held that provisions of Section 323 and not 304 would apply as injuries were simple and were not on vital part and doctor could not ascertain the cause of death. *Patal Marandi* v. *State*, 2003 Cr LJ 2770 (Jhar) : AIR 2003 Jhar HCR 775 : 2003(2) East Cri C 285.

Where accused caused injuries by beating on head and chest of deceased, his wife, which resulted into her death but since no weapon of offence was found or discovered, accused was held liable to be convicted under Section 323, IPC and not under Section 302, IPC. *State of Maharashtra* v. *Dinkar Balkrishna Palande*, 2005 Cr LJ 1280 (Bom) : 2004 All MR (Cri) 2980 : 2005(2) Crimes 1455.

15. Conviction for substantive offence.—It was not proved that the petitioner caused hurt to P.W. 1. As per the contents of Ext. P. W. 1/A the occurrence was witnessed by Basti Ram and Nisha Devi (P.W.7) Basti Ram has not been produced by the prosecution P.W.7 has not supported the prosecution version. Lekh Ram (P.W. 6) has been examined by the prosecution as an eye-witnesses of the occurrence though not mentioned as such in the F.I.R. In his examination-in-chief he has not supported the prosecution version and denied having seen the occurrence. When cross-examined by the public prosecutor he stated that the petitioner hit P.W. 1 with stone but when cross-examined by the petitioner he stated that he has not seen anyone hitting with the stone. Thus, the self contradictory and self destroying version of this witness is utterly an acceptable as eye account of the occurrence. Therefore, the conviction and sentence passed by the court below will be liable to be set aside. *Som Dutt v. State of H.P.* 2002 Cri LJ 1059 (H.P.) : 2002(3) All Cri LR 201.

16. Self-defence.—Accused being attackers hence cannot be given benefit of self-defence. More so when they caused injuries even to the woman folk of the complainant. Since all the accused who had gone together inside the field of the complainant party and inflicted 29 injuries to the complainant party including two of their women folk, after the complainant asked the accused not to dig water course and the entire occurrence took place inside the field of the complainant and also taking into consideration the number, nature and extent of injuries received by five members of the complainant party and one of the accused namely. Bagrawat no right of self-defence of either person or property had to the accused party which was the actual aggressor, and not the complainant party. *Ram Kumar* v. *State of Haryana,* (1994) 1 CC Cases 407 at p. 409 (P&H).

17. Probation.—Appeal was filed against acquittal—Other assailants name unknown to deceased and witnesses—Only respondent prosecuted—Trial Court found no confidence in dying declaration—Respondent may be vicariously liable of the acts of others was held guilty of simple hurt. Benefit of probation given. *State of Haryana* v. *Gulshan Kumar,* (1994) 2 CC Cases 171 (P&H).

Principal may punish his pupil but it must be for welfare of child and reformative and informative. *Rev. Father Jerome D'Souza* v. *State of Maharashtra,* (1995) 2 Bom CR 283 (Bom).

18. Jurisdiction.—Demand of dowry and attempt to set her to fire by sprinkling kerosene oil on her and then turned her out of house at Amroha, but complaint filed at Kashipur. As cause of action arose at Amroha-Court at Kashipur had no jurisdiction to entertain complaint. Applicant directed to move before trial Court at Kashipur accordingly. Court below also directed to dispose of such application first without proceeding any further in matter. *Amna* v. *Tasleem,* [1994) 31 All Cr C 653 (II).

Ornaments and cash given as a gift during the time of marriage becomes *streedhan* property and taking away those ornaments and cash can not be said to be a case of theft and jurisdictional power to entertain the complaint vests where the occurrence takes place. *Sarita Devi* v. *State of Bihar,* 1997 (2) East Cr C 449 (Pat).

19. Compromise.—In case of compromise between parties belonging to same family after long litigation and before award of sentence, permission to compound offence. *Mohinder Singh* v. *State of Haryana,* 1993 Cri LJ 85 (P&H).

20. Non–Explanation of injuries.—In case of *Laxmi Singh* v. *State of Bihar,* AIR 1976 SC 2263 : 1976 Cri LJ 1736, the Hon'ble Supreme Court has held as follows at page 1741 of Cri (LJ).

"In these circumstances, therefore, it was the bounded duty of the prosecution to give a reasonable explanation that the injuries sustained by the accused Darshan Singh in the course of occurrence. Not only the prosecution has given no explanation, but some of the witnesses have made a clear statement that they did not *see* any injuries on the person of the accused. Indeed, if the eyewitness could not have given such graphic details regarding the assault on the two deceased and Dasain Singh and yet they deliberately suppressed the injuries on the person of the accused, this is a most important circumstance to discredit the entire prosecution.

In the case of *State of Gujarat* v. *Bai Fatima*, AIR 1975 SC 1478 : 1975 Cri LJ 1079 the Hon'ble Apex Court held as follows:

> "The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inmical witnesses or where the defence gives a versio which competes, in probability with that of the prosecution. In the instant case when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the court to rely on the evidence of PWs 1 to 4 and 6, mere particularly, when some of these witnesses have lied by stating that they did not *see* any injuries on the person of the accused."

In the case of *Ramesh* v. *State of U.P.*, 1991 Cri LJ 2976 the Hon'ble Supreme Court held as follows (at page 2980 of Cri LJ) :

> "The above circumstances clearly indicate that the incution has not come with clean hands and had also"

Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries.

When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. In the case at hand, triffle and superficial injuries on accused are of little assistance to them to throw doubt on veracity of prosecution case, particularly, when the accused who claimed to have sustained injuries has been acquitted. *Siri Kishan vs. State of Haryana*, 2009 (6) SCR 1184 : 2009 (12) SCC 757 : 2009 (8) JT 305 : 2009 (6) Scale 438.

21. Voluntary causing heart.—The allegation against the applicant was that he and accused Gopal assaulted the victim only with kicks and fists. In the medical examination only two blunt object injuries in the form of lacerated wound and contusion were found on the person of injured which most likely were caused by Lathi alleged to have been used by the deceased co-accused. The incident was of the year 1989. There is nothing on the record to indicate that the applicant in revision has any bad antecedents or criminal history. After a lapse of more than 12 years, socioeconomic conditions of the applicant must have undergone radical changes. To send him to jail to serve our imprisonment of year after this long gap would be doing great injustice to the applicant. Order of Appellate Court was passed on 30.6.2001 and since then the applicant in revision is in jail. Learned Counsel for the applicant further submitted that the applicant in revision shall not treat the same as enhancement of sentence. *Bhirug Revisionist v. State of U.P.* 2002 Cri LJ 271 : 2001 All LJ 2337 : 2001(43) All Cri C 268 : 2001(2) All Cri r 1404 : 2002(1) Rec Cri R 51.

Voluntarily causing hurt and mischief by fire. Appellants rebuked and assaulted informant's wife with slaps and fists and also have threatening that they will cause fire to his house. Witnesses supported case of informant so far as assault is concerned.

From the evidences available, it appears that although the prosecution has proved the case under Section 323 of the IPC, i.e. the assault caused to the informant's wife on the date of occurrence and as such, the appellants, conviction under Section 323, IPC is confirmed.

However, there is no evidence beyond reasonable doubt to prove that three accused persons had gone to the house of the informant in the night to cause mischief by putting 'gaushala chappar' on fire, since no seizure list has been proved nor any villager who came on hulla, Satan Mahara and Arjun Mahara, named in the FIR were brought by the prosecution in the Court to prove that any fire was put on the roof of the informant's 'gaushala'. In that view of the matter, prosecution has failed to prove the charge u/S. 436 of the I.P.C. beyond reasonable doubt. Accordingly, they are acquitted from the charge u/S. 436 of the I.P.C and their conviction on that count is set aside. *Kalru Rai & Ors. vs. State of Jharkhand*, 2010 (3) CriLJ 3509 (Jhar).

22. Principles of Unlawful assembly—Applicability.—Accused persons armed with deadly weapons went to house of victim and inflicted farsa blow on his head and injuring to others.

A close scrutiny of the statements of all the prosecution witnesses reveal that there was a free fight amongst the Complainant Party and the present appellants, during which complainant and his mother sustained injuries and the appellants also sustained injuries, therefore, in such a situation, it would not be a safer course, for the Court to apply the principles of Sections 147, 148 and 149 of IPC to sustain the conviction of the present appellants under Sections 147, 148 and 149 of IPC in view of the specific overt acts of the appellants, however, they can safely be convicted under Section 323 of IPC. Consequently, the present appellants are convicted only under Section 323 of IPC. *Babla and Anr. vs. State of Madhya Pradesh*, 2010 (3) Cri LJ 3061 (MP) (Gwalior).

There was no common object and in any event the present appellant was not a member of any unlawful assembly. Having held so, the High Court ought not to have altered the conviction as recorded by the trial Court. Accordingly, the appeal is allowed. The order of the trial Court *vis-a-vis* the present appellant is restored and that of the High Court vis-a-vis the present appellant stands quashed. If the appellant has served the sentence as imposed by the trial Court, the bail bonds executed for giving effect to order dated 08.01.2008 shall stand discharged. Otherwise, the appellant shall surrender forthwith to serve the remainder of sentence. *Komal vs. State of Madhya Pradesh*. AIR 2009 SC 1958 : 2009 (1) Crimes 373 : 2009 (11) SCC 55 : 2009 (2) Scale 479 : 2009 (1) SCR 1142 : 2009 (2) Supreme 25 : 2009 (2) SLT 480.

Specific role of each accused. If all the witnesses could not attribute specific roles to each of the accused, the same in our considered view, is natural. If seven persons armed with various weapons attack a person, the witnesses who were sanding at some distance may not be able to attribute specific role to each of the accused persons. *Satbir Singh vs. State of Uttar Pradesh*, AIR 2009 SC 2163 : 2009 (3) JT 293 : 2009 (3) Scale 439 : 2009 (3) SCR 406 : 2009 (3) SLT 161.

When it has been proved beyond any shadow of doubt that the respondents formed an unlawful assembly and the respondent-party was prepared for a fight, it must follow its intention to fight and cause injuries to the other party. No overt act by each member of the assembly is necessary to attract Section 149, I. P. C. Where a concerted attack is made on the victims by a large number of persons it is often difficult to determine the actual part played by each offender. But on that account for an offence committed by a member of the unlawful assembly in the prosecution of the common object or for an offence which was known to be likely to be committed in prosecution of the common object, persons proved to be members cannot escape the consequences arising from the doing of that act which amounts to an offence. It cannot be said that any one of the respondents was present at the spot innocently. It can also not be said that some of the members of the unlawful assembly went beyond the common object and committed crime graver than the assembly had in its object. Therefore, the acquittal of the accused persons on account that the specific role was not attributed cannot be said to be justified. *State of M.P. v. Habib Khan and others*, 2007 CriLJ 2505 (MP).

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23. Outraging modesty of woman and hurt.—Applying the principle of appreciation to this case, it is seen that the informant does not complain that the present petitioner aimed the blow to her breast. Rather, she has very categorically stated that the petitioner pressed the Lathi (Katha) on her neck and stood on it. Then the petitioner's wife dragged him. The injury was caused to her breast for the action of the accused persons. It thus, appears that the injury to her breast was caused accidentally. The injury, which was sustained by the injured on her breast has not been attributed particularly to the present petitioner in the sense that she has not stated that due to his assault she sustained the injury. Rather she has stated that due to the assault of the accused persons, she sustained the injury. In this case, this Court comes to the conclusion that applying to the standard laid down by the Apex Court in *Rupan Deol Bajaj vs. Kanwar Pal Singh Gill*, AIR 1996 SC 309 = 1995 SCC (Cr) 1059. it cannot be held to be an affront to the normal sense of feminine decency. It is further noted that in this case there is no suggestive overtuous regarding sex. Therefore, the offence under Section 354 is not made out. The conviction of the petitioner under Section 354, IPC is not sustainable. As far as offence under Section 323 is concerned, learned trial Court as well as the learned appellate Court has come to a concurrent finding of fact which requires no interference. *Kelu Cheran Behera vs. State of Orissa*, 2010 (2) CrLJ 2280 (Orissa).

Although FIR itself does not disclose offences under Sections 323 and 354, IPC against the revisionist, the Investigating Agency proceeded with the investigation on the very date of lodging of inordinately delayed FIR and examined all the five witnesses on the very date of initiation of the P.S. case in question under Sections 323, 354, 309 and 34, IPC. On completion of investigation the charge-sheet was, however, submitted on 09.05.2002 in a very mechanical fashion. On perusal of the DB the perfunctory nature of investigation is manifestly clear. Further, it is also a clear case of sheer non-application of mind on the part of the I.O. Rather, he has neglected to scrutinize the materials brought on record in its proper perspective prior to formation of his opinion that a *prima facie* charge under Sections 323, 354, 309 and 34, IPC has been well established. None of the five witnesses examined by him stated anything implicating the revisionist as the molester of the alleged victim and there was also nothing in the statements to suggest that the *de facto* complainant was assaulted by the revisionist. In fact, the *de-facto* complainant herself has also not levelled any allegation of molestation or assault against the revisionist within the four corners of the FIR.

In such a factual scenario, Court has no hesitation in holding that contents of the FIR even taken at their at face value accepting in its entirety do not constitute *prima facie* offences under Sections 354 and 323, IPC against the accused revisionist. Court is also to hold further that the evidence collected in support of allegations made in the FIR also do not make out any case under Sections 354, 323 and 34, IPC against the accused revisionist. In submission of charge-sheet claiming that offences under Sections 354 and 323, IPC have been established *prima facie* against the accused is of no consequence since evidence and materials so collected by the I.O. were not properly appreciated by the I.O. for the reasons best known to him.

Therefore, viewing the entire matter on the anvil of the viability of the persecution case, this Court convinced to hold that it is a baseless case of a *mala fide* and malicious prosecution and as such continuance of this criminal proceeding would be a sheer abuse of the process of the Court. So, Court of the clear opinion that it is a fit case where the entire proceeding including the charge-sheet should be quashed so far as it relates to the accused revisionist in exercise of the power under Section 482, Criminal Procedure Code. *Biplab Kumar Chatterjee vs. State*, 2010 (3) CrLJ 2638 (Cal).

24. Death of complainant.—Admittedly, complainant had died after recording of his pre-charge statement. Not only the respondents had the right as well as the opportunity to cross-examine him, they did actually cross-examine him. Therefore, the statement of complainant recorded at pre-charge stage is relevant in view of the provisions contained in Section 33 of the Evidence Act.

The learned Metropolitan Magistrate has not taken the pre-charge statement of complainant into consideration. In view of the mandate of Section 33 of the Evidence Act, it was obligatory for him to take the statement of late complainant into consideration before passing judgment on the merit of the case. Failure of the learned Metropolitan Magistrate to take the statement of complainant into consideration has resulted in failure of justice and, therefore, the order passed by him cannot be sustained. *Surjit Kaur vs D. S. Kapoor & Ors.*, 2010 Cri LJ 1008 (Delhi).

25. FIR.—*Non-naming* of one or few of accused persons in FIR or in dying declaration, when not fatal. Prosecution case that the accused persons committed criminal trespass into the school and tried to give lesion in the classes and some outsider accused persons being armed with iron rod, spear etc. started assaulting the clerk of the school.

Eighteen persons faced trial out of which were acquitted by the trial Court and the High Court. Names of some of the appellants were not mentioned in the FIR or the dying declarations.

The law is fairly well settled that FIR is not supposed to be an encyclopaedia of the entire events and cannot contain the minutes details of the events. When essentially material facts are disclosed in the FIR that is sufficient. FIR is not substantive evidence and cannot be used for contradicting testimony of the eye witnesses except that may be used for the purpose of contradicting maker of the report. Though the importance of naming the accused persons in the FIR cannot be ignored, but names of the accused persons have to be named at the earliest possible opportunity. The question is whether a person was impleaded by way of afterthought or not must be judged having regard to the entire factual scenario in each case. Therefore, non naming of one or few of the accused persons in the FIR is no reason to dis-believe the testimony of crucial witnesses. The evidence of witness is clear and cogent. *Kirender Sarkar vs. State of Assam*, AIR 2009 SC 2513 : 2009 CrLJ 3727 : 2009 (12) SCC 342 : 2009 (6) JT 114 : 2009 (6) SCR 1133 : 2009 (6) Scale 589.

Delay in dispatch of FIR to Magistrate—Effect of. High Court firstly dealt with the authenticity of the First Information Report. The High Court has noted that PW. 1 allegedly gave First Information Statement. The original of the statement showed that the last page which contained the signature was torn out. The Sessions Judge after seeing the last page of Ext. P1 FI statement observed as follows :

> "The First Information Statement is shown to the witness. It is seen that the place of which the signature of the informant was there torn off. That portion of the paper is seen torn and removed. From the manner in which is torn away, it is clear that it was not separated due to wear and tear, but that portion alone is deliberately removed. The FIS is handed over to the witness."

The High Court made comparison of the document with other documents and found that document was suspicious. Added to that it was noted that the FIR purportedly recorded on 27.10.1993 at 11.00 p.m. It is accepted that Ilaka Magistrate received it on 28.10.1993 at 8.05 p.m. The High Court found that there was unexplained delay in receipt of the occurrence report by the Magistrate.

Thus, the High Court found that not only the document appeared to be suspicious but in addition there was considerable delay in sending it to Ilaka Magistrate. Added to the aforesaid aspects, the noticeable variation in the evidence of PWs. 1 and 3 have been highlighted by the High Court. The role played by PWs. 1 and 3 while the deceased was being assaulted have been analyzed in great detail. The High Court has noticed that even if the prosecution version about the role of A. 1 is accepted to be true, since the genesis of the incident has not been established, it will be unsafe to record his conviction. The High Court has noticed that crime was not committed in the manner as suggested by the prosecution and the genesis of the incident is not established. *State of Kerala vs. Anilachandran*, AIR 2009 SC 1866 : 2009 (2) Crimes 225 (SC) : 2009 (5) JT 613 : 2009 (6) SCR 152 : 2009 (5) Scale 675.

26. Cognizance of offences.—Informant a member of the Scheduled Caste community alleged that he was accosted in way by number of accused persons including petitioners and was brought in a room where he was intimidated, assaulted, insulted and was abused. Accused persons alleged to have intimidated and abused informant in a room and not within public view. Cognizance taken under provisions of SCST Act is quite bad. Parties have compromised hence order taking cognizance of offences is liable to be quashed. *Girinath Singh & Ors vs State of Jharkhand & Ors.*, 2010 (4) CriLJ 4006 (Jhar).

* * * * *

Sec. 324. Voluntarily causing hurt by dangerous weapons or means.—Whoever, except in the case provided for by Section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of the fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by, means of any substance which it is deleterious to the human body to inhale to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.

Synopsis

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1. Scope.—Accused was sentenced under Section 324, for having inflicted incised wound by knife on the victim. Victim was attacked by the accused when he refused to accompany him for cutting hands and legs of some other person. On his refusal to accompany him, accused took out knife and started causing injuries one after another. *Held*, that all was done because the injured refused to be a criminal and resisted the direction of the accused. That aggravated the seriousness of offence. In such cases, reduction of the sentence would be a misplaced leniency bordering on abetment of offence. 1987 Cri LJ 1399 (Raj).

In instant case, there are minor contradictions and they do not effect the prosecution case and cannot belief the prosecution case. *Ram Janam Gareri* v. *State*, 1995 (32) ACC 5 (All).

2. An instrument, etc.—The expression "an instrument, which used as a weapon of offence, is likely to cause death" in this section should be construed with reference to the nature of the instrument, and not the manner of its use. UBR (1897-1901) Vol. I, 311l : *see* also AIR 1944 Sind 83 : 45 Cr LJ 598. In a case under this section the charge should follow the wording of the section. UBR (1897-1901) Vol. I, 318.

Trial for offences under Section 324, IPC where injury was caused by a sharp edged weapon having cut tender muscle nerves. It was held to be a simple injury. *State of Karnataka* v. *Siddegowda*, 1995 SCC (Cr) 931 (SC).

3. Section 334.—This section applies to the case of a person who causes hurt on grave and sudden provocation to the persons giving the provocation. 1 BHCR 17, Section 334, provides for a lighter punishment for the offence of voluntarily causing hurt on grave and sudden provocation. AIR 1981 All 189 ; 19 Cr LJ 371.

4. Object.—The object of this section is to make a simple hurt more grave and liable to more severe punishment. 7 MHCR App 11. "The means used to inflict the hurt indicate great malignity. A blow with the fist may give as much pain and cause as lasting injury as cutting with knife or branding with a hot iron. But in most cases, the offender who has used a knife or a hot iron is a far worse and more dangerous member of society than he who has only used his first. The hurt actually inflicted may not, according to the classification of hurts, be a grievous hurt. Yet, on account of the mode in which it is inflicted, it deserves to be punished more severely than many grievous hurts. The administering of deleterious or stupefying drugs with the view to commit an offence is made punishable by a subsequent section (*vide* Section 328). The mere administering of any such deleterious thing, where the object or intention is not apparent, may be an offence within this section".—*Morgan and Macpherson.* Causing hurt on grave and sudden provocation is not an offence under this section. 1 BHCR 17, but a charge and finding a case of causing hurt under this section, need not contain a negation that the hurt was caused on grave and sudden provocation. 4 MHCR App 5. Husbands have no right whatever to chastise their wives, even with small canes or bamboos. LBR (1872-1892). 421. A husband, causing hurt to his wife in order to constrain her to obey a demand of his to return to his house, will not be guilty of an offence under Section 320, which apparently refers to some demand in respect of property. In this case, as the husband slightly cut his wife with an instrument of stabbing or cutting, it was held that he was guilty under Section 324, Penal Code. 11 M 257 : 1 Weir 336. An accused cannot be convicted under this section where a charge of affray has been framed against him. 4 LBR 237 ; 7 Cr LJ 398. It is wrong to say that no offence is committed by an accused person who strikes a blow under provocation. 6 Cr R 157 ; 94 Ind Cas 142 : 27 Cr LJ 574 ; AIR 1930 Cal 720. Simply injury caused by cutting weapon falls under Section 324. not under Section 326. AIR 1930 Lah 950 *see* also 34 Cr LJ 271 ; 141 Ind Cas 861 ; 15 NLJ 46 ; 145 Ind Cas 702; 1933 Cr C 549 ; 34 Cr LJ 1051 ; AIR 1933 Lah 315 : AIR 1933 Oudh 269; 1933 Cr C 596. A person convicted both under Sections 324 and 148, IPC, can be sentenced only under one or the other of the two sections. 35 PLR 587 : AIR 1934 Lah 614. In order to bring an offence under Section 324, the instrument with which the injury is alleged to have been caused must be one, not which is liable but which is likely to cause death. 166 Ind Cas 840 ; 38 Cr LJ 299 ; AIR 1937 Rang 8. A stick becomes a dangerous weapon by reason of its iron shod at the top. AIR 1966 Guj 221. Club and a wooden reaper can be said to be deadly weapons so they are likely to cause death if used as weapons. 1981 Cr LJ 562.

In order to bring the offence under Section 307, home to accused, the prosecution must establish that his intention was one of the three kinds mentioned in Section 300. AIR 1965 SC 843 ; 1965 (1) Cr LJ 766.

The prosecution must prove that the accused caused voluntarily hurt and that such hurt was caused by means of an instrument referred to in the section. AIR 1979 SC 1570 : 1979 Cr LJ 1125.

In case of no medical evidence or expert evidence to show the nature of weapons, it must be held that the prosecution failed to prove the case under Section 324. 1977 Cr LJ 98 ; 1970 Cr LJ 1235 : AIR 1970 Pat 322 (if grievous injury is caused by tooth bite, he will be guilty under Sec. 326).

A conviction under the section is not proper where the injuries were caused in exercise of self defence. 1977 SC Cr R 27.

5. Common object.—Where the common object of unlawful assembly armed with deadly weapons was to cause grievous injuries with sharp edged and blunt weapons, it was held that the conviction under Sections 324 and 323, both read with Section 149 cannot be sustained. AIR 1957 Punj 278 : 1957 Cr LJ 1307. Where the course of conduct adopted by the accused clearly showed that they were actuated by the common object of inflicting about nine injuries on the father and so of causing death to the deceased. It was not necessary for the prosecution to prove that a particular accused caused a particular injury either to the deceased or to his father, and was so guilty under Section 324. Since the offence was under Sections 303 and 324, read with Section 149, of the IPC, it would be enough for the prosecution to prove that a result of the assault carried out in the field by the member of the unlawful assembly grievous hurt was caused to the father and his son's death was intentionally caused. AIR 1956 Bom 183 : 1956 Cr LJ 389.

The accused inflicted several injuries. No proof that all the injuries were caused by either of the two accused. It was held that each of them committed offence under Section 324, IPC at the most individually. 1982 RLW 547 ; AIR 1971 SC 335 : 1971 Cr LJ 288 ; 1982 Cr LJ 1346. *See* also 1978 Cr LJ 1303 (delay in lodging FIR was held to be inconsequential). On the evidence, it is not possible to infer common intention as mentioned in Section 34, or common object as mentioned in Section 149, each of the accused will be responsible for his individual acts. AIR 1975 SC 12 : 1975 Cr LJ 32 ; AIR 1977 SC 705 : 1977 Cr LJ 347.

6. Common intention.—Where the accused party members of one family barged into the house of the complainant, manhandled her inside and dragged her out and beat her repeatedly, it was held that the said act of accused persons made out a case of common intention against them in committing offence. *State of Maharastra* v. *Jagmohan Singh Kuldip Singh*, AIR 2004 SC 4412 : 2004 Cr LJ 4254 (SC) : 2004(3) Crimes 319 (SC) : 2004 SCC (Cri) 2003 : 2004(6) Supreme 287.

7. "Instrument".—The expression "an instrument" which used as a weapon offence is likely to cause death" should be construed with reference to the nature of the instrument and not the manner of its use. What has to be established by the prosecution is that the accused voluntarily caused hurt and then such hurt was caused by means of an instrument referred to in the section. *Anwarul Haque* v. *State of M.P.*, 2005 Cr LJ 2602 (SC) : 2005(2) Crimes 159 : 2005(10) SCC 581 : 2005 SCC Cri 1629 : 2005(3) Supreme 618.

8. Procedure.—Cognizable—Summons—Bailable—Compoundable when permission is given by Court—Triable by any Magistrate. The charge should run thus:—

I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

"That on or about the.....day of.........at.......you voluntarily caused hurt to *A, B* by means of.......which is an instrument for shooting, stabbing, or cutting, or which used as weapon of offence is likely to cause death, *etc.*, and thereby committed an offence punishable under Section 324, of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

For legality of charge under Section 302, read with Section 34, but conviction of one accused only under Sections 304 and 324, and acquittal of others. 1957 Cr LJ 270.

9. Acquittal.—Acquittal was maintained. The statement of injured corroborates with medical report and FIR in respect of A-3. High Court convicted A-3 under Section 324, IPC. *Jagmer Singh* v. *Laheri*, 1995 JIC 700 (All).

Mischief of fire and causing injury—Accused was one of terrorists, who put fire in informant house and caused injuries. Witnesses have turned hostile and they have not supported the prosecution case. The doctor has only proved the injury on the shoulder of the informant. No doubt that the terrorists fired upon him when crossing the river and he could not identify any of the terrorists, in that view of the matter, there is no evidence to hold the appellant for any of the offence charged. Since, Hiralal Uraon, in whose house, the informant was taking shelter and who was present there, has stated that he was not among the terrorists rather he stated that he was his neighbour, residing in the house just beside his house and he was drunk due to Jitiya festival and he was himself assaulted. Held; There is no evidence to hold appellant guilty of any of offences charged. Charges against appellant have not been proved beyond reasonable doubts. *Lalsahay Uraon vs. State of Jharkhand*, 2010 (3) CriLJ 3351 (Jhar).

Suppression of genesis of evidence—Discrepancy and inconsistency. The discrepancies coming on record in the evidence of witnesses in no circumstances can be termed to be minors in nature which in our view, are vital for disbelieving and discrediting the evidence of the eye-witnesses. The High Court discarded the important pieces of evidence on the basis of surmises and conjectures. On the day and time of the incident none of the eye-witness including injured witnesses had seen the appellant travelling on Bus. It is their evidence testimony that there were some more persons present at the bus stand, who took the luggage of the appellant after the same was unloaded from the rooftop of the bus. It has come in the evidence of these witnesses that one person hit PW-Laxman Dass. The Investigating Officer has not cared to find out the identity of those persons who were accompanying the appellant on the scene of occurrence and took his luggage or out of those persons who hit PW-Laxman Dass with a stone. It appears that the prosecution has suppressed the genesis of the evidence.

It is the evidence of Fire Arm Expert, that he examined rifle No. 243 of 302 bore which was deposited with the Scientific Branch of the Forensic Science Laboratory by Constable Ram Chhabile. It is clear from the evidence of the Ballistic Expert that the rifle of, 302 bore was sent to him for scientific analysis and not rifle of 315 bore which allegedly was used by the appellant at the time of commission of the offence and which later on was handed over to H.C. Sukhram Singh, who sealed the same in the Police Station. This discrepancy and inconsistency in regard to the use and recovery of the weapon of offence from the possession of the appellant is very vital to discard the truthfulness of the prosecution case. The prosecution has failed to prove that the same weapon of offence was sent to the Ballistic Expert which allegedly was handed over by PW-Vimal Kumar Tiwari or Shambhu Dayal Chaurasia to Head Constable in the Police Station. The contentions of the learned Counsel appearing for the State that such type of minor discrepancy has to be ignored from consideration cannot be accepted.

It is the case of the prosecution that single bullet was fired by the appellant from rifle of 315 bore which caused injuries to four persons.

Witness Tiwari deposed that on the day of incident the appellant fired one single bullet shot, which first hit Prahlad Babu and then Dhanna Lal and the bullet came out of the body of Dhanna Lal and in the process hit two other persons whom he did not know. It has come in his evidence that he could not tell whether all the injured persons were standing in a queue when they received bullet shot.

A Fire Arms Expert examined rifle and he also scientifically examined three live cartridges and one missed fire round. It is his opinion that two pieces of metal could have been fired from above rifle. He placed on record copy of the test report. In cross examination this witness stated that he could not definitely point out whether pieces of metals *i.e.* EB2 and EB3 were the pieces of same bullet which was fired from same rifle. It is his opinion that rifle was of .302 bore and not of .315 bore. He also categorically stated that one bullet could cause only one entry wound to a person. *Mahendra Pratap Singh vs. State of Uttar Pradesh*, 2009 (11) SCC 334 : 2009 (1) Crimes 424 : 2009 (3) JT 120 : 2009 (2) SCR 1033 : 2009 (3) Scale 122 : 2009 (2) Supreme 175 : 2009 (2) SLT 520 : 2009 (2) JCC 1131.

Doubts as to weapon of offence.—There was clear concession by learned Counsel for the accused that in the light of the report given there could be not doubt that deceased had died of gun shot wounds as wads and pellets have been recovered from her body. The High Court unfortunately did not consider the relevance of this concession. The High Court observed that the concession had been made rightly, but it further said that there was doubt about the weapon used on deceased. Even if that be so, there was no scope for directing acquittal of the accused persons in respect of murder.

Further question of testimony of three injured eye witnesses the trial Court noticed that their statements were flawless and nothing has come out in their cross examination on the basis of which any doubt could be created about their veracity. The place was a secluded one. The incident took place on the turning of the passage. The incident continued sufficiently for a long time which was clear from the fact that many shots were fired, firstly by both accused resulting in the death of deceased and injuries to some of the witnesses. The High Court discarded the credible evidence of the eye witnesses on mere surmises and conjectures. *State of Punjab vs. Atma Singh*, 2009 (7) JT 450 : 2009 (4) Supreme 298 : 2009 (7) Scale 689 : 2009 (8) SCR 549 : 2009 (2) Crimes 442 (SC).

The FIR was lodged by victim within few hours. The medical report supported the evidence of victim. The evidence of witnesses were corroborating and trustworthy. The presence of accused with alleged weapon on the spot was proved. The acquittal of co-accused is no ground, for acquittal of accused. Hence conviction sustained. *Tribhuwan Singh* v. *State of U.P.*, 1995 All LJ 598 (All).

Trial for offence under Section 324, IPC, infliction of injury by accused was established. It was held that the mere absence of the name of such accused in the statement of the injured shall not vitiate the conviction. *State of A.P.* v. *Madhav Raju Venkateswamy*, (1995) 2 East Cr C 699 (SC).

Though several persons received injuries in incident but prosecution case was suffering from grave infirmities. Where evidence of injured witness were not reliable and one of injured in incident was found appearing as defence witness in trial and he did not name any of accused as culprit ; it was held that conviction is liable to be set aside. *Santosh Kumar* v. *State*, 1997 Cri LJ 984 (All).

Where in a case, the evidence of eye-witnesses was inconsistent with averments in Fardebeyan and punctured wound on hand was of simple in nature and may be caused by any pointed weapon or may be self inflicted, it was held that in view of personal enmity between parties over partition of property, false implication of accused could not be ruled out and, therefore, the accused was entitled to be acquitted. *Nirmal Kumar Mehta* v. *State of Bihar*, 2004 Cr LJ (NOC) 66 (Jhar) : Air 2004 Jhar HCR 840 : 2003(3) East Cri C 197.

Very finding of aunused wound and the opinion of doctor that it was caused by sharp-cutting weapon created a doubt over prosecution stay that the accused had caused Bhala injury to the injured witnesses. Place of occurrence as alleged by the prosecution was not proved and the injuries on accused were also not explained. In view of above conviction was held not sustainable. *Parmanand Singh* v. *State of Bihar*, 2004 Cr LJ 4430 (Pat) : 2004(3) BLJ Pat 614 : 2004 (3) East Cri C 231.

The wife who was going with co-accused with whom she was alleged to have illicit relationship, allegedly sprinkled acid on person of her husband. Held, there was no occasion for them to carry bottle of acid, because they were not going in search of husband. The circumstances showed that actually it was husband, who out of annoyance on the conduct of his wife, did the occurrence and tried to create evidence in his favour. Hence conviction of his wife and co-accused was not proper. *Emlen Henry* v. *State of Bihar*, 2004 Cr LJ (NOC) 11 : AIR 2004 Jhar HCR 165 : 2004(1) DMC 227 : 2003(2) East Cri C 653 : 2003(3) JCR JHA 249.

10. Conviction.—Conviction under Section 324, IPC—Revision petition was filed for the same. It was held that it was a very close range shot and there was no difficulty in identifying the accused as there was electric light. Hence solitary statement is sufficient for recording conviction. As accused is sole bread earner for family the sentence already undergone would meet ends of justice. *Raghuvir* v. *State of U.P.*, 1995 (32) ACC 283 (All).

Reliance of Dying declaration. This Court has critically examined dying declaration made by the deceased and the surrounding circumstances. There is no doubt whatsoever the statement made by the deceased was on her own volition. It was voluntarily made without any coercion or tutoring of anyone. The statement is natural and coherently made by the deceased in a fit state of mind. There is nothing on record to doubt the evidence of PW-2 who recorded the dying declaration and evidence of duty doctor (PW-13) who certified that the deceased was in fit state of mind to make her statement. Except PW-2 and PW-13 no other individual was present when she made the statement. We do not find any reason whatsoever not to accept the dying declaration.

The deceased in clear and categorical terms stated that she poured kerosene on herself and it was the appellant who lit the match stick resulting in fire and causing 60% burns which ultimately led to her death. The appellant instead of preventing the deceased pouring kerosene upon herself hit the match stick resulting in fire and causing burns. The appellant knew very well that the body of the deceased was drenched with kerosene yet he indulged in the cruel act of lighting the match stick. In the circumstances, we find it difficult to accept the submission that the contents of dying declaration do not disclose the commission of any offence by the appellant. Can it be said that the appellant was not aware that his act was likely cause serious burn injuries to the deceased. The appellant was in fact charged for the offences punishable under Secs. 498-A and 302 IPC. We do not know what view the Court would have taken had there been an appeal by the State as against the acquittal of the appellant under Sec. 302 IPC? Suffice it to say that the High Court took a very lenient view in convicting the appellant for the offence punishable under Sec. 304 Part I IPC and sentencing him to undergo rigorous imprisonment only for a period of seven years. For the aforesaid reasons we confirm the conviction of the appellant for the offence punishable under Sec. 304 Part I of IPC and the sentence awarded by the High Court.

The learned Sessions Judge upon appreciation of the evidence available on record held that prosecution established its case beyond doubt that the appellant lit the match stick when the deceased herself poured kerosene on her body. However, the learned Sessions Judge came to the conclusion that the appellant hade no intention to kill his wife. In the result, the learned Sessions Judge held that in the circumstances it cannot be said that the appellant was having any knowledge that the burn injuries were likely to cause the death of the deceased. But his act would certainly cause hurt to a person and accordingly found the appellant guilty under Sec. 324 IPC. We must express our anguish about the manner in which the learned Sessions Judge has dealt with the matter. *Ongole Ravikanth vs. State of Andhra Pradesh*, AIR 2009 SC 2129 : 2009 CrLJ 3944 : 2009 (8) JT 88 : 2009 (8) Scale 824 : 2009 (10) SCR 155 : 2009 (5) SLT 137.

When accused assaulted with axe and injury found to be simple, conviction altered from Section 326 to one under Section 324, IPC. *Sheo Dularey* v. *State*, 1997 Cri LJ 269 (Alld).

Trial for offence under Section 324, IPC, there was conviction of the accused. Appeal against the same was filed, oral evidence corroborated by the Medical evidence. Hence conviction not to be interfered with. *Sarja Singh* v. *State of Punjab*, (1995) 2 SLJ 1148 (P & H).

The evidence of mother of injured a relative of accused implicating accused. Further statement of Doctor that injuries caused to victim are possible by knife used by accused found credible. Hence conviction confirmed. *Madhab Digai* v. *State*, 1995 Cr LJ 1206 (Ori).

Conviction for offences under Section 324, IPC, appeal against the same was filed on reappraisal of evidence on record, the appellate court finding no infirmity in the order of conviction.—Appeal was liable to be dismissed. *Om Prakash* v. *State*, 1995 JIC 337 (All).

When evidence of injured witness not reliable and one injured appeared as defence witness who did not name any of accused as culprits, conviction not sustainable. *Santosh Kumar* v. *State*, 1997 Cri LJ 984 (Alld).

Conviction for offence under Sections 324 and 324/34, IPC. Revision petition was filed. Petitioner No. 3 inflicted injury with a knife only after victim was caught hold by other two petitioners. Hence there was physical and actual participation of all three petitioners in the assault. Conviction recorded by Court below therefore, calls for no interference. *Basco Laurence Fernandes* v. *State*, (1994) 2 Crimes 441 (Bom) : 1994 Cr LR (Mah) 304 (Bom).

The accused was alleged to have caused injuries by sharp cutting weapon at a time when civil litigation between parties was going on regarding land which provided motive to appellant to commit crime. The testimony of eye-witnesses showed that it was moonlight and every thing was clearly visible. The conviction under Section 324/325 was held proper. *Bijendra Singh* v. *State*, 2004 Cr LJ 1892 (All) : 2004 All LJ 1019 : 2004(48) All Cri C 544 : 2004(2) All Cri R 1519 : 2004(3) Rec Cri R 193.

In a Karnataka case, the accused persons allegedly pulled down victim from Court and dragged him for a distance of about 20 to 25 feet and assaulted him. Medical evidence supported the alleged assault. It was held that merely because there were no injuries on the back of victim, it could not be said that his evidence was false but, however, it could be said that he had exaggerated a little and, taking into account relatively minor nature of injuries sustained by victim, the accused persons were liable to be convicted for offence under Sections 323 and 324, IPC. *State* v. *Dyarappa Bhimsha Koulagi*, 2004 Cr LJ (NOC) 196 (Kant) : AIR 2004 Kant HCR 1326 : 2004(2) Kant LJ 502.

In a Karnataka case, the accused was alleged to have assaulted complainant with stone. The testimony of complainant was quite reliable. The evidence of witnesses, who were won over and did not support prosecution case, was not the least reliable. Accused was, therefore, held liable to be convicted under Section 324. *State of Karnataka* v. *Manakya*, 2004 Cr LJ 1966 : AIR 2004 Kant HCR 1282 : 2004(2) KCCR Kar 873 : 2004(3) Kant LJ 161.

Where there was trial of accused with 3 other accused and conviction of appellant under Sections 324 and 326, and acquittal of others. Revision petition challenging of the same was filed. At the trial, several independent witnesses were cited but the prosecution has however failed to examine these and examined only those witnesses who were closely related to injured. The prosecution has failed to bring home the guilt of the appellant. Conviction and sentence set aside. *Ramdas Kondaji Pekhale* v. *State of Maharashtra*, (1994) 1 Mah LR 428 (Bom).

In the absence of clear materials in this case, it was difficult to come to a conclusion from the mere *ipse dixit of* the two doctors that grievous injury had been caused. In short, it was held that the offence committed was one under Section 324 and not under Section 307 or Section 326, IPC. *Abhi Ram Mukhi* v. *State of Orissa*, 1996 Cr LJ 2341 (Ori).

When accused was convicted under Section 324, IPC. Accused also received several injuries. But no FIR lodged by him. Simply because accused was injured, it cannot be inferred that incident took place in manner as alleged by him as accused inflicted sword injuries to victim—Accused arrested on spot and known to witnesses. Guilt of accused appellant proved beyond reasonable doubt and his conviction thus upheld. (Criminal Trial). *Mahesh* v. State *of U.P.*, (1994) 31 All Cr C 658 (All).

In the absence of any cogent materials to hold that the injury was grievous in nature, it must be held that the injury was simple in nature and accordingly the conviction of petitioner was altered to one under Section 324, IPC, *Akhi* v. *State of Orissa*, 1996 Cr LJ 2352 (Ori).

Though it was allegation against the accused person that he hurt complainant : yet injuries caused to the body of injured person were found to be simple and not grirveous in nature. Hence conviction of accused person was altered from one under Section 326 to one under Section 324. *Sheo Dularey* v. *State*, 1997 Cr LJ 269 (Alld).

The members of unlawful assembly indulged in criminal activity in which deceased was done to death and eye-witness was injured as three persons had assaulted him with a sharp weapon. It was held that person assaulting and injuring the eye-witness could not be convicted of murder under Section 302/149 but they could be convicted under Section 324/149. *Rajendra Shantaram Todankar* v. *State of Maharashtra*, 2003 Cr LJ 1277 (SC) : AIR 2003 (SC) 1110 : 2003(1) Crimes 346 : 2003(2) SCC 257 : 2003 SCC (Cri) 506.

The injuries to the victim were caused by the accused with sharp edged weapon and FIR was lodged promptly within two hours after the occurrence and medical report supported prosecution versions as to injuries and version of eye-witness was reliable. The conviction of accused was held proper but sentence was reduced. *Sheo Nath* v. *State*, 2003 Cr LJ 1318 (All) : 2003 All LJ 514 : 2003(46) All Cri C 301 : 2003(2) CCR 43 : 2003(1) A Cri R 258.

Where the accused had caused injury to victim by blunt side of spade it was held that in the absence of intention to make an attempt on the life of victim, the conviction of accused under Section 324 was held proper. *Haris Chandra Jain v. State*, 2002 Cr LJ 1983 (Orissa) : 2002(93) Cut LT 334 (Ori).

In a quarrel the accused gave one blow to victim in college and second in the road. The victim died of enlarged document, it was held that the offence hurt and not grievous hurt made out. *Sushil Kumar Rai* v. *State*, 2004 Cr LJ 3536 (All) : 2004(49) All Cr LC 291 : 2004(2) All Cri R 1813.

The police squad was attacked when they tried to surround the accused in a hut. He pelted bottles and glasses and tried to give heavy blow on head of PSI with a chopper but it was warded off. It was held that the conviction of accused for offences punishable under Sections 224, 332 and 307 was proper. *Jamil Ahmad* v. *State*, 2003 Cr LJ 3663 (Bom).

Where in a Jharkhand case, the accused assaulted the complainant and the complainant sustained bleeding injuries which were simple in nature. Medical evidence showed that the injuries could not have been caused due to fall as suggested by defence. The complainant had no reason to implicate accused. Testimony of complainant was found reliable though not corroborated by any witness who turned hostile. It was held that finding of guilt and conviction under Section 323, IPC was not proper. *Mahesh Rajbhar* v. *State of Bihar*, 2004 Cr LJ (NOC) 139 (Jhar) ; *See* also *Anwarul Haw* v. *State of U.P.*, 2005 Cr LJ 2602 (SC) : 2005(2) Crimes 159 : 20058(5) JT 9 : 2005(10) SCC 581 : 2005(4) Scale 442 : 2005(3) Supreme 618 : 2005(2) Raj Cri C 437.

11. Sentence.—Conviction of `V' converted under Section 324, but was sentenced to undergo one year RI—Revision petition for reduction of sentence was filed and it was held that the accused being an old person and incident taking place more than 8 years ago, he should be released on the sentence already undergone. *Vijay Singh* v. *State of U.P.*, 1995 JIC 602 (All).

Alteration in Sentence—Conviction from Sec. 302 to Sec. 326 IPC—Scope. The informant on whose evidence trial Court and the High Court placed reliance had categorically stated that it was accused Rakesh who had attacked the deceased with a sword, and he was not sure as to how the other two accused persons including the present appellant attacked the deceased. The evidence of witness shows that the accused Jitu@Jitender had given a blow on the belly. The Doctor found no injury on the belly, but same was on the back side. In this scenario, it would be difficult to uphold the conviction of the appellant for offence punishable under Sec. 302 IPC. Accordingly, the conviction of the appellant is altered to Sec. 326 IPC. We find it strange that though the evidence of PW. 8 was accepted, no conviction was recorded so far as the present appellant is concerned for the assaults made by him on Bhagirath. There are several disturbing factors. Strongly, the State has not questioned the conviction of Rakesh for offence punishable under Sec. 324 IPC and non recording of any conviction insofar as the present appellant is concerned in respect of injuries inflicted by him on Bhagirath PW. 8. *Jitu vs. State of Madhya Pradesh*, AIR 2009 SC 1337 : 2009 CrLJ 1884 : 2009 (2) Crimes 143 (SC) : 2009 (3) JT 602 : 2009 (3) Scale 534 : 2009 (3) SCR 1158 : 2009 (2) Supreme 387.

Accused was convicted under Section 324, which was challenged in appeal and held that the solitary statement of complainant was sufficient for recording conviction as shot was fired from very close range in electric light. However, the accused had already undergone about two months imprisonment and was not a previous convict and the incident happened in heat of moment, no useful purpose would be served by sending him to jail again hence, it is modified to the extent already undergone. *Raghubir* v. *State of U.P.*, 1995 UP Cr R 12 (All).

Keeping in view the nature of the offence and the nature of weapon used, which was a pen-knife and the background of the case, and in view of the conviction under Section 324, IPC, it was thought fit and proper to reduce the sentence of imprisonment to the period already undergone and to impose a fine of rupees one thousand, in default, to suffer further imprisonment for two months. *Akhi* v. *State of Orissa*, 1996 Cr LJ 2352 (Ori).

Where the accused was convicted under Sections 324 and 326, IPC for throwing acid on victim girl, it was held that as the accused was not a student to show any leniency, sentence of RI for 5 years under Section 326 with fine of Rs. 25,000 would be appropriate. *Sangeeta Kumari* v. *State of Jharkhand*, 2004 Cr LJ 1734 (Jhar).

No misuse of bail facility, not in jail even for 3 month though sentenced to one year imprisonment and well settled in life, are no mitigating circumstances to reduce sentence. *Ved Prakash* v. *State of Haryana*, 1996 Cri LJ 4156 (SC) : AIR 1996 SC 2795 : 1996(6) Scale 78 : 1996(6) Supreme 371 : 1996(3) Crimes 194 (SC).

Death sentence—Imposition of—When valid. Murder of six members of a family including helpless women and children having been committed in a brutal, diabolic and bristly manner and the crime being one which is enormous in proportion which shocks the conscious of law, the death sentence as awarded in respect of accused Sattan and Guddu was the appropriate sentence and the High Court ought not to have altered it.

Before dealing with the position in law as highlighted by this Court relating to rarest of rare categories where death sentence can be awarded, submissions made by learned *Amicus Curiae* to show existence of mitigating circumstances need to be noted. It is stated by learned *Amicus Curiae* that motive is not clearly established. This is contrary to the conclusions of the High Court. In fact, the High Court has treated that an entire family was eliminated and if the evidence of witness is considered reliable and trustworthy, the inadequacy and insufficiency of motive pales into insignificance and recedes behind the curtain. So far as the specific overt acts are concerned, it is to be noted that apart from the accused persons who faced trial, three of these persons, namely, absconding accused were described as accused. Six persons were killed. It is not expected that a lady witnessing such a massacre would note the details. *State of Uttar Pradesh vs. Sattan*, 2009 (4) SCC 736 : 2009 (2) Crimes 121 (SC) : 2009 (4) JT 347 : 2009 (3) SCR 643 : 2009 (3) Scale 394 : 2009 (2) Supreme 465 : 2009 (2) SLT 641.

12. Probation.—Accused convicted for causing intentional injury, hence benefit of the provisions of the Probation of Offenders Act should not be extended in routine manner. *Chintamani Mohapatra* v. *State of Orissa*, (1995) 4 Crimes 348 (Ori).

Petitioners not precious convict and only one head injury was made benefit of probation was granted, *Bakhtawar Singh* v. *State of Punjab*, [1994) 2 CC Cases 207 : 1944 (2) SLJ 1122 (P & H).

13. Evidence.—Originally the appellant was tried for offence under Section 302, IPC. Additional Sessions Judge does not seem to have made any efforts to state realities which were presented by circumstances but has chosen to blindly follow evidence of the two eye-witnesses. Hence he has erroneously acquitted the appellant. Accused of the offence under Section 302, IPC. *Amar* alias *Amarendra* v. *State of Maharashtra*, (1995) 2 CCR 163 (Bom).

Evidence showing that appellant accused alongwith others went to spot and attacked deceased and caused his death and also caused injuries on injured. The Injuries sustained by PW 2 were simple, but at the same time, it should hot be forgotten that though the injuries caused by the accused were simple, they have acted actually with an intention to cause his death. It is quite evident that all of them went to the spot with Veecharuval and attacked the deceased and caused his death.

It is not in controversy that one deceased died due to homicidal violence and following the inquest made by the Investigating Officer, the dead body was subjected to post-mortem and all the accused stood charged for the offences referred to above and on trial, accused 1 and 3 were found guilty of murder. *Thangaraj vs. State*, 2010 (3) CriLJ 3409 (Mad).

Where there were burn injuries caused by pouring kerosene oil and lighting it—Conviction was held by trial Court—Acquittal by High Court—State appeal was filed—Medical evidence corroborating evidence of prosecutrix and there was nothing to show false implication of accused. Her evidence found reliable and truthful. Non-examination of any neighbour not material—Hence conviction by trial Court restored. *State of Karnataka* v. *Ganapathy*, 1994 SCC (Cri) 1165 (SC).

Reliability of Eye-witness. PW. 2 Suresh Kumar at the time of occurrence was studying in the school. He is the friend of Raj Kumar, who is the brother of PW. 1. According to him, on the date of occurrence, PW. 2 and his friend Raj Kumar accompanied PW. 1 and the deceased to go to river for taking bath. On the way, the occurrence had taken place. He could state about the occurrence only. He did not refer about the other happenings with reference to the motive as spoken to by PW. 1. At the time of deposition, he was studying B.A. in Nesamani Christian College. He clearly corroborated the evidence of PW. 1 with reference to the overt acts attributed to each of the accused. Nothing has been elicited from PW. 2 that he had anything to speak falsehood against the accused. As a matter of fact, when the victim was taken in a car to hospital, he also accompanied him. When Exh. P1 complaint was given to PW. 11 Head Constable, PW. 2 attested the said complaint. In Exh. P1 also the name of PW. 2 is mentioned. PW. 2 was examined at the hospital during the course of inquest by PW. 14. Therefore, there is no reason to reject the evidence of PW. 2. *Vijaykumar vs. State*, 2009 (12) SCC 629 : 2009 CrLJ 3056 : 2009 (7) JT 36 : 2009 (6) SCR 919 : 2009 (6) Scale 364 : 2009 (8) SLT 27.

Independent *eye-witness*—Reliability. The most important witness in this case is PW. 3 Vanaja, whose house is situated very near to the place of occurrence. According to her she came out of the house and when she was proceeding towards Southern side for taking water, she saw that the accused came and attacked Johnson and while PW. 1 intervened, he was also attacked. Admittedly, she is not related to the deceased family.

There is nothing to indicate that PW. 3 was having any animosity to speak falsehood against the accused. The reading of her deposition would make it clear that she is very natural and reliable witness. It is clear that the occurrence had taken place just opposite to her house and from that place, the blood stained earth was seized under Exh. P9 mahazar attested by her husband PW. 6 Gopalakrishnan on the very same day. She also stated that she had finished her S.S.L.C. and after her marriage, she was living with her husband Gopalakrishnan near the place of occurrence. On coming to know that the victim who was taken to hospital died, she went to the hospital to see the dead body. She gave the reason as to why she went to hospital immediately by stating that : "The person who does not know any thing was killed so I went to Kuhithurai Hospital to see Johnson."

In the light of the above position, it is to be emphatically stated that the evidence of Vanaja, who is an educated, independent, not related and whose house is situated opposite to the place of occurrence would inspire confidence that what all she stated before the Court is cogent and credible. *Vijaykumar vs. State,* 2009 (12) SCC 629 : 2009 CrLJ 3056 : 2009 (7) JT 36 : 2009 (6) SCR 919 : 2009 (6) Scale 364 : 2009 (8) SLT 27.

In a case where intention of the accused is not to kill. Section 307, IPC, will not be attracted. It will be a case covered by Section 324, IPC. In Section 307, the gauging of the intention of the accused will be necessary. 1988 (1) Crimes 276 (All).

Relationship of witness with the injured may be a ground to make close scrutiny of evidence but not to discard the evidence. In the instant case, it was held that minor variation in noting time of occurrence in injury report and FIR did not amount to false case having been made against the accused and that the offence under Section 324, IPC was made out. *State of Orissa* v. *Kanta Mohapatra,* 2005 Cr LJ 3361 (Orissa) : 2005(31) OCR 102 (Ori).

Considering that only a single shot was fired and that the fire only resulted in an entry wound with one pellet which fell down from it and five pellets which entered in the body but did not go deep enough to damage the spinal cord nor injured any other internal organs of the body, the court held that the act was not done with an intention or knowledge and under such circumstances that if he by that act caused death, he would be guilty of culpable homicide amounting or not amounting to murder. The accused was held to have committed an offence under section 324 IPC. *Rohtas* v. *State of U.P.,* 2000 Cri LJ 89 (All).

The accused was guilty of causing incised wound by knife and was sentenced under Section 324. Victim was attacked by the accused when he refused to accompany him for cutting hands and feet of some other person. Other witnesses had turned hostile and the case depended upon the testimony of the victim and the medical evidence. *Held,* that the case was one where injured's statement was of sterling worth and supported by medical evidence and deserved to be believed in too. In the result, appeal failed and dismissed. 1987 Cri LJ 1399 (Raj).

The doctor did not tender evidence that the injury was grievous nor did the court held it so. Injury report showed it to be a simple injury. Conviction was therefore alleged from one under Sections 327 to 324, IPC, and sentence reduced from 3 years to one already undergone. Quantum of fine was however maintained. (1986) 2 Crimes 81 (Raj).

When oral evidence is corroborated by medical evidence, conviction upheld. *Sarja Singh* v. *State of Punjab*, (1995) 2 SLJ 1148 (P & H).

One injured witness was declared hostile and another did not appear in witness-box. The prosecution witness disowned the entire story. Hence order passed by Sessions Judge was perverse and cannot be sustained. Conviction and sentence set aside. *Raghubir* v. *State of U.P.*, 1995 (32) ACC 162 (All).

Unless the injured person is present in the court and identified by doctor no document could be brought on record. In absence of injured person figuring as witness, it is impermissible to record conviction. Hence, acquittal. *Siddapuram Siva Ready* v. *State of A.P.*, (1995) 1 ALT (Cr) 71 (AP).

14. Jurisdiction.—When petitioners was convicted for offences under Section 324, IPC and sentenced to 6 months simple imprisonment with fine. There was no material to justify use of undue leniency in favour of appellant No. 3. After a detailed reference to the evidence it cannot be said to be perverse or made in improper exercise of his jurisdiction there seems to be no case for interference on the part of High Court. *Bosce Laurence Fernandes* v. *State*, (1994) 2 Crimes 441 (Bom) : 1994 Cr LR (Mah) 304 (Bom).

15. Complaint.—The complaint is maintainable as offences mentioned in complaint were cognizable. However, impugned order is set aside as the trial court did not record any preliminary evidence after entertaining it. The trial court should first record it and then make up its mind, whether it is a fit case for summoning the accused. The complainant shall appear in trial court. *Gurmukh Singh* v. *Jaswant Singh*, (1994) 2 Recent CR 717 (P & H).

16. Voluntarily causing hurt.—When assault was pre-determined, benefit of probation cannot be granted. *Shyama Pradhan* v. *State*, 1996 Cri LJ 2936 (Ori).

Discovery statement of accused and recovery of revolver pursuant thereto are important circumstances and pointer to guilt of accused. *Ved Parkash* v. *State of Haryana*, 1996 Cri LJ 4156 (SC) : AIR 1996 SC 2795 : 1996(6) Scale 78 : 1996(6) Supreme 371 : 1996(3) Crimes 194 (SC).

Attempt to murder or voluntarily causing hurt.—Appellant caused injury on head of informant by Sabal. There was evidence of witnesses and independent witness.

It appears that the prosecution case is in support of the evidence of informant and independent witness and also the evidences of PWs. 1 and 4. The I.O. and the doctor have not been examined in this case and no injury report proved in the trial Court. It is difficult to say that the injury caused to the informant is grievous in nature and dangerous to his life.

In that view of the matter, conviction of the appellant under Section 307 of the Indian Penal Code is bad in law and the same is converted under Section 324 of the Indian Penal Code.

Since, the evidence is that the accused assaulted the informant by Sabal, which is dangerous weapon. Accordingly, the sentence of R.I. for four years under Section 307 of the Indian Penal Code is altered to the sentence for two years under Section 324 of the Indian Penal Code. It appears from the record that the appellant was not granted bail. After that, the appellant has filed this appeal and he remained in custody for more than the conviction passed by the trial Court or by this Court. In that view of the matter, trial Court is directed to release this appellant forthwith, if not wanted in any other case. *Patrik Kindo vs. State of Bihar (Now Jharkhand)*, 2010 (3) Cri LJ 2961 (Jhar).

In absence of essential element of voluntarily causing grievous hurt, case falls under Section 324, and not under Section 326. *Golak Chandra Nayak and another* v. *State of Orissa and others*, 1993 Cri LJ 274 (Ori).

17. Free fight.—In free fight between two groups resulting in death of one person, fatal injury can not attributed to any one. *Amrik Singh* v. *State of Punjab*, 1993 Cri LJ 2857 (SC) : 1994 Supp(1) SCC 320 : 1994 SCC (Cr) 387.

18. Private defence.—Accused entered office room of deceased, threw chilly powder into his eyes, picked up an iron hammer as well as a brick lying there and assaulted deceased in presence of complainant, a worker engaged by deceased. Trial Court finding evidence cogent, credible, recorded conviction of appellant. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

When the factual scenario is examined in the background of the principles set out above, the inevitable conclusion is that the appeal is without merit, deserves dismissal which we direct. *Arun vs. State of Maharashtra*, 2009 CrLJ 2065 : 2009(2) Crimes 6(SC) : 2009(4) SCC 615 : 2009(3) Scale 803 : 2009(4) JT 78 : 2009(3) SLT 220.

19. Doubts as to weapon of offence.—There was clear concession by learned Counsel for the accused that in the light of the report given there could be not doubt that deceased had died of gun shot wounds as wads and pellets have been recovered from her body. The High Court unfortunately did not consider the relevance of this concession. The High Court observed that the concession had been made rightly, but it further said that there was doubt about the weapon used. Even if that be so, there was no scope for directing acquittal of the accused persons in respect of murder.

Coming to the question of testimony of three injured eye witnesses the trial Court noticed that their statements were flawless and nothing has come out in their cross examination on the basis of which any doubt could be created about their veracity. The place was a secluded one. The incident took place on the turning of the passage. The incident continued sufficiently for a long time which was clear from the fact that many shots were fired, firstly by Lal Singh then by his son Dial Singh resulting in the death of Major Singh and his mother Dalip Kaur and injuries to some of the witnesses. The High Court discarded the credible evidence of the eye witnesses on mere surmises and conjectures. *State of Punjab vs. Atma Singh*, 2009 (7) JT 450 : 2009 (4) Supreme 298 : 2009 (7) Scale 689 : 2009 (8) SCR 549 : 2009 (2) Crimes 442 (SC).

20. Determination of Co-accused—Similarity of cases.—The High Court did not accept the stand of the prosecution regarding applicability of Sec. 304 Part II read with Sec. 149 IPC. It was held that in respect of the respective acts committed by each one of them the matter is required to be considered. From the post mortem certificate it was noticed that the first injury was caused by main accused with aruval on the neck and the corresponding injury caused the death. At the same time, other accused have attacked the deceased and contributed corresponding injuries. Therefore, it was held that main accused had to be convicted in terms of Sec. 302 IPC. So far as others are concerned the acts attracted Sec. 304 Part II IPC.

Appellant has submitted that while others were convicted for offence punishable under Sec. 304 Part II, IPC he alone has been convicted under Sec. 302 IPC. According to him, there is a parity between the co-accused persons. The High Court has indicated the reasons for which the appellant's case was treated differently. The trial Court and the High Court have noted that the appellant had given a fatal blow on the neck with aruval and the injury caused by such act proved fatal. Therefore, there is no substance in the plea of the appellant that he stood on similar footing as that of co-accused persons. *Jagebar Ali vs. State of Tamil Nadu*, AIR 2009 SC 1774 : 2009 CrLJ 1711 : 2009 (1) Crimes 237(SC) : 2009 (11) SCC 108 : 2009 (2) JT 17 : 2009 (1) Scale 674 : 2009 (1) SCR 407.

21. FIR.—*Delay in dispatch of FIR to Magistrate*—Effect of. High Court firstly dealt with the authenticity of the First Information Report. The High Court has noted that PW. 1 allegedly gave First Information Statement. The original of the statement showed that the last page which contained the signature was torn out. The Sessions Judge after seeing the last page of Ext. P1 FI statement observed as follows :

> "The First Information Statement is shown to the witness. It is seen that the place of which the signature of the informant was there torn off. That portion of the paper is seen torn and removed. From the manner in which is torn away, it is clear that it was not separated due to wear and tear, but that portion alone is deliberately removed. The FIS is handed over to the witness."

The High Court made comparison of the document with other documents and found that document was suspicious. Added to that it was noted that the FIR purportedly recorded on 27.10.1993 at 11.00 p.m. It is accepted that Ilaka Magistrate received it on 28.10.1993 at 8.05 p.m. The High Court found that there was unexplained delay in receipt of the occurrence report by the Magistrate.

Thus, the High Court found that not only the document appeared to be suspicious but in addition there was considerable delay in sending it to Ilaka Magistrate. Added to the aforesaid aspects, the noticeable variation in the evidence of PWs. 1 and 3 have been highlighted by the High Court. The role played by PWs. 1 and 3 while the deceased was being assaulted have been analyzed in great detail. The High Court has noticed that even if the prosecution version about the role of A. 1 is accepted to be true, since the genesis of the incident has not been established, it will be unsafe to record his conviction. The High Court has noticed that crime was not committed in the manner as suggested by the prosecution and the genesis of the incident is not established. *State of Kerala vs. Anilachandran*, AIR 2009 SC 1866 : 2009 (2) Crimes 225 (SC) : 2009 (5) JT 613 : 2009 (6) SCR 152 : 2009 (5) Scale 675.

22. Unlawful assembly.—To prove specific role of each of accused is not tenable.—When it has been proved beyond any shadow of doubt that the respondents formed an unlawful assembly and the respondent-party was prepared for a fight, it must follow its intention to fight and cause injuries to the other party. No overt act by each member of the assembly is necessary to attract Section 149, IPC Where a concerted attack is made on the victims by a large number of persons it is often difficult to determine the actual part played by each offender. But on that account for an offence committed by a member of the unlawful assembly in the prosecution of the common object or for an offence which was known to be likely to be committed in prosecution of the common object, persons proved to be members cannot escape the consequences arising from the doing of that act which amounts to an offence. It cannot be said that any one of the respondents was present at the spot innocently. It can also not be said that some of the members of the unlawful assembly went beyond the common object and committed crime graver than the assembly had in its object. Therefore, the acquittal of the accused persons on account that the specific role was not attributed cannot be said to be justified. *State of M.P. v. Habib Khan and others*, 2007 CriLJ 2505 (MP).

When it has been proved beyond any shadow of doubt that the respondents formed an unlawful assembly and the respondent-party was prepared for a fight, it must follow its intention to fight and cause injuries to the other party. No overt act by each member of the assembly is necessary to attract Section 149, I. P. C. Where a concerted attack is made on the victims by a large number of persons it is often difficult to determine the actual part played by each offender. But on that account for an offence committed by a member of the unlawful assembly in the prosecution of the common object or for an offence which was known to be likely to be committed in prosecution of the common object, persons proved to be members cannot escape the consequences arising from the doing of that act which amounts to an offence. It cannot be said that any one of the respondents was present at the spot innocently. It can also not be said that some of the members of the unlawful assembly went beyond the common object and committed crime graver than the assembly had in its object. Therefore, the acquittal of the accused persons on account that the specific role was not attributed cannot be said to be justified. *State of M.P. v. Habib Khan and others*, 2007 CriLJ 2505 (MP).

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Sec. 325. Punishment for voluntarily causing grievous hurt.—Whoever, except in the case provided for the Section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

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4. Sections 325 and 34—Common intention. 2058
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1. Number of accused.—Where a number of accused intended to beat the complainant but grievous hurt was inflicted, *held*, that it must be proved before any one could be convicted under this section that the common object was the intention to cause grievous hurt or the knowledge that any one of them might be likely to cause grievous hurt in the course of the beating which they intended to give to the complainant. 15 Cr LJ 192 ; 5 WR Cr 12 : 6 PR 1901 Cr ; 83 Ind Cas 589 ; AIR 1923 Lah 35; AIR 1949 All 582 ; 50 Cr LJ 878. The question whether a number of persons who joined in the commission of an offence had a common intention or not is a question of fact and not of law. AIR 1949 All 582. But a conviction of all the accused under this section is not maintainable in the absence of evidence to show which of the accused actually caused the grievous hurt even though there was a pre-arranged plan to give a beating. 49 Cr LJ 995 ; AIR 1949 All 77. the following questions were referred to the Full Bench, namely "(2)(a), If a person is attacked by several persons numbering less than 5 and grievous hurt is caused, and it is not known who caused the grievous hurt, can all of them be convicted of causing grievous hurt, with the aid of Section 34, Penal Code ? 2 (b). If a person is attacked by several persons numbering less than 5 and grievous hurt is caused, and it is known which of them caused grievous hurt, can all of them be convicted of grievous hurt with the aid of Section 34". The Full Bench answered the question in the following words ; "We also answer two parts (a) and (b) of the second questions in the affirmative and hold that all of them under part (a) and others under part (b) can be convicted of causing grievous hurt with the aid of Section 34. Penal Code. Provided, the criminal act was done in furtherance of the common intention of all". But *see* AIR 1947 All 408 ; 48 Cr LJ 858 ; AIR 1946 All 153 ; 47 Cr LJ 532, which were noticed and distinguished in the Full Bench case above referred to *Wanchoo, J.* ; also referred and distinguished the case reported in AIR 1949 All 77 ; 49 Cr LJ 595. Where several persons tacitly agree to beat a certain person with *lathis* and grievous hurt is caused to him, every one of the assailants is supposed to intend the probable consequences of his act, and it is a legitimate inference from their conduct that they intended to cause grievous hurt and not merely simple hurt. 163 Ind Cas 848:

37 Cr LJ 864 ; 1936 A Cr C 89 ; 1936 ALJ 462 ; 1936 Cr C 601 ; AIR 1936 All 437 ; *see* also 161 Ind Cas 344 ; 37 Cr LJ 428 ; AIR 1936 Lah 28 ; 1977 Cr LJ 1092 (no evidence of any intention on the part of the appellants either to cause the death or cause such injuries which they knew to likely cause death but the appellants had the common intention to cause grievous injury with *lathi* and the *khunt*, the accused can be convicted under Section 325 read with Section 34) ; *see* also AIR 1976 SC 1537 ; 1976 Cr LJ 1154.

2. Voluntarily causes grievous hurt.—No doubt a person is said, "voluntarily to cause grievous hurt" when not only is the hurt which is caused grievous but also he intends to cause or knows himself likely to cause grievous hurt. A person who forcibly thrusts a *lathi* into rectum of another must at least know that he is likely thereby to cause grievous hurt to the victim as the rectum is a very tender part of the human body, even if it be supposed for a moment that he did not thereby intend to cause grievous hurt. 157 Ind Cas 370 ; 36 Cr LJ 1151 ; 1935 OWN 902 ; 1935 Cr C 1130 ; AIR 1935 Oudh 469. It is an essential ingredient of the offence under Section 325, Penal Code, that either grievous hurt should be intended to be caused or the offender should have knowledge that the hurt caused was likely to be grievous. 1963 (1) Cr LJ 762 ; AIR 1963 HP 18.

It will appear from Section 325, read with Section 322, IPC that the essential ingredients of offence voluntarily causing grievous hurt are three in number : (1) grievous hurt as described in Section 320 must first be cause (2) the offender intended or knew himself to be likely to cause grievous hurt (3) the hurt was caused voluntarily. AIR 1958 Pat 452 ; 1958 BLJR 88 ; 1958 Cr LJ 1077.

Voluntarily causing grievous hurt and criminal tresspass—The proved facts of the case in the instant case clearly disclose that the act committed by the accused falls within the category's defined under Section 320(7), IPC. Weapon used in the instant case is a dao but blunt side of the dao was used and not the edging side. Considering all these aspects of the matter, I hold that the prosecution has been able to prove the case against the accused Safian Ali and that the provisions of Section 325 of the IPC would be attracted. As regards the other accused person, the prosecution could not establish the case against them by clear, cogent and unimpeachable evidence so as to take a different view from what have been arrived at by the learned trial Judge and their acquittal stands confirmed.

In view of the above discussions, the accused Safian is convicted under Section 305, IPC. It is further proved that the accused Safian Ali trespassed into the house of the informant with intent to assault P.W. 2 and/or to annoy the informant and her family members and ultimately attacked P.W. 2 and caused grievous injury and as such the accused has also committed offence punishable under Section 447, Cr.P.C. *State of Assam vs. Md. Azad Ali & Ors.*, 2010 (2) CriLJ 1584 (Gau).

An assault with whatever intention caused by as many as 11 persons out of whom 8 have been convicted cannot be allowed to 90 scot free if a single injury is found to be grievous on a vital part. So far as section 325 is concerned, absence of any specific role attributed to any person as author of that injury will have no effect on the same. It can specially be gathered from the manner of assault and number and nature of injuries that they could have at least intention to cause grievous hurt. One head injury and two injuries on the mouth on another victim assaulted into fracture of his parital bone breaking of his tooth and the other in the fracture of elbow. In these circumstances, the conviction under section 325, read with section 149, 147, IPC, was held proper . *Uma Shanker Bharti* v. *State of U.P.*, 2001 Cri LJ 362 (All.)

3. Scope.—To establish an offence under this section, it is necessary to prove that the grievous hurt, as described in Section 320, has been caused by the accused and was caused voluntarily. 12 WR Cr 25 ; 21 PR 1889 Cr ; 23 WR Cr 65. A disability for 20 days constitutes grievous hurt. 1 WR Cr 9. When there is neither intention, knowledge nor likelihood that the injury inflicted in an assault will or can cause death, the offence is not culpable homicide not amounting to murder, but "voluntarily causing" grievous hurt. 2 WR Cr 39 ; 5 CPLR Cr 41 ; Rat Un Cr C 558 ; 12 Ind Cas 296 ; 12 Cr LJ 528 ; (1911) 2 MWN 1888. For an offence under this section, it is not only essential that grievous hurt was caused but also that the person causing it either intended to cause or knew that he was likely to cause it. 44 CWN 453.

When one man takes away the life of another, he should prove circumstances, if any, justifying his doing so. Even if the act is done in exercise of the right of private defence, it lies upon him to show that he did not exceed that right. 8 CWN 714 ; 1 Cr LJ 708. The right of private defence cannot be successfully invoked by men who voluntarily and deliberately engage in fighting with their enemies for the sake of fighting, as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence offered to them. 17 Bom LR 888 ; 3 Bom Cr C 100. Where a person has sexual intercourse with a girl of little over twelve years of age, with her consent and thereby causes grievous hurt to her, he commits an offence under Section 325, IPC, and is not protected by Section 80, or Section 88, of the same Code. 12 CPLR Cr 11 ; *see* also 18 Cal 49. On a finding that the accused charged with murder had no intention of killing the deceased or perhaps of badly injuring him, held, that the accused could not be convicted of murder or culpable homicide not amounting to murder and that, as there was not present in the mind of the accused anything more than a knowledge that he was likely to cause a grievous hurt, the accused was guilty only of an offence under Section 325. 18 PR 1893 Cr ; *see* also 18 CWN 1279 ; 15 Cr LJ 709 ; 26 Ind Cas 157 ; 1892 AWN 105 ; 30 All 538 ; 1908 AWN 243; 4 MLT 402 ; 8 Cr LJ 383 ; UBR (1897-1901) Vol. I 293 ; Rat Un Cr C 398 ; AWN 1881, 172. Where in a case of robbery attended with death, there was no intention to cause death or such bodily injury as was likely to cause death, the proper conviction would be for voluntarily causing grievous hurt in committing robbery and not for voluntarily causing hurt in committing robbery. 6 WR Cr 16 ; ILR 1945 Mad 73. The conviction of an accused person, who emasculated himself under Section 309, Penal Code, was held to be illegal and that he could not be convicted of causing grievous hurt to himself under Section 325. 22 PR 1878 Cr. Where for the purpose of facilitating robbery, *dhatura* was administered by two persons to certain travellers in consequence of which one of the travellers died and others were made seriously ill, it was held that in respect of the traveller who died, the offence committed was that punishable under Section 325, of the Code. 1908 AWN 1243 ; 30 All 568 ; 8 Cr LJ 383 ; 4 MLJ 402. The offence of voluntarily causing grievous hurt cannot legally be compounded. 1 Bom 147. An accused person charged with the offence of grievous hurt should be committed for trial to the Sessions Court. 1 BHC 101. The mere fact that the accused who has been convicted of grievous hurt, is a man of bad character would not justify an enhanced punishment. 49 PR 1873 Cr. Where the accused persons were charged under Section 325, IPC, read with Section 149, and the charge under Section 149 fails, they cannot be convicted under Section 325 alone. 16 CWN 1077 ; 15 Ind Cas 646 ; 13 Cr LJ 502. Offence of causing hurt is not an offence against public peace. AIR 1923 Oudh 37 ; 24 Cr LJ 491 ; 72 Ind Cas 955. Conviction under Section 325, if proper in case of causing death of child by accident while beating his mother. AIR 1924 Oudh 228 ; 24 Cr LJ 589 ; 74 Ind Cas 533. An accused who is proved to have struck the deceased with a *lathi* on the head and caused a fracture of the skull which resulted in death is guilty under Section 325. 20 Cr LJ 139 ; 3 Pat LJ 636 ; 49 Ind Cas 171 ; *see* also AIR 1925 Oudh 135 ; 11 OLJ 363 ; 25 Cr LJ 1145 ; 81 Ind Cas 699 ; AIR 1925 Lah 559 ; 26 Cr LJ 1118 ; 7 LLJ 573 ; 26 PLR 430 ; 88 Ind Cas 286. Where intention to cause death is absent conviction should be under Section 325. AIR 1928 Oudh 36 ; 2 Luck 433 ; 4 OWN 337 ; *see* also AIR 1927 Lah 217 ; 8 Lah 521 ; 28 PLR 559 ; 28 Cr LJ 266 ; 100 Ind Cas 234 ; AIR 1929 Lah 178 ; 30 Cr LJ 917 ; 118 Ind Cas 433 ; 1930 MWN 74 ; 31 Cr LJ 477 ; 123 Ind Cas 43 ; AIR 1942 All 430 ; 44 Cr LJ 110. Conviction in alternative under Sections 325 and 304, Part II, is not proper. 146 Ind Cas 221 ; 1933 Cr C 112 ; AIR 1933 Lah 865. Where the common object of the lawful assembly is to abduct and murder *S*, but grievous hurt is caused to *G* by some others are not liable for the offence under Section 325. 143 Ind Cas 55 : 10 OWN 7 ; 1933 Cr C 279 ; 34 Cr LJ 498 ; 8 Luck 301 ; AIR 1933 Oudh 148. Before framing charge on 20 day's rule. Court should *see* that there is some evidence of injured person being in severe bodily pain or unable to carry on ordinary avocations for the period. Merely lying in hospital for that period is not sufficient. 134 Ind Cas 829 ; 32 Cr LJ 1254 ; AIR 1931 Lah 1280. Where the accused is prejudiced by not having notice of facts which constitute ingredients of offence, his conviction of such offence must be set aside. AIR 1933 Mad 843 ; 65 MLJ 723 ; 38 MLW 760. Great caution should be exercised in cases under Section 325, read with Section 147, so as to prevent innocent persons being punished. 133 Ind Cas 865 ; 32 PLR 405 ; 32 Cr LJ 1079 ; AIR 1931 Lah 465. Where it is not clear that which of the two accused caused grievous hurt, none of them should be convicted under this section ; but both of them can be convicted under Section 323. AIR 1940 Mad 586 ; 41 Cr LJ 923. An accused cannot be convicted both under Section 323, and this section where the offence has been committed to the same person on same occasion. AIR 1940 Oudh 419 ; 41 Cr LJ 775. Where the common intention of the accused was merely to give the deceased a sound beating, they should be convicted under Section 325, read with Section 149. AIR 1939 Oudh 254 ; 40 Cr LJ 754 ; AIR 1940 Lah 210 ; 41 Cr LJ 639 ; AIR 1939 Oudh 207 ; 40 Cr LJ 722. Where an accused was convicted under Section 147, and also under Section 325, read with Section 149, separate sentences can be awarded. AIR 1939 Oudh 91 : 40 Cr LJ 217.

Where the accused gave a blow to the deceased which caused his death, without any intention to kill, or to inflict bodily injury likely to cause death, or with the knowledge that the death must be the probable result, he was neither guilty of murder nor of an offence under Section 304-A, but was merely guilty of voluntarily causing grievous hurt. 3 All 776 ; AWN 1881, 133 : 6 Ind Jour 264. Where the conviction is for causing grievous hurt, the record must show under which of the categories of "grievous hurt" specified in Section 320, Penal Code, the offence falls. 1 WR Cr Letters 5. When accused persons are acquitted of rioting, they cannot be properly convicted of grievous hurt under Section 325, by the application of Section 149, of the Penal Code, when it is not found that those persons, or anyone of them were members of an unlawful assembly. 27 Cal 566 ; 4 CWN 546. A resistance to the execution of an illegal warrant does not render persons liable to conviction under Section 147, but when the right of resistance is exceeded and a severe injury, not called for, is inflicted, the person who inflicts such injury may be convicted under Section 325, 29 Cal 244 ; 6 CWN 164. Where the accused armed with sticks (the size of which is not known) gave blows which fell on the temple of the deceased in consequence of which he died four days after, it must be inferred that the accused did not intend to cause death but only grievous hurt, and a conviction for this offence only can be sustained. (1911) 2 MWN 188 ; 12 Ind Cas 296 ; 12 Cr LJ 528 ; 18 PR 1893 Cr ; AWN 1892, 105 ; AIR 1929 Lah 863 : 30 PLR 171 ; 114 Ind Cas 704 : AIR 1929 Lah 456.

A member of an unlawful assembly, some members of which have caused grievous hurt, can be legally punished for the offence of rioting as well as the offence of causing grievous hurt. ILR 7 All 414 ; AWN 1885, 105 : AIR 1924 Rang 291 ; 3 Bur LJ 49 ; 25 Cr LJ 1305 ; 82 Ind Cas 473. When a man has been struck on the head and a fracture caused, to surround him and beat him with *lathis* is to cause hurt which endangers life. 104 Ind Cas 708 ; 28 Cr LJ 868. A poor old sweeper went out towards the latter part of the night and was taking cowdung cakes belonging to the accused's master when the accused fell on him with *dang* beating him severely on the head and arms, whereby the arms were disabled completely. There was no evidence whatsoever that the accused had any intention of killing the sweeper. *Held*, that the accused could not be convicted under Section 308, but was guilty of an offence under Section 325. 102 Ind Cas 907 ; 28 Cr LJ 619. A person can be convicted for grievous hurt only when the effect of the injuries inflicted by him actually lasts for 20 days but not when the sufferer dies before the period has expired. 84 Ind Cas 538 ; 26 Cr LJ 294 ; AIR 1925 Lah 297. For an offence under Section 325, IPC, a sentence of fine alone is legal. 83 Ind Cas 587 ; 26 Cr LJ 61 ; AIR 1924 Oudh 334. Where in trial of the accused for offences under the Penal Code, Sections 147 and 325, the Court sanctions the compromise of the charge under Section 325, the prosecution for the offence under Section 149, does not *ipso tocto* fail. If in such a case the circumstance requires it, the Court can discharge the accused in respect of the charge under Section 147. 26 PLR 35 ; 86 Ind Cas 62 ; 29 Cr LJ 686 ; AIR 1925 Lah 474. Where a joint attack was made by two men armed with *Jatrees* on another who died of the injuries received. *Held*, that there can be no doubt that there was a common intention to cause grievous hurt or that at least they knew it was likely that grievous hurt would be caused, and that the accused were guilty under Section 325, though in the absence of clear proofs as to who caused the fatal injury neither of them could be convicted under Section 304. 7 Lah LJ 44 ; 86 Ind Cas 341 : 26 Cr LJ 57 : AIR 1925 Lah 318. Where it is proved that the deceased and his party attacked the accused who acted in the exercise of his right of private defence and is not shown that the accused, in causing grievous hurt, had not exceeded the right of private defence, he ought to be acquitted of any offence under Section 325, IPC. 83 Ind Cas 589 ; AIR 1924 Oudh 334. If it is not shown which of the two appellants dealt the blow which caused grievous hurt, both the accused cannot be convicted of an offence under Section 325, unless they had a common intention of causing grievous hurt. AIR 1923 Lah 35. Where three men attacked another with *dangs* and caused two separate grievous hurts. *Held*, both were liable under Section 325. AIR 1924 Lah 555 ; 6 LLJ 268 ; 26 Cr LJ 653 : 85

Ind Cas 941 ; *see* also AIR 1922 Lah 394 ; 24 Cr LJ 451 ; 72 Ind Cas 611 ; AIR 1925 Lah 117 ; 6 LLJ 485 ;26 Cr LJ 753 ; 86 Ind Cas 337 ; AIR 1934 Lah 335 ; 84 Ind Cas 861 ; 26 Cr LJ 381 ; 6 LLJ 317 ; AIR 1923 Lah 43 ; 25 Cr LJ 691 ; 81 Ind Cas 179. Two persons making concerted attack on deceased are both guilty although it is not proved that one of them struck any blow. 144 Ind Cas 300 ; 1933 Cr C 547 ; 31 PLR 699 ; 34 Cr LJ 724 ; AIR 1933 Lah 313 ; *see* also AIR 1931 Lah 538 ; 32 PLR 537 ; 32 Cr LJ 1083 ; 35 Cr LJ 467 ; 147 Ind Cas 734 ; 11 OWN 32 ; 1934 Cr C 257 ; AIR 1934 Oudh 87 ; AIR 1934 Oudh 251 ; 1934 Cr C 710 ; 11 OWN 698 ; 35 Cr LJ 943 ; 149 Ind Cas 343 ; AIR 1934 Lah 468 ; 1934 Cr C 767 ; 35 Cr LJ 1355 ; 151 Ind Cas 391. It is illegal for a Magistrate who is seized of the case regarding offence under Section 325, IPC, to make reference to another Court for instructions whether to accept a compromise or not. AIR 1925 Lah 226.

Where there were three persons on the side of the appellants and only two on the side of the deceased, who accidentally received injuries on the head it was not clear from whom, and subsequently, died, the presumption is that the appellants were the first to attack and were not acting in self-defence. They committed an offence under Section 325 and not under Section 304. 3 Lah LJ 589 ; 67 Ind Cas 817 ; 23 Cr LJ 465. An offence under Section 325, Penal Code, is compoundable with the permission of the Court, but the only person who can compound is the man who is hurt. Where, therefore, the man who is hurt dies of the injury, the case cannot be compounded by the heirs of the deceased. 13 ALJ 630 ; 37 All 419 ; 16 Cr LJ 586 ; 30 Ind Cas 138. The right of private defence cannot be successfully invoked by men who voluntarily and deliberately engage in fighting with their enemies for the sake of fighting as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence offered to them. 17 Bom LR 888 ; 3 Bom Cr C 100. Accused who had dispute with his wife because she ran away to her father's house, beat her with a stick after her return as a result of which she dies two days later. He was convicted under Section 325, for causing grievous hurt to his wife and was sentenced to three year's rigorous imprisonment. AIR 1930 Bom 593. Where two or more persons are tried for simple hurts, and grievous hurt caused by a stone thrown from an unknown distance even were it definitely *held*, that a certain man was identified as the person who threw the stone, no extra punishment would be called for unless the stone is thrown at very close quarters. For mere throwing of stone is not as serious an offence as the wielding of a *lathi*. AIR 1930 Lah 1054. Accused took a boy away and by practising magic on him caused several injuries on his body the most serious of which was an incised wound on back of neck. But subsequently he bandaged the injuries and took him back. *Held*, that though there was good reasons for believing the accused intended actually to kill the boy, yet as subsequently changed his mind, he was entitled to benefit of doubt and that the conviction should be altered from of attempted murder to the less serious offence of causing grievous hurt, which he undoubtedly committed. AIR 1935 All 614 ; 1935 AWR 812 ; 1935 A Cr C 159 ; 1935 Cr C 636 ; *see* 1953 Cr LJ 84 ; AIR 1953 HP 1 ; AIR 1952 Cal 481 ; 1952 Cr LJ 210 (though grievous hurt may be caused in an assault, it does not follow that the person who assaulted is guilty of causing grievous hurt).

In order to sustain a conviction under this section, it must be shown that not only grievous hurt defined in Section 320, has been caused but also that the accused intended or knew himself to be likely to cause grievous hurt. 1978 Cr LJ 1485 ; 1980

Cut LR (Cr) 237. Where the deceased had injury on the leg causing a fracture, and some more on the head and death resulted on account of haemorrhage, offence is under Section 304, Part II and not under Section 325. AIR 1982 SC 1183 ; 1982 Cr LJ 1394 : AIR 1974 SC 1803 ; 1974 Cr LJ 1277 (a case of not grievous hurt, where death occurs after a grievous hurt).

4. Sections 325 and 34—Common Intention.—If a person is attacked by several persons numbering less than five persons and grievous hurt, it is not known who caused the grievous hurt, all of them can be committed with the aid of Section 34, 52 Cr LJ 131 ; AIR 1951 All 21 ; 1950 ALJ 884 ; AIR 1952 Kut 4.

Petitioner who was holding iron rod in his hand and other accused inflicted blow causing injuries on head of informant and his son. The injuries sustained by the victim, at the hands of the petitioners could not be denied as the factum of occurrence was corroborated by several witnesses as has been referred in the order impugned recorded by the learned Additional Sessions Judge. It was not the case of the prosecution that the accused persons had administered poison, rather the petitioner inflicted blow with iron rod on his head in furtherance of common intention with the co-accused causing injuries having got bearing in the injury report as well as in the post-mortem report of the deceased. However, the learned Counsel is silent as to the finding of pesticide in the stomach of the deceased in the viscera report furnished by the Forensic Science Laboratory which gives altogether a different circumstances as to the cause of death.

No offence in the given situation is made out under Section 302 or 307 of the Indian Penal Code against any of the petitioners and at best, it could be under Section 325 of the Indian Penal Code as the materials *prima facie* suggest without much more discussion and without prejudice to the merit of the case. As regards complicity of the petitioner Rupa Devi in the alleged offence is concerned, her earlier version before the police suggests that it was Dhananjay Kumhar who was aggressor and, therefore, *prima facie*, charge under Section 325/34 of the Indian Penal Code cannot be, in my view, directed against her and I find material sufficient to consider her case for discharge and accordingly she is discharged in Baghmara. For the reasons stated above, I find *prima facie* materials to proceed against other two petitioners for the charge under Section 325/34 of the Indian Penal Code. *Anup Kumhar and Ors. vs. State of Jharkhand*, 2010 (3) Cri LJ 2963 (Jhar).

If two or more persons join together and in furthence of common intention to cause grievous hurt attack another and cause grievous hurt all of them can be convicted under this section read with Section 34, irrespective of the identity of the person who caused the grievous hurt. AIR 1976 SC 1537 ; 1967 Cr LJ 1154 ; *see* AIR 1968 SC 728 ; AIR 1972 SC 2056 ; AIR 1979 SC 1434 ; 1979 Cr LJ 1092 (common object to take forcible possession and no common object to cause death) ; 1979 Cr LJ 892 (offence held under Section 325 read with Section 34, when no common intention to cause death) ; 1979 Cr LJ 7 : AIR 1978 SC 1759 ; AIR 1975 SC 1506 : 1975 Cr LJ 1322 ; AIR 1968 SC 728.

When the accused was mentioned as one of the assailants of the deceased in the FIR but the grievous hurts found on the person of the deceased was not attributed to him, the conviction under Section 325 can not be sustained. 52 Cr LJ 209 ; AIR 1951 Assam 48. Where a person is assaulted with sticks and other weapons by about 16 persons, the fact that the prosecution witnesses, otherwise completely reliable, are unable to specify the site of the impact of an accused's blow with an axe, in the commission of the attack perpeted by so many person, is not a valid reason at all to reject their evidence that the accused did give the blow. ILR 1962 AP 313 ; 1936 (2) Cr LJ 70.

The records clearly show that no charge was framed in terms of Sec. 34 so far as the appellant is concerned. This position is fairly conceded by learned Counsel for the respondent. It is also accepted that except witness who stated that the appellant assaulted the deceased with a stick, the other purported eye witnesses stated that the appellant had given fist blow. Considering the evidence of witnesses as brought on record the appropriate conviction would be in terms of Sec. 325 IPC and not Sec. 302 IPC. *Shaikh Karimullah vs. State of Andhra Pradesh*, AIR 2009 SC 171 : 2009 CrLJ 1551 : 2009 (1) Crimes 313 (SC) : 2009 (11) SCC 371 : 2009 (2) JT 263 : 2009 (1) SCR 953 : 2009 (2) Scale 254.

Although there is a difference between common object (Section 149), and common intention (Section 34), both sections deal with a combination of persons who become punishable as sharers in an offence, and a charge under Section 149, IPC, is not impediment to conviction by the application of Section 34, if the evidence discloses the commission of the offence in furtherance of the common intention at all. The commission to mention Section 34, in the charge does not affect the case unless prejudice is shown to have resulted in consequence thereof. AIR 1959 SC 672 Rel on ; AIR 1955 SC 204 and AIR 1956 SC 116 ref. 1961 (1) Cr LJ 625 (it was a case of conviction of the accused under Section 325, read with Section 34, IPC). The main object of the appellants was to demolish the obstruction caused by the complainant on the path way leading to the well, they could not be held to have been inspired by any unlawful object. 1979 Cr LJ 398.

Appeal against conviction where there was *lathi* injury—FIR lodged by injured—Several injuries were shown offence under Section 325 made out. *State of U.P.* v. *Kishori Lal*, 99 JIC 205 (All).

The revisionist were armed with *lathies* and their intention was to cause grievous and simple injuries. Hence their conviction under Sections 325/34, IPC, was rightly recorded. *Chhotey Lal* alias *Dulla* v. *State of U.P.*, 1995 (32) ACC 340 (All).

Only one of the accused inflicted fatal blow in *lathiwise* manner on the head of the deceased and other accused did not even attempt to cause any injury to the deceased, the accused who caused the grievous injury to the deceased would be liable for grievous hurt and not of murder. *Ram Sarup* v. *State of Haryana*, (1995) 1 CC Cases 379 (P & H).

Out of four accused, only one accused was armed with sharpedged weapon and while the remaining three were armed with lathies only one accused wound on right side of head had been sustained by the deceased. The fatal injury was of a *lathi*. Despite the fact that one of the accused was armed with a sharpedged weapon only one sharpedged weapon injury was inflicted on the person of deceased. The remaining three accused raised *lathi* blows on the deceased and "*S*". It was also not specified as to who had struck the fatal *lathi* blow on the head of deceased. However, all the accused were acting in concert with the previous meeting of minds. To say in legal words, all the four assaulted deceased and "*S*" in furtherance of their common intention. Taking all these facts and circumstances together, it appeared that the common intention of all the four accused-appellants was only to cause grievous hurt, as otherwise they could have inflicted much more injuries on vital parts of deceased and "S". It was held that under the facts and circumstances of the case, it would be just and proper to hold that common intention of the four accused was only to cause grievous hurt punishable under Section 325, I.P.C. *Satpal* v. *State of U.P.*, 2000 Cri LJ 3355 (All).

In the case of *Parusuraman* v. *State of Tamil Nadu*, 1991 (28) ACC (SC) 604; AIR 1993 SC 141, seven persons were tried for the murder.

Their participation in the occurrence was proved beyond doubt. The deceased had sustained 13 external injuries out of which 11 were on lower legs and arms. It was found that they had no intention to kill and the offence was found to be covered under Section 325, I.P.C.

5. Sections 325, 323.—Quarrel between accused and deceased took place suddenly without any previous motive. It was not a case of prosecution that the deceased was made to fall down and then heavy blows from legs or some other substance were caused on abdomen. Held, the possibility that lever and spleen of deceased were enlarged could not be easily ruled out. The offence of hurt and not grievous hurt was made out. *Shashi Kamal Rai* v. *State of UP*, 2004 Cr LJ 3536 (All) : 2004(49) All Cri C 291 : 2004(2) All Cri R 1813.

6. Evidence and Proof.—Where a person is assaulted with sticks and other weapons by about 10 persons, the fact that the prosecution witness, otherwise completely reliable are unable to specify the site of the impact of an accused's blow with an axe, in the confusion of the attack perpetrated by so many persons, is not a valid reason at all to reject their evidence that the accused did give the blow. ILR 1962 Andh Pra 313.

Eye-witnesses stated that accused persons came to deceased's house laced with lathies in the day time before noon and inflicted lathi blows on his head resulting into his death. Death of deceased was cumulative effect of head injuries which by itself were not sufficient to cause death. Intention to kill, cannot be attributed to the accused. Accused persons could be held guilty under Sec. 325 read with Sec. 34 and not under Sec. 302 read with Sec. 34. *Nasaru & Anr vs State of Rajasthan*, 2010 (4) CriLJ 4016 (Raj).

Where the medical officer in his evidence has clearly stated that there was "fracture of the metacarpal bone of the right hand confirmed by "X-ray examination" he may be presumed to know what amounts to "fracture" and though the extent of the fracture is not indicated in his evidence, yet it may be reasonably inferred that it was not a superficial cut on the bone, but the breaking of the bone itself. 23 Cut LJ 146.

Evidence of the prosecution witness was rejected on the ground that they were interested. 1979 Cr LJ 558. For appraisement of evidence *see* AIR 1974 SC 1156 ; 1976 Cr LJ 1126 : AIR 1979 SC 1494, (for interference of the Supreme Court is case of miscarriage of justice).

When medical evidence lending support to injury caused by handle of axe, conviction under Section 325, upheld. *Guldas* v. *State of Maharashtra*, 1995 Cr LJ 2402 (Bom).

Revision petition against conviction was filed there was 10 days delay in FIR. Injuries were on both sides. Where accusation practically admitted. benefit of doubt may not be given. *Mangal Singh* v. *State of Punjab*, (1994) 1 CC Cases 277 : (1994) 2 SLJ 1382 : (1994) 1 Recent Cr R 107 : (1994) 1 Recent Cr R 390 (P&H) (DB).

When guilt of accused is established from evidence of eye witnesses and medical evidence, finding of conviction upheld. *Romesh Kumar* v. *State of Punjab*, (1995) 3 CC Cases 105 (P & H).

Where complainant was injured he admitted that he fell down. Due to dogs barking—Complainant was brought to police station treating him thief—No corroboration by other evidence no case was made out. *Bhalyyaji* v. *State of Maharashtra*, 1994 Cr LR (Mah) 227 : (1994) 2 Crimes 87 (Bom).

Eye-witness injured by the accused where the Axe handle was used for causing injury—Medical evidence was lending support. Hence conviction under Section 325 upheld. *Guldas s/o Galma Hatwar* v. *State of Maharashtra*, 1995 Cr LJ 2402 (Bom).

Offence of causing grievous hurt over land dispute—Accused persons attacked complainant party and caused injuries—Medical evidence opined injuries being grievous in nature and evidence of injured witnesses corroborated by medical evidence. Hence conviction under Section 325, held proper. *Wachittar Singh* v. *State of Punjab*, 1995 CrLJ 1614 (P & H) ; *See* also *Abhilakh Singh* v. *State of U.P.*, 2006 Cr LJ 1419 (All).

The hard and fast rule can be apphed for assessing a proper sentence and long passage of time cannot always be a determinative factor so bar as sentence as concerned. *Mathar* v. *State of Kerala*, 2005 Cr LJ 898 (SC) : AIR 2005 (SC) 710 : 2005(5) All Cri C 445 : 2005(26) All Ind Cas 65.

7. Sentence.—This section makes it clear that there must be a sentence of imprisonment, whether fine is imposed or not. AIR 1942 Mad 550 : 44 Cr LJ 65. In matter of petty character sentence of fine without imprisonment though irregular is adequate and High Court will not interfere in revision. 142 Ind Cas 624 : 14 PLT 71 : 34 Cr LJ 407 : AIR 1933 Pat 179 : but *see* 50 Cr LJ 322 : AIR 1949 All 213. A sentence of the only under Section 325, IPC, for causing grievous hurt is no doubt illegal. But where the fine has been paid and more than five months have elapsed since the case was settled, the High Court will not pass a sentence of imprisonment on a reference by the District Magistrate for enhancement of sentence. 38 PLR 229. In case of grievous hurt, but not serious character, committed under misguided zeal of helping employer, held, sentence of three years' rigorous imprisonment is sufficient. 10 OWN 482 : 1933 Cr C 596 : AIR 1933 Oudh 269 : *see* also AIR 1934 Lah 111 : 35 Cr LJ 1456. Where some accused caused death of person, while others were only members of unlawful assembly and did not take part in attack on murdered man, the former were sentenced to seven year's rigorous imprisonment while the latter were sentenced to five years. 134 Ind Cas 1041 : 33 Cr LJ 1 : 1931 Cr C 758 : 35 CWN 345 : AIR 1931 Cal 606 : 1952 Raj LW 394 : ILR (1951) Raj 849. In a revision against the sentence of five years RI only the High Court was not inclined to compose sentence of imprisonment on the facts of the case. 55 Punj LR 172 : 1953 Cr LJ 1288 : AIR 1953 Punj 201.

Where on the ground that the parties are close relations lenient view may be taken in the matter of sentence. Hence sentence reduced to period already undergone. *Major Singh* v. *State of Punjab*, (1994) 1 CC Cases 303 (P & H).

Charge of causing grievous injuries to complainant by calling him from house and assaulting him hence convicted under Section 325/34, and sentenced to RI for 1 year. Petition was challenged. It was 12th lunar night hence, it was easy to recognise a known person. Daughter and wife of injured were eye-witness whose presence at the scene of occurrence was natural. The identification of the appellants cannot be doubtful, A-3 deserves benefit of doubt and conviction and sentence of 4 years imprisonment A-1 was liable to be upheld, A-2 was 24 years of age and was nephew of A-1 and appears to have acted on behest of A-1. Therefore his sentence reduced to period already undergone. *Rama* v. State *of M.P.*, (1994) 2 Crimes 497 (MP).

While others were acquitted the petitioner was convicted and sentenced under Section 325, and 325/34, IPC and revision petition by complainant for enhancement of compensation and against acquittal of appellant for charge under Section 307, IPC. What is it transpires that only one injury was given on head of PW and other two injuries were located on the right shoulder and left leg from reverse side of *Kulhari* and the blow was not repeated by the accused, the trial court was right in acquitting the appellants on this account. It is also a fit case where substantive sentence awarded to the appellant should be treated as already undergone. *Samukh Singh* v. *State of Punjab*, (1994) 3 CC Cases 30 (P&H).

Provisions of Section 325, are mandatory and the Court is bound to award a sentence of imprisonment to the accused convicted under the section. It may in addition award a sentence to fine also. The discretion of the Court is limited to a decision on the question of quantum of the sentence. AIR 1960 Ker 147 : ILR 1959 Ker 1258 : 1960 Cr LJ 592. In awarding sentence the Court should take into account the weapon used. the manner in which the offence was committed and the consequences that had ensued. AIR 1956 Madh B 269 : 1956 Cr LJ 1408 : 1956 Madh BLJ 905. Where there is clear finding that the injury caused was a very serious one, there is no question of reduction in the sentence. AIR 1979 SC 1703 : 1979 Cr LJ 1388 : *see* also 1977 Cr LJ 351 (power of Supreme Court to reduce the sentence) : 1977 Cr LJ 351. *See* also AIR 1982 SC 1466 ; AIR 1980 SC 83 (juvenile offender) ; AIR 1977 SC 1991 : 1977 Cr LJ 1601 (release on probation of good conduct).

Allegation of causing injury by the petitioners. Accused married with petitioner's daughter against his will. No previous convict but chances of reconciliation, benefit of probation was granted on paying Rs. 5,000/- entitled to be released. *Harjit Singh* v. *State of Haryana*, (1994) 1 CC Cases 269 (P & H).

Tried for offences punishable under Sections 147, 323/149, and 307/149, IPC. Convicted and sentenced under the same. Appeal before High Court was filed and conviction altered by High Court to under Sections 147, 323/149, IPC and sentenced them to one year nine months RI respectively and under Sections 325/149, IPC for 1½ years RI. Appeal to Supreme Court was made. PW 5 is an injured witness and his presence at the scene of occurrence cannot be doubted. While the Courts below have relied on the evidence of the eye-witnesses and accepted the prosecution case, the High Court, however, having regard to the nature of the injuries came to the conclusion that no case under Sections 307/149, IPC, was made out and accordingly while upholding the convictions under Sections 147, 323/149, and 325/149, IPC. The occurrence is said to have taken place in the year 1976. Some of the appellants are more than 76 years of age and one of them has also died. In this context it must also be noted that some of the accused persons also received injuries. Having regard to all these circumstances, it is not a fit case where the appellants should be sent back to jail. In the result, while their convictions are affirmed the sentence is reduced to the period already undergone. However, the court imposes a fine of Rs. 200/- on each of the appellants in default of which they will be sentenced to one month's rigorous imprisonment. *Ayub* v. *State of U.P.*, 1994 All LJ 305 at p. 306 : 1994 Cr LJ 1219 (SC).

Injuries caused to the complainant' injured persons by blunt weapons by appellants hence convicted and sentenced—Revision petition was filed which was challenged of. It was held that the guilt of the accused is established from evidence of eye-witnesses and medical evidence. Finding is upheld. The appellants were aged 17 to 22 years and remained in jail for two to three months. Hence, sentence is reduced to period already undergone. *Romesh Kumar* v. *State of Punjab*, (1995) 3 CC Cases 105 (P & H).

Where there was punishment of imprisonment, it was held that as punishment prescribed is substantive sentence and also fine, court awarding sentence must impose sentence as prescribed which is mandatory. *Dhandapani* v. *Dhandapani*, 1995 MLJ (Cr) 406 (Mad).

The incident is 15 years old and accused remained in custody. In view of age of appellants and other circumstances the sentence is reduced to period already undergone and fine is enhanced. *Pooran son of Bansi* v. *State of Rajasthan*, (1995) 2 RCD 317 (Raj).

The accused allegedly caused grievous hurt to injured persons. The Court after considering evidence altered conviction of appellant from Section 325 to Section 323, IPC. As regards sentence the Court held that as the said offence was the first offence of accused, the parties were related to each other, they had settled the dispute outside and good relations prevailed between them now, the accused were entitled to be released on probation of good conduct. *Budhan Pandit* v. *State of Bihar*, 2004 Cr LJ (NOC) 179 (Jhar).

Where the incident had occurred more than 26 year ago and the accused were now more than 60 years of age, sentence of imprisonment for 5 years was reduced to 2 years and he was held liable to pay fine of Rs. 15000/-. *Abhilakh Singh* v. *State of UP*, 2006 Cr LJ 1419 (All).

The accused appellants along with number of others armed with hockey sticks, iron chains, *etc.* attacked the aged defenceless persons indiscriminately including women and children completely turning the happy marriage occasion to one of mourning. On the facts, the High Court was justified in enhancing the sentence and there is no case for interference on any account. *Rakesh Singh* v. *State of M.P.*, 1996 Cr LJ 2311 (SC).

When accused was punished for 6 months imprisonment and fine incident is 18 years old, sentence reduced to period already undergone. *Bhoop Singh* v. *State of Rajasthan*, 1996 Cri LJ 3790 (Raj).

8. Procedure.—Cognizable—Summons—Bailable—Compoundable. when permission is given by Court—Triable by any Magistrate.

There is a clear indication in the Criminal Procedure Code. that a-person can be charged with an auxiliary offence when he stands charged with the main offence itself. There a person can be charged with an auxiliary offence under Section 367, Penal Code, where he stands charged with the main offence itself under Section 325 and Section 326, Penal Code. AIR 1962 AP 267 : (1962) 1 An WR 125 : 1962 MLJ (Cr) 148 : (1962) 1 Andh LT 203 : 1962 (2) Cr LJ 28.

Where permission is granted to compound the offence the effect is that the accused is acquitted of the charge. AIR 1980 SC 1200 : AIR 1981 SC 1775. Where several persons are charged with being members of an unlawful assembly whose common object is to cause grievous hurt and grievous hurt is caused by some of them but rioting is not proved the accused can not be convicted under Section 325. in the absence of a separate charge. AIR 1955 SC 274 : 1955 Cr LJ 921.

An offence which law declares to be non-compoundable even with the permission of the Court cannot be compounded at all. The offence under Section 326, IPC, is admittedly non-compoundable and hence the Court cannot permit the same to be compounded. However, considering the fact that parties have come to a settlement and the victims have no grievance now and considering the further fact that first appellant has already undergone a period of imprisonment of about six months, a lenient view can be taken and the sentence can be reduced to the period which he had already undergone. "*Ram Lal* v. *State of Jammu and Kashmir*, 1999 Cri LJ 1342 (SC) : AIR 1999 (SC) 895 : 1999(2) SCC 213 : 1999(1) JT 147 . 1999(1) Scale 162 . 1999(1) Supreme 216.

In *Y. Suresh Babu* v. *State of A.P.*, (1987) 2JT (SC) 361 non-compoundable offences were allowed to be compounded. It was specifically observed that the said case "shall not be treated as a precedent."

Mahesh Chand v. *State of Rajasthan*, AIR 1988 SC 2111 offence under Section 307, IPC was permitted to be compounded with the following observations:

"We gave our anxious consideration to the case and also the plea put forward for seekling permission to compound the offence. After examining the nature of the case and circumstances under which the offence was committed. It may be proper that the trial court shall permit them to compound the offence."

In *Mahesh Chand*, AIR 1988 SC 2111 *Suresh Babu Case* (Supra) attention of the Hon'ble Court was not drown to the aforesaid legal prohibition hence these decisions were rendered per incuriam.

9. Abetment.—A case under this section can be proceeded with even after the death of the complainant. AIR 1943 Pat 379 : 45 Cr LJ 331.

10. Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :

That you, on or about the.........day of.........at........voluntarily caused grievous hurt to *A. B* and thereby committed an offence punishable under Section 325 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge by the said Court.

11. Probation.—Accused's statutory right to plead for reduction of sentence. *Held*, accused was rightly dealt with. 1987 Cr LR (MP) 113.

Where there was blows of *gandasi* and *lathi* inflicted on complainant by petitioners, hence, convicted under Section 323, IPC and released on probation under Section 4(1), of Probation of Offenders Act. Revision petition was filed. The ocular testimony was fully corroborated by medical evidence. Hence the order of the court below convicting petitioners and releasing them on probation calls of no interference. *Sher Singh* v. *State of Punjab*, (1994) 2 Crimes 162 (P & H).

Conduct was good hence benefit of probation was given. *Girdhari* v. *State of Haryana*, (1994) 3 CC Cases 546 (P & H).

When an appeal was dismissed by session judge—Revision petition to High Court.—Considering the nature of injuries on person of complainant attributed to petitioner and his co-accused since acquitted and the fact of his antecedents and family background and the agony of trial for 3 years undergone the petitioner is released on probation. *Dalip Singh* v. *State of Haryana*, (1994) 3 CC Cases 239 (P&H).

To be a student is no reasons by itself for showing leniency to a culprit. Section 6 of the Probation of Offenders Act, however, provides to give benefit of Section 3 or Section 4 of the said Act to a person who is below 21 years of age at the time of commission of an offence if such offence is not punishable with life imprisonment. These provisions, no doubt, are of mandatory nature. However, the court is not to give the benefit of probation if it is not warranted in view of the circumstances of the case, nature of the offence and the character of the accused. *Om Prakash* v. *State of H.P.*, 2000 Cri LJ 2675 (HP) : 2000(2) Shim LC 22 : 2000(3) Rec CR R 735 (HP).

12. Grievous hurt.—Medical evidence corroborating evidence of injured witnesses suffering grievous injuries in nature, conviction proper. *Wachittar Singh* v. *State of Punjab*, 1995 Cr LJ 1614 (P & H).

When accused pushed victim who fell down, suffered head injury and became unconscious and his relatives arranged for immediate medical aid to him and thereafter FIR lodged by his wife, delay caused could not raise any doubt or suspicion. *State of Karnataka* v. *Diwakara Bhat*, 1997 Cri LJ 226 (SC) : 1996(1) SCC 148 : 1996(7) Scale 97 : 1996(8) JT 457 : 1996(7) Supreme 348.

When death of deceased was caused due to grievous injuries on his body, conviction altered from Section 326 to Section 325, IPC. *M.A. Taide* v. *State of Maharashtra*, 1996 Cri LJ 4025 (Bom).

The doctor who examined the injured not examined. On the question as to whether in the absence of the doctor in the present case a conviction is impossible. Since there is sufficient evidence on record to establish the charges and more importantly since the defence has not disputed the wound certificates or insisted upon the presence of the doctor, that the non-examination cannot be treated as a fatal infirmity to the prosecution. On the state of the present record, the evidence clearly makes out that accused nos. 1 and 6 in furtherance of their common intention inflicted the injuries on P.Ws 1 and 2. They are therefore liable to be convicted of the offences punishable under Sections 325, 323 read with section 34 IPC. *State v. Sheku alias Shekhara Poojary and Others*, 2002 Cri LJ 2148 (Kant.) : AIR 2002 Kant HCR 1278 : 2002(5) Kant LJ 25.

13. Causing Grievous Hurt.—Accused were rightly convicted under Section 325 IPC. Faced with this position, learned counsel for the appellants submitted that the ippellants are first offenders. They were less than 21 years old at the date of commission of the offence. There was no serious attribution to them. It was due to the ack of care on the part of the injured that the injuries assumed that proportion. It was submitted that it was otherwise petty case of giving of fist blows, leg blows and slaps. It vas submitted that it was otherwise petty case of giving of fist blow, leg blow and slaps. t was submitted that keeping in view that the appellants have been writing under the incertainties of this criminal case since the year 1990 and it was the year of 2001 and he attribution to them is not of a grave and serious nature, they should be released on probation of good conduct under Section 4 of the Probation of Offender Act, 1958. Therefore such submission of the learned counsel should be given weight and accepted. n consequence, the sentence of imprisonment and that of fine is set aside. Instead, hey are ordered to be released on probation of good conduct under Section 4 of the probation of offenders Act, 1958 on their furnishing personal bond in the sum of Rs. 10000/- each together with surety bond of the like amount for a period of 3 years. *Rajesh Kumar and Others v. State of Haryana* 2002 Cri LJ 756 : 2002(1) Rec Cri R 108.

14. Acquittal.—Accused was convicted for offence under Section 325, IPC hence Appeal was filed.—Incident of assault and complaint was made but oral evidence of complainant not adequately corresponding with medical evidence. Material contradictions exist in his initial and supplementary statement. Hence evidence tendered by complainant not trustworthy. Conviction set aside and appellant was acquitted. *Bhaiyyaji* v. *State of Maharashtra*, (1994) 2 Crimes 87 : 1994 Cr LR (Mah) 227 (Bom).

Appeal against acquittal.—The proved facts of the case in the instant case clearly disclose that the act committed by the accused falls within the category's defined under Section 320(7), IPC. Weapon used in the instant case is a dao but blunt side of the dao was used and not the edging side. Considering all these aspects of the matter, I hold that the prosecution has been able to prove the case against the accused Safian Ali and that the provisions of Section 325 of the IPC would be attracted. As regards the other accused person, the prosecution could not establish the case against them by clear, cogent and unimpeachable evidence so as to take a different view from what have been arrived at by the learned trial Judge and their acquittal stands confirmed.

In view of the above discussions, the accused Safian is convicted under Section 305, IPC. It is further proved that the accused Safian Ali trespassed into the house of the informant with intent to assault P.W. 2 and/or to annoy the informant and her family members and ultimately attacked P.W. 2 and caused grievous injury and as such the accused has also committed offence punishable under Section 447, Cr.P.C. *State of Assam vs. Md. Azad Ali & Ors.*, 2010 (2) CriLJ 1584 (Gau).

Where injuries were to both sides. No evidence was there as to who was aggressor—Injuries to one accused remained under explained—Testimony of interested witnesses not corroborated by independent witnesses.—It was held that conviction cannot be based on evidence of interested witnesses unsupported by independent evidence. Hence conviction was set aside. *Ropi Ram* v. *State of Haryana*, (1995) 2 CC Cases 514 (P & H).

Main accused allegedly killed deceased by giving him fatal lathi blow on the head of deceased during altercation between deceased and him. Wife and mother of deceased sustained injuries in process of being separated from deceased when they wanted to cover. The presence of other two accused persons who were brothers of main accused, on spot would have caused more injuries to said two ladies and deceased. The participation of two accused persons in crime was found doubtful. Benefit of doubt was given to them and they were acquitted. *Ramadhar* v. *State*, 2004 Cr LJ 2378 : 2004 All LJ 1205 : 2004 All LJ 1205 : 2004(48) All Cri C 534 : 2004(2) All Cri R 1526.

The accused allegedly bite left ear of complainant causing cut injury. There were seven eye-witnesses. 4 witnesses, who were independent and natural witnesses to the alleged incident deposed that they did not know about the incident. The evidence of other eye-witnesses showed that he reached the place of occurrence after the alleged incident and came to know about the incidence from the complainant himself. Medical evidence also did not support the prosecution case. The evidence on record showed there was scuffle between accused and complainant and the complainant felled on bicycle of accused and was injured. It was held that the cut-injury on ear could be due to fall of complainant on bicycle of accused and false implication of accused due to professional rivalry could not be ruled out and that the accused was entitled to be acquitted. *State of Maharashtra* v. *Om Prakash*, 2004 Cr LJ 982 (Bom) : 2004 All MR Bom (Cri) 750.

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15. Private defence.—Contention was that acts done by them were in exercise of right of private defence. Digging of water channel providing the cause of fight. Petitioners were entitled to restrict it by exercising their right of private defence—Respondents were aggressors. It was held that Courts below not appreciating the evidence correctly hence order of conviction set aside. *Fattu* alias *Fateh Singh* v. *State of M.P.*, (1995) 3 Crimes 279 (MP).

16. "Any Instrument."—Absence of any evidence about sticks being of lethal type and something like sharp blade or sharp point *etc.* attached to them. Such sticks would not fall within ambit of "any instrument". *Jagannath Narayan Nikam v. State of Maharashtra*, 1995 Cr LJ 795 (Bom).

17. Conviction.—The three appellants were convicted under Sections 302/34 Appellant No. 2 caused fatal injury resulting in death. The other two appellants No. 1 and No. 3 joined in assaulting when deceased fell down, but there was no evidence of preconcert or meeting of minds of the three accused for committing murder. *Held*, that for want of evidence of any such conspiracy, appellants 1 and 3 could not reasonably be held guilty of charge under Section 302/34, but they appeared to be guilty of Section 325/34. 1987 Cri LJ 113 (Pat).

18. Culpable homicide.—On quarrel when accused pushed deceased down from staircase without any deliberation, conviction altered from Section 304, Part II to Section 325, IPC. *Bakkiaraj* v. State, 1997 Cri LJ 429 (Mad).

19. Death of complainant.—Admittedly, complainant had died after recording of his pre-charge statement. Not only the respondents had the right as well as the opportunity to cross-examine him, they did actually cross-examine him. Therefore, the statement of complainant recorded at pre-charge stage is relevant in view of the provisions contained in Section 33 of the Evidence Act.

The learned Metropolitan Magistrate has not taken the pre-charge statement of complainant into consideration. In view of the mandate of Section 33 of the Evidence Act, it was obligatory for him to take the statement of late complainant into consideration before passing judgment on the merit of the case. Failure of the learned Metropolitan Magistrate to take the statement of complainant into consideration has resulted in failure of justice and, therefore, the order passed by him cannot be sustained. *Surjit Kaur vs D. S. Kapoor & Ors.*, 2010 Cri LJ 1008 (Delhi).

20. Non examination of minor injury on accused.—Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries.

When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. In the case at hand, triffle and superficial injuries on accused are of little assistance to them to throw doubt on veracity of prosecution case, particularly, when the accused who claimed to have sustained injuries has been acquitted. *Sri Kishan vs. State of Haryana*. 2009 (6) SCR 1184 : 2009 (12) SCC 757 : 2009 (8) JT 305 : 2009 (6) Scale 438.

21. *De facto* complainant.—To cause "grievous hurt" it is not necessary that any weapon of offence must be used. Even without any weapon, an injury of the nature mentioned in Section 320 could be caused. The offence under Section 325 is voluntarily causing grievous hurt. It does not speak of user of any weapon of offence. That does not mean that to attract Section 326, not only that grievous hurt should be caused and a weapon of offence of the kind mentioned therein is used, the injury must be one which is likely to cause death. Section 326 in clear and unambiguous terms provides that the instrument referred to therein is of such a nature that if it is used as a weapon of offence, it is likely to cause death. The expression "is likely to cause death" is attributable to instrument which is used as weapon of offence and not to the "grievous hurt". If grievous hurt is caused using a weapon of offence of the nature mentioned in Section 326, it becomes a graver offence for causing grievous hurt. To constitute a 'grievous hurt', it is not always necessary that the kind of hurt should be one which "is likely to cause death". All the kinds of hurt mentioned as "first" to "eighthly" in Section 320 would constitute grievous hurt. Only the eighth clause therein mentions about "hurt which endangers life". This by itself is sufficient to arrive at the conclusion that the injury caused need not be one which is likely to cause death, in order to attract Section 326. *Sreekumar v. State of Kerala and another*, 2009 CriLJ 3862 (Ker).

* * * * *

Sec. 326. Voluntarily causing hurt by dangerous weapons or means.—Whoever, except in the case provided for by Section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with *imprisonment for life* or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

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1. Amendment.—The words in italics were substituted for the words "transportation for life" by Act 26 of 1955, Section 117, and Sch. with effect from 1.1.1956.

2. Scope.—The section can only apply to a person who does a substantive act himself, and inflicts a blow causing grievous hurt as defined in the Code. 6 CWN 98. An accused cannot be convicted under this section unless the weapon used by him was deadly and the hurt intended or known to be likely to be caused was grievous. AIR 1939 Mad 507 : 40 Cr LJ 827 (1) : AIR 1939 Mad 507 : 40 Cr LJ 827 : AIR 1942 Mad 415 : 43 Cr LJ 671. The accused cannot be convicted under Section 326, read with Section 149, when it is not possible to say that the act was done in pursuance of the common object of the unlawful assembly. 202 IC 579 : 13 Cr LJ 871 : 43 Cr LJ 511 : AIR 1943 Pat 376 : AIR 1942 Cal 426 : 43 Cr LJ 455. Where an accused caused grievous hurt with dangerous weapon, he should be convicted under this section and not under Section 307. AIR 1939 Mad 780 : 40 Cr LJ 922 : *see* also AIR 1941 All 288 : ILR 1941 All 441 : 42 Cr LJ 621 : AIR 1941 Lah 322 : 43 Cr LJ 165. To convict an accused under Section 304, Part II, knowledge that the injury intended to be caused was likely to endanger life must be proved. If such knowledge or intention requisite for a conviction under Section 302, or under Section 304, Part I, is not proved, he is guilty of an offence under Section 326. and under Section 304, Part II, ILR 1944 Cal 305 : AIR 1945 Cal 467. Nose-cutting is a very serious offence and such cases should ordinarily be committed to Sessions. The sentence of 6 months rigorous imprisonment under Section 326, in such case, cannot be said to be excessive. AIR 1950 Ajmer 13. A blow on the head with an axe which penetrates half an inch into the head is likely to endanger life. AIR 1955 SC 216 : (1955) 1 SCR 1083 : 1955 SCA 228 : 1955 SCJ 106 : 1965 Cr LJ 572 : *see* also AIR 1960 Ker 301 : 1960 Ker LJ 430 : 1960 Cr LJ 1213. Accused dealt blow on the forehead of the deceased with *dao*. The deceased remained fully conscious for 4 days and then collapsed. The offence falls under Section 326, and not under Section 302, 1963 (2) Cr LJ 592.

Political rivalry. Although there is a general statement about the inflicting injury by the other accused person including the accused Nos. 4 and 5, no such injuries are found in the evidence of the doctor. Had there been other injuries on the body of the accused, the same would have been reflected in the medical report, the accused being subjected to medical treatment immediately after the occurrence.

From the discussions made hereinabove, it is found that the FIR though was filed immediately within two hours of the occurrence, it is full of exaggeration and interpolation at various places. The name of the accused Nos. 4 and 5 have been inserted only due to political rivalry with their father. The learned P.P., in his usual fairness, also has not ruled out the possibility of political rivalry in this case which is elicited by defence. From the examination, it is not found as to how certain statements could be written in the FIR after making the endorsement in the FIR putting his signature. Prosecution is silent about this aspect altogether. That apart it is also a mystery as to why the informant, the eye witness failed to divulge the names of the other accused in the FIR. In this connection reference in *K. Ashokan and Ors. v. State of Kerala*, 1998 (3) SCC 570 : 1998 Cri LJ 2834 has got much relevance and in *State of Haryana v. Shibu alias Sib Narayan and others*, 2008 (11) SCC 377: 2008 AIR SCW 5400 wherein the Apex Court endorsed the view of the High Court as regards the improbability of the prosecution case, in view of the interpolation in the FIR as well as the non-mentioning of the names of the accused persons in the FIR lodged by the eye-witnesses to the occurrence has also much relevance with the present case.

Upon careful and close scrutiny of the prosecution witnesses it is found that the witnesses unfold two parts of the occurrence that took place, as a result of which witness was injured. As regards the first part of the occurrence the incident that have taken place inside the electric shop except the evidence exhibited by witnesses there is no clear, cogent and impeachable evidence on record. As regards the second part of the incident i.e., the chasing of the victim by all the accused persons it is found that there is no evidence in that regard. There is no indication as to when the other three accused persons joined with the earlier party. Insertion of the name of accused Nos. 4 and 5 in the FIR appears to be at a later point of time. The medical evidence is absolutely silent as regards the severe blows and attack given by the accused persons in the subsequent stage while they assaulted the victim by chasing. Accordingly, the second appeal of the occurrence is highly improbable and prosecution could not prove the same by any evidence worth the name. *Narayan Sarkar & Ors. vs State of Tripura*, 2010 Cri LJ 986 (Gauhati).

It is true that the weapon used was an axe which is a deadly weapon and it is also true that the amputation of the arm is a very serious injury but where the trial court seems to have erred is in holding that this was an attempt to murder. The injury inflicted, with all its horrifying dimensions would not normally endanger life unless it is an extreme case and if the intention was or the attempt was to take life, then more than one blow or even a fatal blow would have been directed towards a vital part of a body which was not done. The convection was attered from under section 307 to one under section 326, IPC. *Basappa Balappa Bhangi* v. *State of Karnataka*, 1999 Cri LJ 2689 (Kant).

"The crime mentioned in the section requires severe repression. and where grievous hurt is caused it usually calls for a heavy sentence. Where some aggravating circumstance exists to which the law attaches a severe punishment, such as the use of a deadly weapon, it is the duty of the Court to ascertain, the aggravating circumstance and not to assume jurisdiction by ignoring it, and then by passing a sentence for a minor offence, defeat the plain intention of the law. LBR (1872-1891) 182 : see also 20 PR 1915 Cr. "Sections 325 and 326 like the two section immediately proceeding provide the ordinary punishment and punishment under certain aggravating circumstance, of the offences mentioned—the two latter sections applying to the case of causing 'grievous hurt', and the two others to the case of 'hurt'. Many acts made punishable under the proceeding provisions may approach closely in character to those deliberate attempts to commit culpable homicide which are punished by Sections 307 and 308. Such attempts, when hurt is caused by them, are distinguishable from the offence here punished, because in the former, the act done is intended or known to be likely to cause death ; whereas nothing more than hurt or grievous hurt is contemplated in cases falling under the present section. But it may happen that the same act and the same circumstances which satisfy the Court that hurt or grievous hurt has been voluntarily caused, are equally cogent to show that the intention of the accused was to cause death. *Morgan and Macpherson.* A person urged another to attack the complainant, and such other person cut the complainant in the forearm with a clasp knife, while the former threw sticks at him. It appeared from the evidence that there was no proof that the latter had the knife in his hand at the time of the former's urging him on, nor was there evidence that the former knew in any other way that the latter would be likely to use the clasp knife. *Held,* that the former could not be convicted of abetting the offence of causing grievous hurt with a dangerous weapon under Section 326, Penal Code, but that he would only be convicted of abetting an assault. 4 LBR 271 : 8 Cr LJ 472. Where a person caused grievous hurt by means of *chhavi* in excess of his right of private defence he can be convicted under this section. 29 PWR 1914 Cr : 182 PLR 1914 : 15 Cr LJ 540 : 24 Ind Cas 948.

Where the accused in the course of a quarrel, stabbed the opponent in four places out of which he died, held, that in the absence of any evidence to show the character of the wounds inflicted, and whether death was the probable result of the wounds, the accused could not be convicted of culpable homicide, but should have been convicted of voluntarily causing grievous hurt with dangerous weapon. LBR (1872-1892), 463. A person cutting his wife's nose and ears with a razor and her gut with a pair of scissors, is guilty of the offence of voluntarily causing grievous hurt with an instrument of cutting and the offence is not therefore, compoundable. 19 PR 1902 Cr. To constitute an offence under Section 327, of the Penal Code, the act must have been done "voluntarily". That is the very essence of the offence. 12 CWN 533 : 7 Cr LJ 362. Before a conviction for the offence of grievous hurt can be passed, one of the injuries defined in Section 320, must be strictly proved ; and the eighth clause is no exception to the general rule of the law that a penal statute must be construed strictly. 19 Bom 247. Where the accused struck two blows, one of them severe and the other slight on the head of the deceased, and the deceased died in consequence, *held,* that it was safer and sounder to convict the accused under Section 326, than under Section 304, of the Indian Penal Code. 115 Ind Cas 66 : 30 Cr LJ 378 : AIR 1929 Lah 37.

Where the accused shot the deceased at his thigh and the latter died after ailing for two months and it appeared that he would not have died but for an attack of dysentery, *held,* that the accused was liable to be convicted under Section 326, and not under Section 300. 11 Lah LJ 44 : AIR 1929 Lah 433 ; *see* also AIR 1934 Lah 368 : 1934 Cr C 617 : 35 Cr LJ 1283 : 151 Ind Cas 238 : AIR 1931 Lah 103. Where blows are dealt with *lathis,* intention to cause grievous hurt is presumed. AIR 1922 Nag 141 : 23 Cr LJ 313 : 66 Ind Cas 665. Where there is no premeditation and the accused inflicts an injury on abdomen with pen knife on sudden provocation, offence is under Section 326. AIR 1924 Lah 234 : 24 Cr LJ 663 : 73 Ind Cas 695 : *see* also AIR 1922 Lah 26 : 3 LLJ 581 : 32 Cr LJ 658 : 63 Ind Cas 450 : AIR 1933 Lah 733. Where in an unlawful assembly substantive offence under Section 326, are committed in prosecution of common object by some all can be convicted under Section 326, read with Section 148, even though no conviction under Section 148, is passed. 1933 MWN 109 : 1933 M Cr C 75 : AIR 1933 Mad 842. A conviction under Section 326. ought not to be passed on the uncorroborated dying declaration of the deceased person. 11 Mys LJ 328.

In a prosecution for an offence under Section 326, IPC, a lenient sentence should be inflicted where the eye-witness did not profess to *see* the beginning of the fight and consequently it is impossible to say whether any provocation was given and to what extent. 30 PLR 582.

Where a person was charged under Sections 326 and 149, he can be convicted under Section 326, read with Section 34, where it was proved that the accused being present and armed with a deadly weapon gave an order to other persons armed with deadly weapons to assault the complainant. 113 Ind Cas 676 : 30 Cr LJ 205 : AIR 1929 Pat 11 ; *see* also 47 M 746 : 35 MLT (HC) 21 : 82 Ind Cas 465 : AIR 1925 Mad 1 : 25 Cr LJ 1297 : 47 MLJ 221 : AIR 1942 Oudh 444 : 43 Cr LJ 781 ; AIR 1942 Mad 420 : 43 Cr LJ 795 ; AIR 1942 Lah 40 : 43 Cr LJ 443 ; AIR 1940 Mad 298 : 41 Cr LJ 898. Where the Court had been able to make up his mind definitely about the actual persons who caused the injuries sustained by the complainants and there was delay in making their complaint, a conviction cannot be sustained. AIR 1923 Lah 447. The accused were charged with offence under Section 326, read along with Section 149. They were acquitted on the latter charge as the alleged motive was not convincing and the common object was not made out. *Held*, this does not prevent a conviction being bad under Section 326, IPC, if grievous hurt was caused. 74 Ind Cas 717 : 24 Cr LJ 813.

Where accused were charged separately with having entered complainant's house and cut off his ears and removed his ear-rings and there was no specification of a common intention to inflict grievous hurt, *held*, that as the identification of the person who inflicted the grievous injury was not made out, and as there was an absence of common intent, the conviction under Section 326, was bad, for which must be substituted conviction under Section 323. 47 Ind Cas 445 : 19 Cr LJ 929. Where an accused was found guilty of having cut off his wife's nose by a razor he should be convicted under Section 326. 20 PR 1915 Cr : 39 PWR 1915 Cr. Where deceased struck on hand with *thakwa* died of septicoemla long after wound was inflicted and after keeping normal temperature and the injury by itself could not be called dangerous to life in this case the offence was held to fall under Section 326, and not under Section 304. AIR 1931 Lah 103. Wound on neck with sharpedged weapon is dangerous to life. but it is not sufficient in itself to cause death. AIR 1930 Lah 305. Fact that quarrel during which deceased gets fatal wound is sudden and arises in heat of passion is mitigating circumstance in favour of accused. AIR 1930 Lah 311. Where blows on head causes death a sentence of five years' rigorous imprisonment was held proper. AIR 1930 Bom 483. A person causing injury so as to endanger life, is presumed to know that he would cause death. AIR 1930 Bom 483. Blow with spear on fleshy part of body is not necessarily fatal and the offence does not fall under Section 302, but under Section 326. AIR 1930 Lah 950 : 129 Ind Cas 483 : 1930 Cr C 1046.

Common intention. In her dying declaration, the deceased has imputed the acts of entry into her house and physical presence at the time of the incident to the appellant without anything more. No other overt act saves as mentioned above has been imputed to the appellant by the deceased. It has also not come in evidence before us that the appellant tried to gag her mouth or overpower the deceased in any other manner so as to facilitate the pouring of acid on her by the main accused. Had the appellant shared an intention common with the main accused to kill the deceased by throwing acid on her, it would have been manifest in his conduct which would certainly have been something more than him being just a mute spectator to the whole incident.

Thus, in absence of any active role played by the appellant or overt act being done by the appellant, it cannot be said with certainty that the appellant had accompanied the main accused to the house of the deceased with a common intention to murder the deceased. In view thereof, the conviction of the appellant under Section 302 read with Section 34 IPC cannot be sustained.

However, keeping in mind the facts that the deceased had turned down the sexual advances made by the appellant and that he had accompanied the main accused who was carrying a vessel containing acid in his hand at the dead of the night and in an unearthly hour, it can be said with certainty that the appellant had the intention to inflict bodily harm on the deceased otherwise the appellant would not have accompanied the main accused to the house of the deceased. Since the appellant was present at the scene of occurrence and simply watched the main accused throwing acid on the deceased without preventing the main accused from doing so clearly establishes that the appellant had intended to cause injury to and also disfigurement of the deceased and as such is liable to be punished under Section 326 IPC. Also since the appellant could be said to be possessing knowledge that the throwing of acid is likely to cause death of the deceased, a case under Section 304 Part II is also made out. The appellant has already served rigorous imprisonment for a period of seven years. *Bengai Mandal alias Begai Mandal vs State of Bihar*, 2010 Cri LJ 1420 (SC).

Deceased in her dying declaration, had attributed acts of carrying vessel containing acid and throwing content thereof on her only to accused No. Both accused were demanding illicit body relations with her as also entering into her house.

It cannot be said with certainty that co-accused had accompanied main accused to house of deceased with common intention to commit murder. Appellant is, therefore, liable to be convicted under Secs. 326 and 304, Part II and not under Sec. 300.

In absence of any active role played by the appellant or overt act being done by the appellant it cannot be said with certainty that the appellant had accompanied the main accused to the house of the deceased with a common intention to murder the deceased. In view thereof, the conviction of the appellant under Sec. 302 read with Sec. 34 IPC cannot be sustained.

It can be said with certainty that the appellant had the intention to inflict bodily harm on the deceased otherwise the appellant would not have accompanied the main accused to the house of the deceased. Since the appellant was present at the scene of occurrence and simply watched the main accused throwing acid on the deceased without preventing the accused from doing so clearly establishes that the appellant had intended to cause injury to and also disfigurement of the deceased and as such is liable to be punished under Sec. 326 IPC. Also since the appellant could be said to be possessing knowledge that the throwing of acid is likely to cause death of the deceased, a case under Sec. 304 Part II is also made out. *Bengai Mandal alias Begai Mandal vs. State of Bihar*, AIR 2010 SC 686.

Deceased in her dying declaration, had attributed acts of carrying vessel containing acid and throwing content thereof on her only to accused. Both accused were demanding illicit body relations with her as also entering into her house.

It cannot be said with certainty that co-accused had accompanied main accused to house of deceased with common intention to commit murder. Appellant is, therefore, liable to be convicted under Sections 326 and 304, Part II and not under Section 300.

In absence of any active role played by the appellant or overt act being done by the appellant it cannot be said with certainty that the appellant had accompanied the main accused to the house of the deceased with a common intention to murder the deceased. In view thereof, the conviction of the appellant under Section 302 read with Section 34 IPC cannot be sustained.

It can be said with certainty that the appellant had the intention to inflict bodily harm on the deceased otherwise the appellant would not have accompanied the main accused to the house of the deceased. Since the appellant was present at the scene of occurrence and simply watched the main accused throwing acid on the deceased without preventing the accused from doing so clearly establishes that the appellant had intended to cause injury to and also disfigurement of the deceased and as such is liable to be punished under Section 326 IPC. Also since the appellant could be said to be possessing knowledge that the throwing of acid is likely to cause death of the deceased, a case under Section 304 Part II is also made out. *Bengai Mandal alias Begai Mandal vs. State of Bihar*, AIR 2010 SC 686.

In case of mutual infliction of injury on each other conviction should be under Section 326, and not under Section 307. AIR 1925 Rang 133 : 2 Rang 558 : 26 Cr LJ 409 : 84 Ind Cas 1049 ; *see* also AIR 1929 Pat 523 : 1929 Cr C 283 : 151 Ind Cas 760 : 35 Cr LJ 1407 : 36 PLR 88 : 1934 Cr C 763 : AIR 1934 Lah 477. In case joint assault with deadly weapon common intention is presumed. AIR 1924 Lah 216 : 24 Lah 216 : 24 Cr LJ 401 : 72 Ind Cas 513. A laddle comes under the category of "substance" and a person who voluntarily causes grievous hurt by means of a heated laddle is guilty of an offence under this section. 153 Ind Cas 425 : 36 Cr LJ 346 : 1935 AWR 57 : 1935 A Cr C 12 : 1935 Cr C 268 : AIR 1935 All 282. It cannot be said that every stick is an instrument of the kind described in Section 326, IPC. Beating a person with a stick with the knowledge that such beating would cause grievous hurt would not amount to an offence under this section. 45 LW 93 : 1937 MWN 178 : 169 Ind Cas 372 : 38 Cr LJ 753 : AIR 1937 Mad 321 : (1937) 1 MLJ 750. Where the case is of a nose-cutting the doctor's evidence is that it is likely to heal, it cannot take it out of the mischief of this section. 1949 AMLJ 64.

The accused was charged under Section 326, IPC, for causing grievous hurt on the deceased by throwing some acid on him, when he was asleep. The deceased was taken to the hospital and discharged after about four months and was again admitted to the hospital till his death. *Held, on* consideration of the lamentable omission in and the irresponsible nature of investigation that it was not proved beyond all possibility of reasonable doubt that the accused caused grievous hurt to the deceased by any corrosive substance. 24 Cut LT 241.

Convicted for offence under Section 326, IPC. Revision petition under Sections 397 and 401, Cr PC. It was held that the right of private defence claimed was not accepted by courts below. The proper way of looking at the right is not triviality of injuries inflicted but real consideration is the apprehension that grievous hurt or death would be caused. This was not fully investigated. Further, the story does not inspire confidence and evidence is wholly unsatisfactory. Hence conviction and sentence is vacated. *Tulsiram* v. *State of M.P.*, 1994 Cr LR (MP) 142 (N) (MP).

Filing of counter case by accused not fatal for prosecution case. *Mohd Ibrahim* v. *State of A.P.*, 1993 Cri LJ 89 (AP).

While police filed a charge-sheet under Section 326, IPC, a private complaint was filed under Sections 447, 325 and 506 (2)/34, IPC, and both the cases were clubbed together on a report by the APP. On acquittal of the accused the complainant filed a revision from an order under Section 326, IPC, and an appeal from the complaint case. *Held*, the Magistrate had adopted an unpermissible procedure. There was no contingency also for so to do. Case premanded for re-trial. (1986) 2 Crimes 397 (Ker).

3. Dangerous weapon.—Whether a particular can *per se* cause any serious wound or grievous hurt or injury has to be determined factually. It is not every case a stone would constitute a dangerous weapon. It would depend upon the facts of the case. In some provisions *e.g.* Sections 324 and 326 expression "dangerous weapons" is used. In some other more serious offences (*e.g.* Sections 397 and 398). The facts involved in a particular case, depending upon various factors like size, sharpness, would throw light on the question whether the weapon was a deadly weapon or not. That would determine whether in the case Section 325 or Section 326 would be applicable. *Mathai* v. *State of Kerala*, 2005 Cr LJ 898 (SC) : AIR 2005 (SC) 710 : 2005(1) Crimes 181 : 2005(2) JT 365 : 2005(3) SCC 260 : 2005(1) Supreme 215.

In the instant case, the knife which was allegedly used to commit the offence was opined to be one which could have caused the injury suffered by the deceased. The description of weapon in the case and that it could cause the Maxilla to be cut were sufficient indication that, that answered the description of a dangerous weapon under Section 326, IPC. Fracture had been suffered by victim as per medical evidence. The accused was held liable to be convicted under Section 326, IPC. *Sreenivasan* v. *State of Kerala*, 2006 Cr LJ 1485 (Kerala).

4. Procedure.—Cognizable—Summons—Not Bailable—Not compou-ndable—Triable by any Magistrate.

5. Charge.—I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) *as* follows :—

"That on or about the........day of......at.......voluntarily caused grievous hurt to *A, B* by means of Ex.....which is an instrument for shorting (or stabbing *etc., as the case may be*) an thereby committed an offence punishable under Section 326, of the Indian Penal Code, and within my cognizance."

"And I hereby direct that you be tried on the said charge".

6. Sentence.—An offence under Section 326, IPC has to be punished with imprisonment, the imposition of fine being an additional punishment at the option of the Court. A sentence of fine alone is obviously not according to law. 1927 MWN 575. The act of nose-cutting is one which imports deliberate design of a particular brutal and cruel character. In such a case a sentence of nine months was enhanced to two years. AIR 1938 Bom 430 : 40 Bom LR 832 ; *see* also AIR 1944 Sind 186 : 45 Cr LJ 764. But where the offence has been committed on real provocation one month's rigorous imprisonment is sufficient. AIR 1943 Mad 681 : 45 Cr LJ 143. In AIR 1956 Bom 193 : 1956 Cr LJ 479, the public servant while performing his duty was injured with axe by the accused who is unusually excitable and a poor villager. *Held*, that the same could not be a justification for the grossly inadequate sentence of 3 year's RI. If the accused be below 18 years of age, he cannot be dealt with under the provisions of the Probation of Offenders Act but can be treated leniently considering the fact that he was acting under the influence. 1965 (1) Cr LJ 478 : AIR 1965 Raj 74.

Appropriateness of Sentence. In this case we feel the High Court has erred in balancing the relevant factors. The High Court seems to have waived off the custodial sentence and let off the respondents with a modest fine mainly on two considerations. One, that the offence was committed in the year 1996 and it would serve no useful purpose to send the respondents to jail after ten years of the occurrence. And two, the respondents being convicted of the offence of causing grievous hurt in place attempted murder. We are unable to agree with the High Court on both the counts. Any inordinate delay in conclusion of a criminal trial undoubtedly has highly deleterious effect on the society generally and particularly on the two sides to the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the accused. There is, therefore, no reason to give all the benefits on account of the delay in trial to the accused and to completely deny all justice to the victim of the offence. In this case there is nothing to indicate that the appellants or the prosecution were responsible for the delay in trial. We are, therefore, of the view that the High Court was not right in substituting the custodial sentence of the respondents to only fines of Rs. 3500.

Coming to the second reason weighing with the High Court, it is a mistake to think that as a rule all offences falling under Sec. 326 would be less serious than the offences falling under Sec. 307 of the Penal Code and would consequently attract lighter sentence.

From the injuries suffered by Appellant No. 2 it is evident that though the respondents did not intend to kill him altogether they surely wanted to leave him crippled for a lifetime. In our opinion, therefore, the High Court was not right in letting them off on completing sentence of imprisonment of merely four months and three months respectively. We accordingly restore the sentence of rigorous imprisonment given to the respondents 1 and 3 and direct that they must serve rigorous imprisonment for two years in addition to the fine of Rs. 3,500 imposed by High Court, in case of default in payment of fine the respondents would suffer simple imprisonment for six months. On realization of the amounts of fine Rs. 6,000.00 would be paid to Appellant No. 2. *Mangal Singh vs. Kishan Singh*, AIR 2009 SC 1535 : 2008 (12) JT 582 : 2008 (16) SCR 505 : 2008 (15) Scale 33 : 2008 (9) SLT 564.

Brother expressed natural resentment over the molestation of his young sister. He was dragged out of the house and was bodily lifted to the house of miscreant. The accused tied him with a rope against a pole, then tortured him, burnt his face with burning cigarette and cut his palms into pieces bit by bit. *Held*, that accused had rendered himself liable to the extreme penalty. A sentence of three year's rigorous imprisonment and a fine of Rs. 600 was held to be just. 1987 Cri LJ 128 (MP).

When injuries was made by sharp edged weapon, hence, accused was convicted under Sections 326/34, and 324, IPC.—Revision against conviction was filed. The sentence was reduced to period already undergone. Payment of Rs. 2,000 to be made. *Tara Singh* v. *State of Punjab*, (1994) 1 CC Cases 271 : (1994) 1 Recent Cr R 457 : (1994) 1 SLJ 735 : (1994) 1 Recent Cr R 200 (P & H).

Compounding of offence committed under Section 326, IPC—Technically no compounding was permitted—Yet as injured and appellant belonging to same family and all disputes amicably settled and injured compensated also, Sentence of imprisonment reduced to one already undergone. *Sulakhan Singh* v. *State of Punjab*, (1995) XXII Cr LT 342 (P & H).

There was absolutely no reason to doubt the statements of witnesses with regard to the incident. An independent witness in as much that he had been employed with the complainant party as well as the accused party at various times. It also appears that he was the focus of the quarrel and the motive that had precipitated the incident, as both the parties were pushing for employing which had led to the unpleasant situation between them. Likewise we find difficult to disbelieve the statement of the injured victim himself as he has given a graphic description as to what had happened. It is true, as has been contended that there are some differences between the statements of these two witnesses but they are bound to occur with the evidence being recorded after about five years. It must also be borne in mind that a parrot like deposition after a long lapse of time smacks of tutoring and some differences in fact advance the credibility of the witnesses.

There is some uncertainty about the involvement of Neelam Bahal, appellant No.l. The facts of the case indicate that she was perhaps not aware that Rakesh Bahal was carrying a weapon in his pocket or on his person. The prosecution evidence also reveals that it was only after the quarrel had reached a certain pitch that he had rushed inside the house and had brought a knife and caused the injuries to Satish Chandra. We also find that no specific overt act has been attributed to Neelam Bahal and only a very tenuous role that has been ascribed to her. To our mind this kind of evidence creates a clear doubt as to her participation. Held that Neelam Bahal, appellant No.1 must be given the benefit of doubt, and thereby acquitted. The appeal qua her is allowed.

Though the general condition of the patient was very bad yet there is no categoric statement in the medical certificate issued by doctor that the injuries were in fact dangerous to life. We are unable to fathom as to whether this was a deliberate omission or an oversight but whatsoever it may be the benefit must accrue to the accused. We have also gone through the evidence of doctor and find that he had admitted that he had not mentioned that the injury was dangerous to the life as he did not think it necessary to do so. At the same time we are unable to accept Ms. Jaiswal"s statement that the case would fall under Sec. 323 or 324 of the IPC but in the light of the statement of victim that he had remained in hospital for fifteen days due to the injuries caused to him, makes out a case of grevious hurt. Rakesh Bahal alone should thus be held guilty under Sec. 326 of the IPC simpliciter. We are told that he has already undergone almost one year of the sentence and in the light of the fact that the incident happened in the year 1987 when he was a young man of about 25 and now must be of middle age, we reduce the sentence to the period already undergone by him. *Neelam Bahal & Anr. vs. State of Uttarakhand*, 2010 AIR SCW 88 : AIR 2010 SC 428

Alteration in Sentence—Conviction from Sec. 302 to Sec. 326 IPC—Scope. The informant on whose evidence trial Court and the High Court placed reliance had categorically stated that it was accused Rakesh who had attacked the deceased with a sword, and he was not sure as to how the other two accused persons including the present appellant attacked the deceased. The evidence of witness shows that the accused Jitu@Jitender had given a blow on the belly. The Doctor found no injury on the belly, but same was on the back side. In this scenario, it would be difficult to uphold the conviction of the appellant for offence punishable under Sec. 302 IPC. Accordingly, the conviction of the appellant is altered to Sec. 326 IPC. We find it strange that though the evidence of PW. 8 was accepted, no conviction was recorded so far as the present appellant is concerned for the assaults made by him on Bhagirath. There are several disturbing factors. Strongly, the State has not questioned the conviction of Rakesh for offence punishable under Sec. 324 IPC and non recording of any conviction insofar as the present appellant is concerned in respect of injuries inflicted by him on Bhagirath PW. 8. *Jitu vs. State of Madhya Pradesh,* AIR 2009 SC 1337 : 2009 CrLJ 1884 : 2009 (2) Crimes 143 (SC) : 2009 (3) JT 602 : 2009 (3) Scale 534 : 2009 (3) SCR 1158 : 2009 (2) Supreme 387.

Petition was filed for reduction of sentence. The occurrence dates back to 1980. Appellants are on bail since 1983. Each of them have undergone imprisonment for one year. Hence, the sentence of 3 years is reduced to period already undergone. *G. Satyanarayana Reddy* v. *State of Andhra Pradesh,* (1994) 2 Crimes 318 (SC) : 1994 Supp(2) 287 : 1994(4) JT 216 : 1994(2) Scale 857 : 1994(1) UJ 685 : 1994 SCC (Cr) 1239.

When complainant kept applicant's mother under detention and demanded money—Applicant caused him grievous injuries. It was held that on account of conduct of complainant and his own mother, lenient view to be taken. Sentence modified and reduced to six months. *Sirnam* v. *State of M.P.*, (1995) 1 OCR 282 (MP).

Where the incident had taken place about 23 years ago and the accused had already served out part sentence of the imprisonment and he was not involved in any other criminal cases since then, sentence of imprisonment was reduced to period already undergone. *Sat Narain* v. *The State*. 2000 Cri LJ 1018 (Delhi), relying on *Ramesh Kumar Gupta* v. *State of M.P.*, 1995 Cri LJ 3656 : AIR 1995 SC 2121.

Where husband held chopping the hands of the wife and death of the wife was caused in absence of medical care—Extra-judicial confession was of the husband. Dying declaration of the wife was proved and there was corroborating medical evidence—Conviction was hence sustained.—However, sentence reduced to period already undergone *i.e.*, 7-1/2 years. *Budhan* v. *State of M.P.*, 1995 Cr LR (MP) 72 ; *See also Prakash Chandhappa Channur* v. *State of Maharashtra,* 2005 Cr LJ 1085 (Bom) : 2005 All MR (CRI) 584.

Revision against conviction was filed, there was *Gandasi* injury which was proved by medical evidence. The accused has already remained two months in jail—Sentence reduced to period already undergone. *Surjit Singh* v. *State of Punjab*. (1994) 2 CC Cases 47 (Delhi).

Offences under Section 326, IPC was made by four accused—Conviction of 'O' under Section 326, IPC and other 3 under Sections 326/34, IPC, which was challenged n appeal. It was held that merely because all the accused persons inflicted injuries to deceased, their common intention to cause grievous hurt cannot be gathered on account of their participation alone. Each accused is, therefore, liable for his own act. Appeal is partly allowed and sentences reduced and fine enhanced. *Om Prakash* v. *State of Rajasthan*, 1994 RCC 485 (Raj).

Appeal was filed against conviction—On the next day of occurrence petitioner was medically examined—Minor injuries were found, 10 years of occurrence has passed, sentence reduced to period already undergone. *Mukhtiar Dass* v. *State of Punjab*, (1994) 2 CC Cases 225 (P & H).

Conviction and sentences for offences under Section 326/34, was challenged in appeal. The prosecution case rested on evidence of eye-witnesses and medical evidence. The factum of complaint against accused appellant is established. Accused appellants attacked prosecution party and caused grievous injuries. The conviction of appellants GJ and GS for offences under Sections 326/34, IPC, is affirmed. However, quantum of sentence is reduced to 3 years rigorous imprisonment. *Jaswinder Singh* v. *State of Punjab*, (1994) 2 CC Cases 522 (P & H).

When petitioner faced proceedings for 12 years and remained in jail for considerable period, sentence reduced to period already undergone. *Shokin* v. *State of Rajasthan*, 1996 Cri LJ 4222 (Raj).

Considerating the fact that the parties had settled their dispute outside the court and the fact that ten years, had elapsed from the date of the incident and that the appellant had already undergone three months, imprisonment, the court thought that ends of justice would be met if the sentence of imprisonment was reduced to the period already undergone besides imposing a fine of Rs. 5000/- on each of the accused under section 326, read with section 324, IPC. *Vankar Jahabhai Shankerbhai* v. *State of Gujarat*, 2001 Cri LJ 1647 (Guj).

In a case the accused was convicted under Section 326 and sentenced to undergo mprisonment for one year. High Court on appeal upheld the conviction but reduced the sentence to period already undergone in *lieu* of enhanced fine of Rs. 25000/-. When the case came to the Supreme Court it was held, that sentence was not justified as undue sympathy to impose adequate sentence causes more harm to public justice system to undermine the public confidence on the efficacy of law. The sentence was, therefore, ixed at eighteen months. *Surjit Singh* v. *Mahara Ram*, AIR 2004 SC 4122 : 2004 Cr LJ 3878 : 2004(6) JT 251 : 2004(5) Supreme 748 : 2004(3) Crimes 222 (SC) : 2004 SCC (Cr) 1801.

Where in view of various overt acts, committed by them the sentence was sought to be enhanced, it was held that after a gap of 14 years it was not proper to enhance the sentence imposed by the High Court. *Bala Seetharamaiah* v. *Perik S. Rao*, 2004 Cr LJ 2034 : AIR 2004 SC 2172 : 2004(4) SCC 557 : 2004(4) JT 549 : 2004(2) Supreme 741 : 2004(2) Crimes 385 (SC).

Where accused was alleged to have inflicted injuries on members of prosecution party, who were close relatives, and the incident occurred in spur of moment sentence of 5 years' imprisonment was reduced to 2 years. *Iqbal Singh* v. *State of Rajasthan*, 2004 Cr LJ 4163 (Raj).

In a Rajasthan case, the sentence was reduced to period already undergone by him having regard to the fact that he had remained in jail and more than twenty one years had elapsed since incident occurred. *Roopa Ram* v. *State of Rajasthan*, 2004 Cr LJ (NOC) 278 (Raj).

Reduction of sentence. Since the notice issued by this Court was limited to the sentence alone, we refuse to go to the merits of the conviction, though the feeble attempt is made by the Learned Counsel to plead innocence on the part of the appellant. However, insofar as the sentence is concerned, we must take into account the affidavit sworn by Badlu Ram, the complainant, practically absolving the appellant. Though it will be of no use at this stage for pleading the acquittal, it is certain that the relations between the parties have improved.

It is also seen that the incident is 30 years old and after being released in 2006 on bail, it will not be proper to send the accused back to jail, more particularly, because nothing has been stated against him regarding his indulgence in any criminal activity. We are also mindful of the fact that the accused must have acted under the influence of his father, who was in fact, the main actor in the whole drama. It was he, who had filed the civil Suit and lost. The appellant, therefore, seems to have acted under the influence of his father. *Lastly*, there is nothing on record to suggest that the injuries were very serious and endangered the life of Badlu Ram. In fact, it is only on that ground, that the accused persons have been charged for offence under Sec. 326 IPC. In short, even if we agree that the conviction was justified for the reasons aforementioned, we lean in favour of the leniency in sentence. Accordingly, we confirm the conviction, however, limiting the sentence to that, which is undergone by the appellant. With these observations, the appeal is dismissed. *Radhey Shyam vs. State of Uttar Pradesh,* 2008 (14) SCC 558 : 2009 CrLJ 1107 : 2008 (14) Scale 686 : 2008 (16) SCR 131 : 2008 (9) SLT 510.

Quantum of Sentence. As per the opinion of the Autopsy Surgeon, the death of the deceased was caused due to extensive hemorrhage on account of shock due to injury No. 8 mainly and Injury Nos. 13 and 14 causing hemorrhage. They were incised wounds. Since accused persons abjured guilt, trial was held. Each of the accused persons was convicted as noted above. Appeals were filed before the High Court. So far as the appellant is concerned, it was submitted that he could not be convicted in terms of Sec. 302 read with Sec. 34 IPC as only accused Nanhe, according to the prosecution, caused incised wounds. The appellant was holding only a stick. The High Court relied on the evidence of two eye-witnesses PWs. 5 and 9 and held that the appellant cannot be held guilty of offence punishable under Sec. 302 read with Sec. 34 IPC. It was held that the prosecution has not proved that each of the participating culprits had the some intention and each one shared the intention of the other. The High Court noticed that the accused Prabhu and Jagdish had caused lacerated wounds and, therefore, the knowledge which can be inferred from the said acts is that they intended to cause grievous hurt. Accordingly, the conviction as noted above was altered.

Learned Counsel for the appellant submitted that the appellant cannot be convicted in terms of Sec. 326 read with Sec. 34 IPC. It was submitted that none of the injuries were grievous hurts and the sentence in any way is very harsh.

The heading of the Sec. provides some insight into the factors to be considered. The essential ingredients to attract Sec. 326 are : (1) voluntarily causing a hurt; (2) hurt caused must be a grievous hurt; and (3) the grievous hurt must have been caused by dangerous weapons or means. As was noted by this Court in *State of U.P. vs. Indrajeet Alias Sukhatha*, 2000 (7) SCC 249, there is no such thing as a regular or earmarked weapon for committing murder or for that matter a hurt. Whether a particular article can *per se* cause any serious wound or grievous hurt or injury has to be determined factually. At this juncture, it would be relevant to note that in some provisions e.g. Secs. 324 and 326 expression "dangerous weapon" is used. In some other more serious offences the expression used is "deadly weapon" (e.g. Secs. 397 and 398). The facts involved in a particular case, depending upon various factors like size, sharpness, would throw light on the question whether the weapon was a dangerous or deadly weapon or not. That would determine whether in the case Sec. 325 or Sec. 326 would be applicable.

Considering the principles set out above, certainly the appellant guilty of offence punishable under Sec. 326 read with Sec. 34 IPC. However, in the peculiar facts of the case, the sentence of 5 years rigorous imprisonment would meet the ends of justice. *Prabhu vs. State of Madhya Pradesh*, AIR 2009 SC 745 : 2008 (13) JT 72 : 2008 (16) SCR 1095 : 2008 (15) Scale 228 : 2009 (1) SLT 506.

7. Evidence and Proof.—When evidence of witnesses is consistent on involvement of accused persons and nature of injuries corroborated by medical evidence and evidence of eye-witnesses, conviction is justitied. *Thathanna* v. *State of A.P.*, AIR 1994 SC 652 : 1994 Cr LJ 632.

There was absolutely no reason to doubt the statements of witnesses with regard to the incident. An independent witness had been employed with the complainant party as well as the accused party at various times. It also appears that he was the focus of the quarrel and the motive that had precipitated the incident, as both the parties were pushing for employing which had led to the unpleasant situation between them. Likewise we find difficult to disbelieve the statement of the injured victim himself as he has given a graphic description as to what had happened. It is true, as has been contended, that there are some differences between the statements of these two witnesses but they are bound to occur with the evidence being recorded after about five years. It must also be borne in mind that a parrot like deposition after a long lapse of time smacks of tutoring and some differences in fact advance the credibility of the witnesses.

There is some uncertainty about the involvement of appellant No.l. The facts of the case indicate that she was perhaps not aware that Rakesh Bahal was carrying a weapon in his pocket or on his person. The prosecution evidence also reveals that it was only after the quarrel had reached a certain pitch that he had rushed inside the house and had brought a knife and caused the injuries to Satish Chandra. We also find that no specific overt act has been attributed to appellant No.1 and only a very tenuous role that has been ascribed to her. To our mind this kind of evidence creates a clear doubt as to her participation. Held that appellant No.1 must be given the benefit of doubt, and thereby acquitted. The appeal qua her is allowed.

Though the general condition of the patient was very bad yet there is no categoric statement in the medical certificate issued by doctor that the injuries were in fact dangerous to life. We are unable to fathom as to whether this was a deliberate omission or an oversight but whatsoever it may be the benefit must accrue to the accused. We have also gone through the evidence of doctor and find that he had admitted that he had not mentioned that the injury was dangerous to the life as he did not think it necessary to do so. At the same time we are unable to accept statement that the case would fall under Sec. 323 or 324 of the IPC but in the light of the statement of victim that he had remained in hospital for fifteen days due to the injuries caused to him, makes out a case of grevious hurt. Rakesh Bahal alone should thus be held guilty under Sec. 326 of the IPC simpliciter. We are told that he has already undergone almost one year of the sentence and in the light of the fact that the incident happened in the year 1987 when he was a young man of about 25 and now must be of middle age, we reduce the sentence to the period already undergone by him. *Neelam Bahal & Anr vs State of Uttarakhand*, 2010 AIR SCW 88 : AIR 2010 SC 428

Trial for offence under Section 326, IPC. Incident admitted to the accused—Oral and medical evidence corroborating each other—Hence conviction of the accused, held, proper. *Thathanna* v. *State of Andhra Pradesh*, (1994) 1 Cr C 428 (SC) : 1994 Cr LJ 632 : AIR 1994 SC 652.

When medical opinion is not able to explain how injury could have endangered life of deceased, conviction under Section 326, mis conceived. *Ashok Kumar Pradhan* v. *State of Orissa*, (1995) 3 Crimes 155 (Ori).

In appeal against conviction under Section 326, IPC, when injured was operated upon but medical evidence not produced, it he stablishes only simple injury. *Govind* v. *State of M.P.*, 1995 Cr LR 165 (MP).

Testimony of an important eye-witness whose presence at spot cannot be doubted. cannot be undermined by discrepancy in time of recording FIR. State *of Rajasthan* v. *Ani @ Hanif*, 1997 (1) Crimes 146 (SC) : AIR 1997 (SC) 1023 : 1997(1) JT 460 : 1997(1) Scale 287 : 1997 Cr LJ 1529.

8. Acquittal.—Trial for offence under Section 326, IPC and evidence firmly indicating towards the guilt of the accused.—Conviction of the accused not to be quashed on the ground of acquittal of the co-accuseds. *Sk. Bandar* alias *Badiruddin* v. *State of Orissa*, 1995 Cr LJ 63 (Ori).

On the adjourned date acquittal order cannot be passed by the Court—If order is passed, it shall be miscarriage of justice. *Azaz Hussain* v. *J.J. Jan*, (1994) 2 Crimes 741 (MP).

Both the appellants convicted under Sections 326/34, IPC—Revision petition was challenged of.—It was held that the averments made in bail application of these two appellants have to be read as a whole and when so read the averments relied upon by court below make out a case for assault on '*M*' on the hands of two appellants so as to warrant their conviction under Sections 326/34, IPC. Hence, set aside. *Dheera* v. *State of U.P.*, 1994 U.P. Cr R 400 : 1994 ACC 396 (All).

It seems that the accused party wanted to disarm the complainant party in a process while defending it caused numerous injuries. This aspect would not be sufficient to hold either that accused party itself was aggressor and not the complainant party or that accused had in any manner exceeded the right of private defence of person and property. Hence order of conviction and sentence passed by the trial court is set aside and accused are acquitted. *Hamam Singh* v. *State of Punjab*, (1994) 2 CC Cases 549 (P & H).

The complainant alleged that his right hand was fractured due to twisting by accused but as per medical evidence wound was grievous in nature and might have been caused by any blunt object. Evidence of victim and his brother were contradictory and untrustworthy and there was delay in lodging the complaint also. The conviction of accused was set aside. *Ambati Vykunta Rao* v. *State*, 2003 Cr LJ 241 (AP) : 2003(2) Crimes 255 (AP).

Where accused a juvenile, caused serious injury is vital part of the body of victim by Hasia but did not report blow, it was held that intention of accused to cause injury become doubtful and, therefore, the accused was entitled to the benefit of doubt. *Motilal Hansda* v. *State of Bihar*, 2005 Cr LJ 49 (Jhar) : AIR 2005 Jhar HCR 148 : 2004(4) JCR Jha 171 : 2004(4) JLJR 263.

In the instant case the accused was convicted only on the ground that injury was corresponding to the statement of one witness. The same evidence of other witnesses in relation to all other co-accused was not accepted. It was held that the conviction of accused was not proper, especially when the doctor's evidence was that injuries could have been caused by weapon other than seized weapon. *Mohan* v. *S. Mane*, 2006 Cr LJ 220 (Bom).

Conviction based on averments made in bail application of appellants—Averments was found to be not clear but ambiguous—Hence conviction based on such averments not proper and hence set aside. *Dheera* v. *State of U.P.*, 1994 ACC 396 : 1994 UP Cr R 400 (All).

9. Probation.—Causing of injury on head with *Gandasi* using *dang*-wise by accused—When was held guilty for offences under Sections 326/325/324/323, read with Section 34, IPC which was confirmed by Sessions Judge—Revision petition for same was filed. The Doctor admitted that sometimes an injury on head caused by blunt weapon may give appearance of incised wound. Hence, no offence under Sec. 326, IPC, is made out. Conviction under Secs. 323 & 324/34 confirmed. Accused bread winner of the family and had faced trial for 9 years and was not a habitual offender. Hence released on probation. *Pala Singh* v. *State of Punjab*, (1994) 1 Recent Cr R 286 (P & H).

10. Wrongful confinement.—Where deceased was beaten and confined in police custody and was arrested in a case under Section 307. His arrest and detention will not be illegal. From the evidence available on record both documentary and oral J.B. Katariya had caused injuries to deceased Virendra Singh while he was in police custody and even if it is not possible to say that he intended to cause the death of Virendra Singh, but he can certainly be clothed with the knowledge that the injuries which were being caused to the deceased at the police station were likely to cause his death though probably without any intention to cause his death, or even to cause such bodily injuries to him as were likely to cause death. The offence would fall under Section 304, Part II IPC. So far offence under Section 342 IPC is concerned it is admitted that deceased was not wrongfully confined. He was arrested in a case under Section 307 CPC. His arrest and detention was not illegal. His conviction under Section 342 IPC is set aside. *J.B. Katariaya v. State of U.P.* 2002 Cri LJ 2220 (All.) : AIR 2002 (SC) 1529 : AIR 2002 Kant HCR 990 : 2002(3) Scale 83 : 2002(2) Supreme 500.

11. Conviction.—Though injured was operated upon but the medical evidence was not produced, the evidence establishes a simple injury with a sharp weapon. Hence conviction altered to under Section 324. IPC and RI for one year and fine. *Govind* v. *State of M.P.*, 1995 Cr LR 65 (MP).

Revision against conviction. Accused persons armed with lathi, farsi and axe came at spot and assaulted complainant due to which he sustained grievous injuries from perusal of the record it is evident that both the Courts below concurrently found that the petitioners have committed offence for which the petitioners have been convicted. This Court is well aware about the limitation of this Court while exercising the revisional jurisdiction, which does not empower reappreciation of evidence. Hence, so far as conviction is concerned the judgment passed by the Courts below is maintained. *Toran Singh Yadav vs. State of M.P.*, 2010 (3) CrLJ 2601 (MP).

When the accused was convicted under Section 304, Part I, which was confirmed by High Court—Revision petition was filed. It was held that the accused caused simple injury with axe resulting in death. The said injury was not found sufficient to cause death in ordinary course. Hence conviction altered to one under Section 326, IPC. *Moti Lal* v. *State of Madhya Pradesh*, (1994) 3 Recent Cr R 77 (SC) : 1994 Cr LJ 1633 : 1994 (2) East Cr C 353.

Revision petition against conviction was filed. Deceased was injured with deadly weapons—While sleeping—Common intention was proved—Oral testimony not in contradiction with medical evidence—Conviction was held fully justified. *Pirthi* v. *State of Haryana*, (1994) 1 CC Cases 339 (P&H).

When accused was convicted under Section 326, IPC, and sentenced to rigorous imprisonment for two years—Revision petition and assailing for conviction and sentence was filed. There was material contradiction in evidence of victim in court and his statement before police under Section 161, Cr PC. Further, independent witnesses were not examined. The prosecution story appears to be twisted and doubtful. Hence conviction liable to be set aside. *Rabi Sahu* v. *State of Orissa*, 1994 Cri LJ 2226 (Ori).

When testimony of eye witness is that he saw accused with blood stained weapon coming out of house of victim, conviction under Section 326, is proper. *Prasad Mahato* v. *State of Bihar*. 1993 Cri LJ 3136 (SC) : AIR 1993 (SC) 2477 : 1994 SCC (Cr) 55.

Where accused convicted for offence under Section 304, Part II, which was converted into Section 326, IPC—Medical opinion not able to explain how injury could have endangered the life of the deceased—Hence, conviction under Section 326, misconceived—Blow was with knife, a dangerous weapon—Offence squarely covered by Section 324, IPC.—Conviction was altered to Section 324, IPC. *Ashok Kumar Pradhan* v. *State of Orissa*, (1995) 3 Crimes 155 (Ori).

Where contention of evidence cannot be relied upon for conviction—Case of molestation not established and accused sustaining injuries which remained unexplained. It was held difficult to maintain conviction u/S. 326, IPC. Hence, conviction and sentence set aside. *Dharam Pal* v. *State of Haryana*, (1995) 2 Crimes 629 (P&H).

When there is no infirmity in evidence of eye witnesses though interested ones, conviction is sustainable. *State of Maharashtra* v. *Hindurao Daulu Charapale*, 1997 (1) Crimes 407 (Bom).

It was alleged that six accused persons had assaulted the complainant and caused injuries to him. Appellant was found guilty under Section 326 and co-accused under Section 323 but they were acquitted of charge under Sections 147, 148 and 307. The accused on appeal *inter alia* pleaded the right of private defence. The accused as per evidence had run to house for fetching a tabli and then assaulted the victim and all this shows that there was time to have recourse to public authorities. So right of private defence plea was not sustained and conviction of accused and sentence awarded were confirmed. *Rizan* v. *State of Chhattisgarh*, 2003 Cr LJ 1226 (SC) : AIR 2003 (SC) 976 : 2003(2) SCC 611 : 2003(2) JT 191 : 2003(1) Supreme 890 : 2003(2) Crimes 125 (SC) : *See* also *Sri Shantanu Chakrabarty* v. *State of Tripura*, 2005 Cr LJ 4333 (Gau).

The accused was without any reason questioned by deceased and aggravated by it they wielded lathies and gave a single blow on head of deceased. Since incident occurred at the spur of moment without any intention of motive of causing death, they were convicted under Section 326/34. *Chowas Mandal* v. *State of Bihar (Jhar)*, 2004 CR LJ 1405 (SC) : AIR 2001 (SC) 1603 : 2004(1) Crimes 331 : 2004(2) Scale 217 : 2004(1) Supreme 861.

The accused had inserted his fingers and a stick in the vagina of his wife as a result of which she sustained heavy bleeding injury. Delay in lodging FIR properly and satisfactorily explained. The evidence of victim wife was satisfactory, trustworthy and convincing and corroborated by medical evidence with regard to nature and cause of injuries sustained by him. Mere non seizure of stick was not to affect the prosecution case. *Bomma Haiah* v. *State*, 2003 Cr LJ 2439 (AP) : 2003(1) ALD (crl) 965 : 2003(2) Andh LT AP 340.

Where accused as a member of unlawful assembly caused injury during a malice on which six persons had taken part, it was held that accused was guilty under Section 326 and not under Section 304. *Ranu* v. *State of UP*, 2004 Cr JL 1407 (SC) : AIR 2004 (SC) 1605 : 2004(2) JT 289 : 2004(1) Crimes 325 (SC).

The accused were alleged to have caused grievous hurt in a dispute and possibility of false implication even *prima facie* was ruled out. There was no serious discrepancy between statement of two injured eye-witnesses. The conviction under Section 326 and releasing the offender on probation upon furnishing the bond to keep good conduct was held proper. *Balbir Singh* v. *State*, 2003 Cr LJ 3148 (P&H) : 2003(55) Chand LR (Civ & Cri) 339 : 2003(2) Rec Cri R 204.

Where the accused threw acid due to which the victim was badly injured and one of his eyes was also destroyed, the conviction of accused under Section 326 was held proper. *Basudev Kar* v. *State* 2004 Cr LJ 1572 (Ori) : 2004(18) All Ind Cas 432 : 2004(1) Orissa LR 318.

The accused alongwith other members of unlawful assembly wanted to teach a lesson to prosecution witnesses and when deceased intervened he was shot dead. Evidence showed that there was no common intention of accused persons to cause death but only to cause grievous injuries. The conviction of accused was altered from under Section 302/149 to one under Section 326/149. *Chander Pal* v. *Rajpal* v. *State of Haryana*, 2004 Cr LJ 285 (SC) : Air 2004 (SC) 625 . 2003(8) JT 545 : 2003(4) Crimes 460 (SC) : 2003(8) Supreme 442.

In an Allahabad case, the accused allegedly inflicted knife blows on the victim body the accused being a co-villager was identified by the victim. She was successful in test of cross-examination. FIR was also lodged promptly. Conviction of accused under Section 326, 324 was held proper. *Bhudevo Snigh* v. *State*, 2004 CR LJ 4544 : 2004 All LJ 3508 : 2004(50) All Cri C 203 : 2004(3) Crimes 611.

Members of unlawful assembly chased deceased and assaulted him and while coming back one of the assailants caused injuries to the injured witness. It was held that all are liable to be convicted with the aid of Section 149 and Section 326 could not be applied in case of accused assailant alone. *State of Maharashtra* v. *Kashirao*, 2003 Cr LJ 4464 (SC) : AIR 2003 (SC) 3901 : 2003(10) SCC 434 : 2003(7) JT 437 : 2003(6) Supreme 294 : 2003(4) Crimes 74 (SC).

In a Gauhati case, the injured who had lost his firearm had implicated accused as sole assailant. There was no material on record to show that the prosecution case could not be believed. It was held that minor contradictions or omissions could not make prosecution case doubtful and that the conviction was proper. *Atiqur Rahman Mazumdar* v. *State of Assam*, 2004 Cr LJ 2362 (Gau) : 2005(1) Gau LR 91.

12. Murderous assault.—The deceased had died either because of his own negligence or the reason could be medical illiteracy or lack of awareness because he used to go to a Medical Assistant in a village dispensary for getting the bone treated which was not proper approach. In any case he has died because of the perforation of the wound which was stitched by Doctor S. L. Kachroo. This was a grievous hurt caused by means of an instrument used for stabbing or cutting and since the dagger or the sword when used as a weapon of offence is likely to cause death, therefore, the accused are guilty of causing voluntarily grievous hurt by use of a dangerous weapon. They are, therefore, guilty of an offence punishable under Section 326 read with Section 34 IPC. *State v. Abdul Rashid and Others* 2002 Cri LJ 3118 (J&K).

The death of deceased was caused due to single head injury inflicted by the accused and occurrence had taken place in front of the house of the deceased in which his son was also injured. The prosecution had failed to show complications of injury and other intervening circumstances causing the death. The prosecution also did not produce doctor as witness who had treated the deceased. It was held that accused could only be convicted under Section 326/324 and not for offence of murder. *Kathandapani* v. *State*, 2003 Cr LJ 151 (Mad) : 2002(2) Mad LW (Cri) 826.

Where the accused caused gun-shot injuries to deceased but death was not the direct result of the said injuries as the deceased died after one and a half month of occurrence and in between he had also been operated upon, it was held that the accused could be held guilty under Section 326 and not under Section 302, IPC. *Dev Raj* v. *State of Punjab*, AIR 1992 SC 950 : 1992 Cr LJ 1292 : 1992(2) JT 302 : 1992(1) Crimes 980 : 1992 SCC (Cri) 519 : 1992(1) Scale 608.

The accused had caused injuries on leg of deceased by means of *Katari* and medical evidence showed that if best of the treatment would have been provided immediately the death might not have occurred. Moreover accused had no knowledge that the injuries would cause death and also had no intention to do it. The conviction for murder was set aside. *Anama Naik* v. *State*, 2003 Cr LJ (NOC) 39 (Orissa) : 2002(3) All Cri LR 64 : 2002(93) Cut LT 28 : 2002(2) Rec Cri R 437.

Where the accused person had assaulted the deceased and the medical evidence showed that none of the injuries even collectively appeared to be dangerous to life, the conviction was altered from under Section 302 to one under Section 326 34. *State of Haryana* v. *Manga Ram*, 2003 Cr LJ 830 (SC) : AIR 2003 (SC) 558 : 2003(1) SCC 637 : 2002(10) JT 240 : 2003(1) Crimes 250 (SC) : 2003(1) Supreme 39.

13. Applicability.—Some hurts which are not like those hurts which are mentioned in the first seven clauses, are obviously distinguished from a slight hurt, may nevertheless be more serious. Thus a wound may cause intense pain, prolonged disease or lasting injury to the victim, although it does not fall within any of the first seven clauses. Before a conviction for the sentence of grievous hurt can be passed, one of the injuries defined in Sec. 320 must be strictly proved, and the eighth clause is no exception to the general rule of law that a penal statute must be construed strictly. *Prabhu vs. State of Madhya Pradesh*, AIR 2009 SC 745 : 2008 (13) JT 72 : 2008 (16) SCR 1095 : 2008 (15) Scale 228 : 2009 (1) SLT 506.

14. Compromise.—In *Ram Lal* v. *State of J & K*, 1999, JT (SC) 147 : AIR 1999 SC 895 : 1999(2) SCC 213 : 1999(1) JT 147 : 1999(1) Scale 162 : 1999 Cr LJ 1342, the court referred to the decision of this court in *Y. Suresh Babu* v. *State of A.P.*, (1987) 2 JT (SC) 361 and held as under:—

> "We gave our anxious consideration to the case and also the plea put forward for seeking permission to compound the offence. After examining the nature of the case and the circumstances under which the offence was committed, it may be proper that the trial court shall permit them to compound the offence."

In *Ram Pujan* v. *State of U.P.*, 1973 Cr. LJ 1612 : AIR 1973 SC 2418, the court held that the major offences for which accused have been convicted were no doubt non-compoundable, but the fact of compromise can be taken into account in determining the quantum of sentence.

In the case of *Y. Suresh Babu* v. *State of A.P.*, (1987) 2 JT (SC) 361 the court has specially observed that the said case "shall not be treated as a precedent". The aforesaid two decision are based on facts and in any set of circumstances, they can be treated as per incuriam as pointed attention of the court to sub-section (9) of section 320 was not drawn. Hence, the High Court rightly refused to grant permission to compound the offence punishable under section 326.

In *Surendra Nath Mohanty* v. *State of Orissa*, 1999 Cri LJ 3494 (SC) : 1998(8) SCC 387 : 1998(9) JT 1991 : 1999(2) SLT 478(2), the Apex court discussed the law as under:—

> "We reiterated that the course adopted in *Ram Pujan* v. *State of U.P.* AIR 1973 SC 2418: 1973 Cr LJ 1612 and *Mahesh Chand* v. *State of Rajasthan*, AIR 1988 SC 2111 : 1989 Cri LJ 121 (Supra) was not in accordance with law. However, considering the fact that parties have settled their dispute outside the court and the fact that 10 years have elapsed from the date of the incident and the further fact that appellants have already undergone 3 months' imprisonment as per the sentence imposed on them we think that ends of justice would be met if the sentence of imprisonment is reduced to the period already undergone besides imposing a fine of Rs. 5000/- on each of the accused under Section 326 read with section 34, IPC, we reduce the sentence as indicated above and direct that in default of payment of fine, the appellant concerned shall undergo simple imprisonment for a further period of three months. We also refrain from imposing

any separate sentence on the other counts of offences. Out of the fine amount, if realised, a sum of Rs. 9000/- also be paid to the injured as compensation"

15. Voluntary causing hurt.—Absence of torch light or electric light at time of occurrence is immaterial when accused were either close relations or co-villagers of witnesses, as there can be no mistaken identity. *Shyama Pradhan* v. *State*, 1996 Cri LJ 2936 (Ori).

Where it was allegation against the accused that he hit his sister in-law with injured in angry attitude and where evidence of eye-witnesses were found truth worthy and there is nothing change could be brought through cross examination ; it was held that medical evidence and the evidence of other witnesses have corroborated the prosecution story and therefore, conviction of accused held proper. *Ravendra* v. *State*, 1997 Cr LJ 171 (Mad).

16. Free fight.—In free fight between two groups when accused inflicted are injury on head of deceased, he was not responsible for other fatal injury caused to deceased. *Amrik Singh* v. *State of Punjab*, 1993 Cri LJ 2857 (SC) : 1999(9) SCC 132 : 1999(236) ITR 38.

17. Volunteering causing grievous hurt.—Where from the medical evidence in Medical report it was obvious that Zaibunnisa sustained deep superficial burns on right side of face, right eye, both upper extremity right side to neck, upper chest wall and loss of vision of right eye and disfiguration of right ear. Similarly, Azra Sutana sustained injuries at the right side portion of her face, right nostrils upper extremity, chest wall etc. These facts will be very clear from Ex. 57/1, 57/2 and 57/3 the photographs of zaibunnisa and Exh. 59 the photographs Azra Sultana after the incident. Therefore there was nothing to interfere in the order of conviction of accused. *Syed Shafiq Ahmed v. State of Maharashtra and Others*, 2002 Cri LJ 1403 (Bom.): 2002 All MR (CRI) 1617 : 2001(3) Mah LR 726.

Revision against conviction. Accused persons armed with lathi, farsi and axe came at spot and assaulted complainant due to which he sustained grievous injuries from perusal of the record it is evident that both the Courts below concurrently found that the petitioners have committed offence for which the petitioners have been convicted. This Court is well aware about the limitation of this Court while exercising the revisional jurisdiction, which does not empower reappreciation of evidence. Hence, so far as conviction is concerned the judgment passed by the Courts below is maintained. *Toran Singh Yadav vs. State of M.P.*, 2010 (3) CrLJ 2601 (MP).

This Court do find absolutely no reason to doubt the statements of witnesses with regard to the incident. An independent witness in as much that he had been employed with the complainant party as well as the accused party at various times. It also appears that he was the focus of the quarrel and the motive that had precipitated the incident, as both the parties were pushing for employing which had led to the unpleasant situation between them. Likewise we find difficult to disbelieve the statement of PW. 3 the injured victim himself as he has given a graphic description as to what had happened. It is true, as has been contended that there are some differences between the statements of these two witnesses but they are bound to occur with the evidence being recorded after about five years. It must also be borne in mind that a parrot like deposition after a long lapse of time smacks of tutoring and some differences in fact advance the credibility of the witnesses. We also find that the counter version given by the accused cannot be accepted. The accused has claimed that PW. 3 had an evil eye on Neelam Bahal but if that was the reason for the incident they were further called upon to explain as to how the injuries had been suffered by PW. 3, more particularly, as the incident had apparently taken place outside the residential home of the appellants.

We are, however, of the opinion that there is some uncertainty about the involvement of Neelam Bahal, Appellant. The facts of the case indicate that she was perhaps not aware that Rakesh Bahal was carrying a weapon in his pocket or on his person. The prosecution evidence also reveals that it was only after the quarrel had reached a certain pitch that he had rushed inside the house and had brought a knife and caused the injuries to Satish Chandra. We also find that no specific overt act has been attributed to Neelam Bahal and only a very tenuous role that has been ascribed to her. To our mind this kind of evidence creates a clear doubt as to her participation.

We are, therefore, of the opinion that Neelam Bahal, Appellant must be given the benefit of doubt, and thereby acquitted. The appeal *qua* her is allowed.

A reading of the above would indicate that though the general condition of the patient was very bad yet there is no categorical statement in the medical certificate issued by doctor that the injuries were in fact dangerous to life. We are unable to fathom as to whether this was a deliberate omission or an oversight but whatsoever it may be the benefit must accrue to the accused. We have also gone through the evidence of doctor and find that he had admitted that he had mentioned that the injury was dangerous to the life as he did not think it necessary to do so. At the same time we are unable to accept that the case would fall under Sections 323 and 324 of the IPC but in the light of the statement of victim that he had remained in hospital for fifteen days due to the injuries caused to him, makes out a case of grievous hurt. Rakesh Bahal alone should thus be held guilty under Section 326 of the IPC simpliciter. We are told that he has already undergone almost one year of the sentence and in the light of the fact that the incident happened in the year 1987 when he was a young man of about 25 and now must be of middle age, we reduce the sentence to the period already undergone by him. *Neelam Bahal and Anr. vs. State of Uttarakhand*, 2010 (2) CrLJ 2100 (SC).

18. Sex crime.—The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood. The High Courts would therefore be well-advised to draw the attention of the trial courts to be amended provisions of Section 327, Cr. P.C. and to impress upon the Presiding Officers to invariably hold the trial of rape cases in cameras, rather than in the open court as envisaged by Section 327(2) Cr. P.C. when trials are held in camera, it would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the court as envisaged by Section 327(3) Cr. P.C. This would save any further embarrassment being caused to the victim of sex crime. *Trilochan Singh Johar and Another v. State and Another*, 2002 Cri LJ. 3268.

19. Principles of Unlawful assembly—Applicability.—Accused persons armed with deadly weapons went to house of victim and inflicted farsa blow on his head and injuring to others.

A close scrutiny of the statements of all the prosecution witnesses reveal that there was a free fight amongst the Complainant Party and the present appellants, during which complainant and his mother sustained injuries and the appellants also sustained injuries, therefore, in such a situation, it would not be a safer course, for the Court to apply the principles of Sections 147, 148 and 149 of IPC to sustain the conviction of the present appellants under Sections 147, 148 and 149 of IPC in view of the specific overt acts of the appellants, however, they can safely be convicted under Section 323 of IPC. Consequently, the present appellants are convicted only under Section 323 of IPC. *Babla and Anr. vs. State of Madhya Pradesh*, 2010 (3) Cri LJ 3061 (MP) (Gwalior).

Where in a murder trial no charge was framed under Sec. 149 (S. 300 read with Sec. 149), However, the charges as framed made it clear that Court specified that accused persons were members of unlawful assembly and in prosecution of the common object of such assembly, i.e., in order to commit murder of deceased, committed offence and at that time they were armed with daggers etc. to bring in the application of Sec. 148 and in Charge No. 3, there was a specific reference to the transactions, as mentioned in the first charge, and the object to commit murder by hacking on the body of the deceased with daggers and causing his intentional death and thereby committing offence punishable under Sec. 302 IPC, the charge in relation to offence punishable under Sec. 149 IPC was thus, not only implicit but also patent in the charges and no prejudice could have been caused to accused due to non-framing of charge under Sec. 300 read with Sec. 149. Consequently, order of High Court that in the absence of charge under Sec. 302 read with Sec. 149 IPC, they could not have been convicted under Sec. 302, but that each would be liable for conviction for offence punishable under Sec. 326 would be liable to be set aside. Further, if conviction under Sec. 300 read with Sec. 149 could not have been made in the absence of charge, conviction in terms of Sec. 326 also could not be made. *Dumpala Chandra Reddy v. Nimakayala Balireddy and Ors.*, AIR 2008 SC 3069 : 2008 (10) SCR 938 (SC) : 2008 (8) SCC 339 : 2008 (8) JT 117 (SC) : 2008 (10) Scale 178 (SC) : 2008 (5) Suprem 129 (SC) : 2008 CrLJ 3936 (SC) : 2008 (3) SCC (Cr) 493 : Crimes 71 (SC).

20. Offence of Attempt to murder.—The High Court has completely overlooked the evidence on record and the impugned judgment shows total non-application of mind. The High Court observed that the doctor has not stated that the injury was sufficient to cause death in the ordinary course of nature. PW. 1 had noted that 1/3 of the leg was chopped off below the knee. He had categorically stated that the injury could have caused death. The Doctor clearly stated that the aforesaid chopping of the leg was grievous in nature. With some strange logic the High Court observed that merely on the testimony of witness it cannot be assumed that the injury was sufficient to cause death in ordinary course of nature.

The evidence of PW. 5 the victim clearly shows the gruesome nature of the attack and the intention of the accused persons. According to him, two accused Ram Singh and Bapulal caught hold of him. He was laid down on the ground and the accused Krishan Lal chopped out the left foot and Ram Singh caught hold of his left leg and Bapulal caught hold of his right leg, Arjun caught hold of his leg and Krishan Lal kept his legs on his left hand and put clothes in his mouth and caught hold of his head. Leela Krishan said that his foot jaw has been chopped off and the heels should also be chopped out. Accused Suraj Singh kept his leg on a log of wood and Leela Krishan chopped out his feet by axe from above the ankle. The trial Court noticed that the leg was chopped out between the knee and the ankle. Krishan Lal asked Ram Singh to keep the chopped pieces of the leg in the bag and Ram Singh picked up the pieces of legs and kept them in the bag. Though accused Arjun Singh asked that both his eyes should be taken out, accused Ganga Ram told him that chopping of his one leg was sufficient to cause his death.

Thereafter the High Court directed suspension of sentence. By then they had suffered custody for about 3 months 15 days more. There was no similarity in the period of sentence already suffered by the accused persons when the High Court passed the impugned judgment.

Looked at from any angle the judgment of the High Court is clearly unsustainable, deserves to be set aside which we direct. The judgment of the trial Court stands restored so far as conviction as well as the sentences are concerned. *State of M.P. v. Kashiram,* AIR 2009 SC 1642 : 2009 (4) SCC 26 : 2009 CrLJ 1530 : 2009 (9) JT 140 : 2009 (1) SCR 806 : 2009 (2) Scale 118 : 2009 (1) SLT 765 : 2009 (2) JCC 872.

Appellant had intention to commit murder as he threw full glass of acid on body of injured informant, causing extensive injury. Prosecution proved case beyond reasonable doubts against appellant. He has rightly been found guilty under Sections 341, 323, 326 and 307/34. *Amar Soni & Anr vs State of Jharkhand,* 2010 (4) CriLJ 4003 (Jhar).

21. *De facto* complainant.—To cause "grievous hurt" it is not necessary that any weapon of offence must be used. Even without any weapon, an injury of the nature mentioned in Section 320 could be caused. The offence under Section 325 is voluntarily causing grievous hurt. It does not speak of user of any weapon of offence. That does not mean that to attract Section 326, not only that grievous hurt should be caused and a weapon of offence of the kind mentioned therein is used, the injury must be one which is likely to cause death. Section 326 in clear and unambiguous terms provides that the instrument referred to therein is of such a nature that if it is used as a weapon of offence, it is likely to cause death. The expression "is likely to cause death" is attributable to instrument which is used as weapon of offence and not to the "grievous hurt". If grievous hurt is caused using a weapon of offence of the nature mentioned in Section 326, it becomes a graver offence for causing grievous hurt. To constitute a 'grievous hurt', it is not always necessary that the kind of hurt should be one which "is likely to cause death". All the kinds of hurt mentioned as "first" to "eighthly" in Section 320 would constitute grievous hurt. Only the eighth clause therein mentions about "hurt which endangers life". This by itself is sufficient to arrive at the conclusion that the injury caused need not be one which is likely to cause death, in order to attract Section 326. *Sreekumar v. State of Kerala and another,* 2009 CriLJ 3862 (Ker).

* * * * *

Sec. 327. Voluntarily causing hurt to extort property, or to constrain to an illegal act.—Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal or which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Scope 2093
2. Person interested in the sufferer. 2093
3. Procedure....2093
4. Charge. 2093
5. Separate conviction. 2093
6. Offence. 2093
7. Plea of false implication not tenable. 2093

1. Scope.—"The bodily hurt is inflicted by way of torture. The excitable cruelties which are committed in India by robbers, dacoits, *etc*, for the purpose of extorting property, or information relating to property render a severe punishment necessary. The section applies not only to such cases, but to all cases in which the hurt is for purpose of extorting, or compelling against the sufferer's consent, the delivery of property, notwithstanding that the offender may have valid claim or title to such property".—*Morgan and Macpherson.* Torture by means of stinging rattles, the effect of which was to extort property, is an offence under this section. 18 WR Cr 8.

2. Person interested in the sufferer.—"Any tie of blood relationship, marriage service or even friendship, seems sufficient. The Court must ascertain for what purpose the suffering was caused, whether it was directed wholly at the sufferer or at another through him. Besides the purposes above referred to, of extorting property or information relating to property, another purpose may be to constrain to any illegal act".—*Morgan and Macpherson.*

In case of discrepancy in the prosecution evidence regarding plain sheet of paper, the acquittal was held justifiable under Section 327, IPC, 1983 Raj Cr Case 166.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compound-able—Triable by a Magistrate of the first class.

4. Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That on or about the......day of....at......you voluntarily caused hurt to *A*, *B* for the purpose of extorting from the *A*, *B* (or from a certain interested in the said *A*, *B* to wit.......) a certain property to wit...... and thereby committed an offence punishable under Section 327, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by the said Court on the said charge.

5. Separate conviction.—It is doubtful whether separate convictions under Section 147, and this section are legal. 8 CLR 390.

6. Offence.—The evidence was that mother-in-law caused injuries on person of deceased who committed suicide. The Supreme Court held that the offence was made out and seeking her old age sentence of fine of Rs. 3,000/-was imposed. *State of M.P.* v. *Nikku* Ram, AIR 1996 SC 67.

7. Plea of false implication not tenable.—The question is as to whether of enmity. The factum of injuries to persons had really seen the assailants, they would normally not let them go and substitute them by imaginary persons. That is against the rule of nature, since the injuries were there, only the real assailants could have been implicated and not substituted by others. *Babu* v. *State*, 1996 Cr LJ 2116 (All).

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Sec. 328. Causing hurt by means of poison, etc., with intent to commit an offence.—Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxication or un-whole-some drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.

Synopsis

1. Scope 2094
2. Hurt 2095
3. Procedure 2096
4. Charge 2096
5. Offence 2096
6. Administration of drug—Error in stating offence 2096

1. Scope.—In order to convict a person of an offence under this section mere administration of the drug will not do. There must also be evidence to show that such administration was with the intent specified in the section and to cause injury to the person to whom it was administered. 15 Cr LJ 512 ; 25 Cr LJ 517 ; 46 All 27 ; 4 Bom LR 425 ; 1 Weir 335 ; 30 All 568 ; AIR 1931 Pat 346 : 32 Cr LJ 1228 : 134 Ind Cas 639 ; 60 Ind Cas 50 : 22 Cr LJ 194 : 3 LLJ 191 : AIR 1942 Mad 100 : 43 Cr LJ 320 ; AIR 1941 Mad 832 ; AIR 1931 Pat 346 : 32 Cr LJ 1228. "This offence is complete although no hurt is caused to the person to whom the poison or drug is administered. It is sufficient if he is induced to take it by a person who has any such intention as is specified in the section or who knows that it is likely to cause hurt. A person who knowingly causes another to take poison, may be presumed without further proof to intend to cause hurt unless he is able to show satisfactorily a good intention, *e.g.*, that it was administered in good faith medicinally. Stupefying, intoxicating, or unwholesome drugs or liquors may often be given and taken by those who knew their qualities, or who have no intention to cause hurt or to commit an offence by means of them. Where such things are administered, the criminal intention, which is an essential portion of the offence here defined, should be made to appear to the satisfaction of the Court. The sale of intoxicating or unwholesome liquors or drugs by persons who know their qualities, and that they are likely to cause hurt, is not, it seems, an offence falling under this section".—*Morgan and Macpherson.*

The accused was not knowing that arrack mixed with small quantity of methyl alcohol was likely to cause death. Hence Section 203, IPC, or even Section 304, IPC was not applicable. *Joseph Kurian* v. *State of Kerala*, 1995 Cr LJ 502 (SC) ; 1995 SCC (Cr) 20 : (1995) 1 East Cr C 487 : 1995 Cr R 325 (SC).

In a Jharkhand case, there was no evidence to show that the accused had knowledge that the herbal which he sold to deceased for treatment of a particular disease. There was total absence of motive or intention to commit murder. Prosecution witness, who had also taken the same herbal with curd and rice was alive. The post-mortem report showed that the cause of death was due to fracture of ribs of both sides of chest with injury to lungs, internal haemorrhage and shock. It was held that the possibility of existence of indosulphan in curd could not be ruled out. *Shankar Mandal* v. *State of Bihar*, 2004 Cr LJ (NOC) 190 : AIR 2004 Jhar HCR 2001 : 2003 (3) East Cri C 216.

The seizure memo in respect of the recovery of mustard oil from Ram Lalit dated 12.2.1999 shows that the tin from which the sample of mustard oil was taken has not been described at all. All that it says was that the tin was open and it contained half a tin of mustard oil. There is no mention if the tin had any marking of the manufacturer or of the seller. As against this the tin recovered from the premises of the petitioner bears a label of "Nandi Brand Mustard Oil" Kachhi Ghani, 15 kg filtered crushed by kolooh, Manufactured by Haryana Oil Industries, Bhiwani Road, Rohtak", and further a sticker carrying the words "Representative sample tested in competent laboratory and certified unadulterated" were fixed. Further on the cap of the tin the words "Nandi Brand double filtered 100% pure mustard oil Haryana Oil Industries, Rohtak – 124051" were printed. No bill of any kind showing sale of mustard oil by the petitioner to co-accused Ram Lalit has been recovered by the investigation.

It appears, therefore, that the only link between the petitioner, Kailash Chand Gupta and the offence of sale of adulterated mustard oil which was poisonous, is the statement of co-accused, Ram Lalit. The investigation has not procured any evidence to show that the contents of the tin recovered from Ram Lalit could not have been supplied to him by anyone other than the petitioner. The label, sticker and the print on the tin recovered from the petitioner showed that the manufacturer of the oil was Haryana Oil Industries. Therefore, the oil recovered from Ram Lalit could have been supplied to him by any manufacturer of oil and even if it was the same oil which was produced by Haryana Oil Industries the same could have been supplied to him directly by Haryana Oil Industries or by any other middle-man. Thus the very foundation of the charge against the petitioner, namely the link of the sale of adulterated/ poisonous mustard oil and the petitioner is missing. Thus the petitioner cannot be charged for the offence under Section 328, IPC. *Kailash Chand Gupta* v. *State*, 2005 Cr LJ 2846 (Delhi) : 2005(2) Crimes 359 : 2005(2) Cur Cri R 138 : 2005(118) DLT 60 : 2005(1) FAC 140.

2. Hurt.—In order to constitute an offence under the section it is not necessary that the hurt should be caused to any particular person intended or that the person injured or likely to be injured should have been previously known. 5 BHC Cr 50 ; 5 LBR 79. The accused called in a "medicine mean" to detect a case of theft. The latter told the accused that he could administer the juice of some leaves to all the villagers, and that it would cause the belley of the thief to swell. The medicine man mixed some drug with the juice in presence of the accused and those who took the medicine really submitted themselves to the deal. Three of them showed symptoms of having been poisoned and suffered severely for upwards of a fortnight. *Held*, the accused had committed an offence under Section 328, for having caused in unwholesome drug likely to cause hurt to be administered. 1 Weir 335. The words "or other thing" in Section 328, of the Penal Code must be suffered to the preceding words and be taken to mean "unwholesome" or "other thing" and not other thing simply. 1 WR Cr 7. The offence of administering drugs, when life was not endangered, is punishable under Section 328, Penal Code, and not as for grievous hurt under Section 326. 4 WR Cr 4. Accused administering small dose of poison (opium) not capable of causing death, offence is one under Section 328, and not under Section 327. (1956) 9 Sau LR 307 : 1957 AWR (Sup) 1. Held, on facts that according to Modi's Medical Juris-prudence and Toxicology (XIII Ed.) page 625, the seeds of *dhatura* were reputed to have any *approdiastic* property. It was also sometime given as love philter. It might, therefore, be that the *dhatura* in the instant case might have been administered by the appellant to her husband not with an intent to cause hurt to him but as a love philter or as an *aprodissiac.* But it cannot be controverted that knowing *dhatura* to be a poison, one who administers it does it with knowledge to cause hurt. 1963 MPLJ (notes) 88.

The accused sold a bottle of liquor to the victim without knowing that it contained poison and the victim died after consuming the liquour, it was held that the accused was guilty under Section 328, as there was no *mens rea* 1980 (UP) Cr LR 105. *See* AIR 1975 SC 241 : 1974 Cr LJ 1249 (compounder dispensing deleterious substance to his own doctor) : 74 CWN 424 (accused administering a small dose of poison which did not prove fatal, accused guilty under Section 328, and not under Section 307).

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable—Triable by Court of Session.

4. Charge.—I (*name and office of the Sessions Judge, etc.*), hereby charge you (*name of the accused*) as follows :—

That on or about the......day of....at.....you administered to *AB* a certain poison, to wit...... (or any stupefying thing, *etc.*), or caused the same to be taken by *AB*), with intent to cause hurt to the said *AB* (or knowing it to be likely that you will thereby cause hurt to the said *AB* or with intent to commit or facilitate the commission of the offence of......upon the said *AB*), and thereby committed an offence punishable under Section 321, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by the said Court on the said charge.

5. Offence.—The chain of circumstances leading to the death of deceased was not complete as against the accused appellant and it cannot be said to be leaving no room for any other hypothesis except the guilt of the accused/appellant. Therefore, offences under Section 328 and 302 of the Indian Penal Code was not made out against the accused/appellant. *Kaushal Prasad* v. *State of M.P.*, 1996 Cr LJ 2268 (MP).

6. Administration of drug—Error in stating offence.—The charge under Section 304 framed against the appellant-accused was with definite allegation of culpable homicide not amounting to murder by reason of administration of drug without taking precaution for reaction there from. This is totally different from causing hurt by means of administration of unwholesome drug. On no count a definite charge of culpable homicide can be an error for causing hurt. Going by Sec. 214, Cr. P.C., in every charge words used in describing an offence shall be deemed to have been used in the sense attached to them by law under which such offence is punishable. Therefore, to construe the section relating to culpable homicide as only an error for causing hurt by unwholesome drug will lead to misleading so far as the accused is concerned resulting in failure of justice so far as his opportunity to defend is concerned. Therefore, the contention that mentioning of Section 304, I.P.C. in the charge was only an error for Section 328, I.P.C., the ingredients of which have been brought in evidence, and therefore, the conviction can be confirmed as under Sec. 328, I.P.C., as the accused is in no way prejudiced by such error in stating the offence, would not be tenable. *Radha Sasidharan v. State of Kerala,* 2006 CriLJ 4702 (Ker).

* * * * *

Sec. 329. Voluntarily causing grievous hurt to extort property or to constrain to an illegal act.—Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything that is illegal or which may facilitate the commission of an offence, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Synopsis

1. Amendment....2097
2. Scope....2097
3. Non-compliance of Sections 239 and 240....2098
4. Procedure....2098
5. Charge....2098

1. **Amendment.**—The words in italics were substituted for the words "transportation for life" by Act 26 of 1955, Sec. 117, and Sch with effect from 1.1.1956.

2. Scope.—*Vide* notes under Section 327. Grievous hurt under the like aggravated circumstances is here made punishable. What is made punishable under Section 329, is constraining the person to do illegal act. So when no hurt is caused to a person to compel him to write off a debt or to withdraw a suit to enforce it, no offence would be made out under Section 329, because writing off a debt or withdrawing a suit to enforce it is not an illegal act. AIR 1951 Sau 49 : 5 AI Cr D 291 : 52 Cr LJ 704.

"The use of the word constraint implies that a person is controlled or obstructed from doing an act which the person wants to do. The applicants allegedly wanted to obstruct complainant from deposing against them in another criminal case. The question is if they were trying to force him to an illegal act. It is clear from the definition that whatever be an offence within the meaning of the Penal Code would be covered by it. The legislature has made elaborate provisions in the Code itself regarding evidence. If a person refuses to take oath or state of affirmation before a court of law, he is liable to be punished under section 178 of IPC. If a person refuses to answer question as a witness in a court of law he is liable to be punished under section 179, IPC. The complainant may be required to commit any of the aforesaid offences by constraint put upon him by the applicants. It is not in dispute that pursuant to their intention of preventing the complainant from giving evidence against the applicants, they caused him voluntarily grievous hurt. Thus, applicants were requiring him to commit an offence within the meaning of Indian Penal Code. They were forcing him to an illegal act if facts stated in the chargesheet are true. Consequently, charge under section 329, IPC was rightly framed against the applicants." *Ameen* v. *State of M.P.*, 2001 Cri LJ 1947 (MP) : 2001(2) MPHT 144 (M.P.).

Of the two injuries caused to the victim, one was located chest which was grievous and the other upon the thigh which was simple, it was held that the absence of any evidence which of these injuries were inflicted by the accused should have been convicted under Section 327, for causing a simple hurt with a sharp weapon. (1976) 1

SCC 406. The accused, a police officer, can not be convicted without sanction of the State or Central Government. AIR 1967 All 519 : 1967 CrLJ 1463 ; 1979 CrLJ (NOC) 161.

3. Non-compliance of Sections 239 and 240.—Order sheet is silent about the compliance of Sections 239 and 240, Criminal Procedure Code. Magistrate did not hear the accused and the prosecution on the question of charges. It is the duty of the Court to hear prosecution and accused and consider the material available before him before passing the order framing of charge, which is not done in the present case. Nor Magistrate has recorded his opinion that there is sufficient ground to presume that the accused has committed an offence triable by him and in his opinion accused could be adequately punished by him.

The learned Magistrate shall hear the prosecution and accused and shall consider every material produced before him and thereafter learned Magistrate shall pass appropriate order either to discharge the accused or to frame the charges against the accused in accordance with law. *Vijay Kumar Agarwal vs. Mahesh Kumar Agarwal*. 2010 (2) CrLJ 1753 (Uttrakhand).

4. Procedure.—Cognizable—Warrant—Not compoundable—Not Bailable—Triable by Court of Session.

Offence under the section is liable by the Sessions Court and therefore neither the Super of the Central Jail nor the IR of Proves was competent the prisons. (1981) 1 Cal HN 43 : (1981) 1 CLJ 42.

5. Charge.—*See* charge under Section 327, substituting 'grievous hurt' for the word 'hurt'. Refusal to frame charge in the fact of the case was proper. 1980 Raj Cr C 145.

* * * * *

Sec. 330. Voluntarily causing hurt to extort confession, or to compel restoration of property.—Whoever voluntarily causes hurt for the purpose of extorting from the sufferer or any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Illustrations

(a) *A*, a police-officer, tortures *Z* in order to induce *Z* to confess that he committed a crime. *A* is guilty of an offence under this section.

(b) *A*, a police-officer, tortures *B* to induce him to point out where certain stolen property is deposited. *A* is guilty of an offence under this section.

(c) *A*, a revenue-officer, tortures *Z* in order to compel him to pay certain arrears of revenue due from *Z*. *A* is guilty of an offence under this section.

(d) A, a *zamindar*, tortures a raiyat in order to compel him to pay his rent. *A* is guilty of an offence under this section.

Synopsis

1. Elements 2099
2. Cases 2099
3. Sanction..2100
4. Sentence 2100
5. Framing of charges..2100
6. Procedure..2101
7. Charge 2101

1. Elements.—There must be connection between the assault and restoration of property. 5 Pat LW 106. It must be proved that the assault was inflicted for the purpose of extorting confession or restoration of property. 46 Ind Cas 525 : 5 Pat LW 109 : 19 Cr LJ 749 ; 13 WR 23 Cr ; 138 Ind Cas 134 : 33 Cr LJ 557 : 35 MLW 61 : 1932 MWN 65 : 62 MLJ 223 : AIR 1932 Mad 214. A police man who stands by, acquiescing in an assault on a prisoner committed by another police man for the purpose of extorting confession or information leading to the detection of the crime is guilty of an offence under this section. In such a case the maxim "*Respondent Superior*" has no application. AIR 1940 Nag 186 : 41 Cr LJ 757 ; AIR 1940 Nag 340 : 42 Cr LJ 17. The word "demand" refers to some demand in respect of some property. 11 M 257. A person voluntarily causes hurt when he himself does an act with the intention of causing hurt to any person or with the knowledge that he is likely thereby to cause hurt to any person and actually causes hurt thereby to any person. 9 CPLR Cr 18. An offence under this section is committed when hurt has been caused for the purpose of extorting information which might lead to the detection of an offence. 20 WR Cr 41. Where the accused was shown to have toctily instigated the commission of an offence by others by expressing approval of their conduct in maltreating a tenant and by suggesting that the tenants having lost their heads should be given a sound beating. *Held*, that the accused was rightly convicted and sentenced under Section 330, read with Section 114, IPC. 25 ALJ 149 : 8 LR 28 Cr : 100 Ind Cas 537 : 28 Cr LJ 313.

2. Cases.—When a police constable, in the course of an enquiry, violently beat the deceased who dies of the beating nine days subsequently, held, that he was guilty of an offence under Section 330, IPC. 86 PR 1866 : *see* also (1964) 2 Andh WR 43 : 1964 Mad LJ (Cr) 415 : AIR 1964 AP 548 (Police officers subjecting suspect to torture with a view to extract confession). An Excise Inspector searching the house of a person, under the suspicion that he would find cocaine there, committed many irregularities. He had no warrant authorising him to make the search, he had brought only one search witness and he directed a constable to scale the outer wall of the house. The accused assaulted and beat him. *Held*, that the Inspector and the constable were not acting in the discharge of their duties as public servants and the accused were not guilty of an offence under Section 330, Penal Code, but were guilty of causing hurt only. 13 ALJ 439 : 37 All 358 : 16 Cr LJ 495 : 29 Ind Cas 335. Illegal beating administered to the accused by the police in the presence of PSI made the PSI guilty under Section 330, read with Section 109, Section 113 and Section 107, of IPC. 1981 Guj LR 282. The police is not beyond reach of law. 1980 Simla LC 73.

3. Sanction.—For sanction. *See* AIR 1967 All 519 : 1967 Cr LJ 1463.

4. Sentence.—In this case the accused, a sergeant of police, was convicted under Section 330, IPC, and sentenced to three months' simple imprisonment for causing hurt to a prisoner in his custody for the purpose of extorting a confession. On revision, the sentence was enhanced to rigorous imprisonment for two years, for reason that the offence found to have been committed was of gravest character, and such as to shake judicial confidence in a most important portion of the evidence, which has commonly to be relied on by the Court of Justice, namely, the genuiness and trust-worthiness of early confession, for such evidence ought to be free from the slightest taint, and to tamper, with it is to polite justice at the found. UBR (1897-1901) Vol. I, 330. The law clearly draws a great distinction between simple hurt caused in the ordinary way and simple hurt caused for the purpose of extorting a confession or making an accused person recover any property. Conduct of causing hurt under Section 330, Penal Code, by responsible police-officer engaged in the investigation of a crime is one of the most serious offences known to the law. The result of third degree methods or of actual torture or beating must be that innocent persons might well be convicted, confession being forced from them which are false. In almost every case in which a confession is recorded in criminal Courts, it is alleged by the defence that the police have resorted to methods such as these. It is seldom, however, that an offence of this nature is, or can be proved. It clear is the duty of the Courts when a case of this kind is proved to pass sentence which have deterrent effect. 163 Ind Cas 145 : 37 Cr LJ 811 : 38 PLR 689 : 1936 Cr C 506 : AIR 1936 Lah 471. Where the statute says that for an offence the offender shall be imprisoned, it naturally means that he should be sent to jail. To impose a sentence of imprisonment till the rising of the Court is an evasion of the statutory provision and such an evasion would be justified only in every exceptional circumstances ; as for instance, when the offence is found to be very severely technical or where there are extenuating circumstances possessing unusual force. AIR 1955 Mad 424 : (1955) 2 MLJ 651 : 1955 Cr LJ 1080.

5. Framing of charges.—This brings us to the next question as to whether the trial Court as well as the High Court was justified in dropping the charge under Sec. 330 IPC since R.K. Jain's death took place while he was in custody. The important question is whether a *prima facie* case can be said to have been made out for a charge to be framed under Sec. 330 IPC. Since the cause of death has been shown to be asphyxia on account of detention of the deceased in unhygienic conditions despite his respiratory problems and the injuries to the ribs and mouth of the deceased could possibly have been caused by the attempts made by the doctor at the Hospital to resuscitate the deceased, who had been brought to the Hospital in comatose condition, with the body showing no signs of pulse, respiration or blood pressure, *prima facie* a case is made out for framing of charge under Sec. 330 IPC. The sheet showing the progress and treatment of the accused on arrival at the Hospital, also corroborates the same and it also mentions the fact that cardiac pulmonary resuscitation was immediately started and the patient was also put on mechanical ventilator as part of the attempts at resuscitation. Apart from indicating that the patient had died of asphyxia, the medical opinion does not give any reason for such asphyxia and even in reply to the queries made on behalf of the investigating authorities the reply received from Dr. Satpathi, as to the cause of death, was that it had occurred due to asphyxia, but as to how it had occurred was under investigation. *Indu Jain v. State of Madhya Pradesh*, AIR 2009 (SC) 976 : 2008 (15) SCC 341 : 2009 CrLJ 951 : 2008 (12) JT 524 : 2008 (14) SCR 1137 : 2008 (15) Scale 168 : 2009 (2) SLT 72 : 2009 (1) JCC 246.

6. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable—Triable by a Magistrate of the first class.

7. Charge.—I (*name and office of Magistrate, etc.)* hereby charge you (*name of the accused)* as follows :—

That on or about the......day of.... at....you voluntarily caused hurt (*or* grievous hurt) to *AB* for the purpose of extorting for him (*or* from a certain person interested in the said *AB* namely *CD*), a confession (*or* information) which may lead to the detection of the offence of (*mention it*) a misconduct (*mention in*) or for the purpose of constraining the said *AB* (*or CD*) to restore (or cause the restoration of any property or valuable security), or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, to wit (*specify it*), and thereby committed an offence punishable under Section 330, (*or* Section 331), of the Indian Penal Code and within my cognizance of the Court of Session (*or* High Court).

And I hereby direct that you be tried by the said Court on the said charge.

* * * * *

Sec. 331. Voluntarily causes grievous hurt to export confession, or to compel restoration of property.—Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or any person interested in the sufferer any confession or any information which may lead to the detection of an offence or misconduct, or the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to ten years, and also be liable to fine.

Synopsis

1. Scope 2101
2. Charge 2101

1. Scope.—"The hurt or grievous hurt in these sections is supposed to be committed by way of torture, but for purposes differing from those mentioned in the two preceding sections. The illustrations show the operation of these provisions. The information sought for may be required for the advancement of justice—any more, it may be such information as cannot be withheld without offending against public justice—the property, the extoration of which is sought, may be property which the sufferer has borrowed from the offender, and which he illegally refuses to give back—the claim or demand may be a just claim—but the law will not tolerate the employment of such means as are here made punishable, even when used for honest ends".—*Morgan* *and Macpherson.* Here the word "demand" must be with respect to property-consequently the extortion of a promise to restore an abducted woman is not an offence under this section. 5 Lah LJ 374 : 73 Ind Cas 272 : 24 Cr LJ 576 : AIR 1924 Lah 167. Torture by police-officer for getting confession which causes death is an offence under this section. 40 Ind Cas 610.

Section 331, applies to cases where grievous hurt is caused by a person for the purpose of having a claim or demand which the other person owes to him, satisfied and not to cases where the claim or demand is owed by the culprit to the victim of the assault. 6 DLR (Sau) 30 : 5 AI Cr D 291 : AIR 1951 Sau 40 : 52 Cr LJ 704.

Section 53, of the Madras District Police Act, 24 of 1859, extends to acts done or intended to have done under the provisions of any other law conferring powers on the police in respect of arrest search and investigation. AIR 1964 SC 33 : 1964 (1) Cr LJ 16 : 1961 (2) Cr LJ 191.

2. Charge.—I (*name and designation of the Session* Judge) hereby charge you *(name of the accused)* as follows :—

That you on or about the..........(date) at...........(time) and at.........(place) voluntarily caused grievous hurt to....... (name of the injured) for the purpose of extorting from him (or....... a person interested in him) a confession (or an information) which might lead to the detection of an offence (or misconduct) (or for the purpose of constraining him or any other person interested in him to restore or to cause the restoration of any property or valuable security, to wit...... or to satisfy any claim or demand or give information which might lead to the restoration of any property or valuable security) and thereby committed an offence punishable under Section 337, of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried in the Court of the said charge".

* * * * *

Sec. 332. Voluntarily causing hurt to deter public servant from his duty.—Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Synopsis

1. Notes....................2102
2. Procedure....................2105
3. Charge....................2106
4. Sentence....................2106

1. Notes.—Where a constable was employed to watch the accused, and the accused knew of it when he assaulted him. *Held,* that the constable was not doing anything in excess of his authority at the time of the assault, and the accused was rightly convicted under Section 332, IPC. 7 MLT 386 : 6 Ind Cas 12 : 11 Cr LJ 221. But no offence under section is committed when a public servant does not act in the discharge of his duty. 76 PLR 1903. Under Section 54, Criminal Procedure Code, a police-officer investigating a charge of burglary (a cognizable case) is empowered to arrest without an order from a Magistrate or a warrant, persons against whom a reasonable suspicion of having been concerned in the burglary existed, and so the persons assaulting the police-officer while arresting them would be guilty of an offence under Section 332, Penal Code. 18 PR 1910 Cr : 6 Ind Cas 956 : 32 PWR 1910 Cr : 104 PLR 1910 : 11 Cr LJ 423. An accused cannot be found guilty of an offence under Section 332, IPC, because the object of the riot is to resist the search by the police and in making the searches, the police are not acting in the discharge of their duty. 8 SLR 1 : 16 Cr LJ 15 : 26 Ind Cas 319. So also when a public servant is acting in his private capacity, it is no offence under this section if the accused voluntarily causes hurt to him. 161 PLR 1911 : 12 Cr LJ 236 : 10 Ind Cas 278. A public servant acting under irregular search warrant cannot take benefit of this section, where he is hurt in executing such warrant. 14 Cr LJ 142 : 18 Ind Cas 894 : 155 PLR 1913 : 16 PR 1913 Cr : 20 PWR 1913 Cr. An accused person while under trial struck a Sub-Inspector of Police, who was in the witness-box giving evidence against him. *Held*, that the offence of which the accused was guilty in this respect was rather that provided for by Section 355, of the Penal Code, than that punishable under Section 332, of the Code. AWN 1907, 186 : 6 Cr LJ 22. The words "in discharge of his duty" mean that the officer has a duty to discharge and is discharging it at the particular time. This section cannot mean that the officers acting under colour of his office. 18 All 246 : AWN 1896, 48. Where the common object of an unlawful assembly was to assault the Police-officers in discharging their duty, and hurt was actually caused to some of them, separate sentence under Sections 147 and 332, IPC, were disallowed and sentence under Section 332, IPC, only was maintained. 38 PWR 1907 Cr: 6 Cr LJ 446 ; *see* also 223 PPR 1112 : 41 PWR 1912 Cr. Resistance to the execution of a warrant under this section is an offence under this section, and where the warrant has been destroyed by the accused the presumption is that it has been properly drawn up. 16 CWN 336 : 13 Ind Cas 1002 : 13 Cr LJ 186. Where a public servant receives a blow from a stick while trying to quiet the riot, but the evidence to show who actually struck it is discrepant, it is not lawful to frame a separate charge under Section 332, Penal Code, against any one of the rioters in particular. 14 PWR 1912 Cr : 111 PLR 1912 : 15 Ind Cas 92 : 13 Cr LJ 460 : 19 Cal 105. Where the police harrassed a person during an investigation and the latter consequently threw himself in to a well and his sympathisers among whom were the accused attacked the police, held, that there was no question of grave and sudden provocation, and that the accused was rightly convicted under Section 332, Penal Code. 11 LLJ 287 : AIR 1929 Lah 739. Person obstructing or assaulting vaccinator ordered to vaccinate ladies and children is guilty under Section 332. AIR 1935 All 160 : 153 Ind Cas 469 : 36 Cr LJ 356 : 1935 ALJ 175 : 1935 Cr C 212. Assault on an octroi-officer demanding inspection of bundle suspected to contain dutiable goods is an offence under this section. 29 SLR 54 : AIR 1935 Sind 245.

In order to substantiate a charge under Section 332, IPC, it must be established that the person to whom the offence was caused was acting in the discharge of his duty as a public servant. 9 Lah LJ 424 : 105 Ind Cas 817 : AIR 1927 Lah 706 : *see* also 17

NLJ 78 : 1934 Cr C 1120 : AIR 1934 Nag 247 : 142 Ind Cas 790 : 34 Cr LJ 439 : 1932 Cr C 570 : 1932 ALJ 530 : AIR 1932 All 449 ; 42 Cr LJ 501 : AIR 1941 Oudh 385 ; AIR 1942 Pat 281 : 43 Cr LJ 279 ; AIR 1944 Mad 183 : 45 Cr LJ 535. A duty may be negative as well as positive. 42 Cr LJ 321 : AIR 1941 Oudh 267. In considering the question of "discharge of official duties" it is not the dress that concludes the matter but it is what the public servant was doing at the time that connects. 1936 MWN 892 ; *see* also AIR 1935 Sind 245 : 37 Cr LJ 148 ; 37 Cr LJ 375 : 161 IC 612. A vaccinator is a public servant and if he be assaulted or obstructed while discharging his duties an offence under this section is committed. 36 Cr LJ 356 : AIR 1935 All 160 : 1935 ALJ 175. An offence under this section has been committed where a process server about to arrest person under warrant is beaten and injuries has been caused to him. 1939 MWN 518 : 48 Cr LJ 616 : 230 IC 326. Where a police servant is acting in the legitimate discharge of his public functions and is hurt, the offender is guilty of one of his special offences relating to public servants. But when a public servant is acting *bona fide* but not in the legitimate exercise of his public functions, he can be guilty only of causing hurt or assault. 83 Ind Cas 899 : 26 Cr LJ 195. Both Sections 332 and 333, IPC, require as an ingredient of the offence, the presence of an intention on the part of the accused persons, namely, to prevent or deter a public servant from discharging his duty. If the accused persons were unware of the fact that the persons confined were public servants, the offence has not been committed. 22 ALJ 501 : LR 5A, 177 Cr : AIR 1942 All 645. An officer of police who is empowered to conduct an investigation, is entitled to carry out a search without a warrant. In carrying out such a search is bound, under Section 103, of the Cr Pro Code to call upon two or more respectable inhabitants of the locality to attend and witness the search, and if he omits to do so, a house holder would be justified in closing the door and refusing ingress into the house, and would not be guilty of an offence under Section 332. 42 All 67 : 17 ALJ 1047 : 52 Ind Cas 663 : 20 Cr LJ 695. The words "in the discharge of his duty as such public servant" in section 332, of the Penal Code mean in the discharge of a duty imposed by law on such public servant in the particular case. 15 ALJ 813 : *see* 1953 Cr LJ 1569 : A1R 1953 Nag 292. A distrainer having a warrant has no right to take the front door of a house, and if he threatens to do so, such a proceeding renders the house unsafe calling for immediate defence of private property. Further, if the accused resist such attempts he cannot be said to have exceeded his right of self-defence and any conviction under Penal Code, Section 332, is liable to be set aside. AIR 1930 Mad 430. Separate sentence under sections 147 and 332, of the Indian Penal Code, are not illegal. AIR 1926 Lah 521 : 27 Cr LJ 824 : 95 Ind Cas 600. In case of illegal search-warrant, person resisting police is not guilty under Section 332. 38 All 14 : 16 Cr LJ 819 ; *see* also AIR 1930 Pat 387 : 125 Ind Cas 784. Where police servant is acting *bona fide* but not in legitimate exercise of his function, the accused causing hurt is not guilty under the section. AIR 1921 Sind 51 : 26 Cr LJ 195 : 16 SLR 161 : 83 Ind Cas 899 ; *see* also AIR 1926 Lah 250 : 27 PLR 74 : 27 Cr LJ 377 : 92 Ind Cas 889. Where Court is unable to free its mind from possibility of accused having been roughly beaten under orders from public servant. Section 332, does not apply. 142 Ind Cas 897 : 33 PLR 1065 : 34 Cr LJ 460 : AIR 1933 Lah 162. Where the attack and beating were not concerned with actual rescue of the arrested person, the accused were guilty of the minor offence punishable under Section 323, IPC and not of the offence under Section 302. AIR 1940 Cal 321 : 44 CWN 502 : 41 Cr LJ 744.

Where an information lodged at the police-station a police apprehends breach of the peace and in order to prevent it enters the house in the joint possessions of the complainant and accused; his entry cannot be said to be either illegal or unauthorised. Hence, if he is beaten and confined in a room, then an offence under Sections 332 and 342, is clearly made out. AIR 1951 Ajmer 37 : 52 Cr LJ 220.

The words 'in consequence of anything' in the section shows that the offence under the section can also be committed when a person is assaulted in consequence of the discharge of his duty. 1952 Cr LJ 1709 : AIR 1952 All 933 : 1952 ALJ 434.

Where there is no evidence that the police officer saw the person playing for money or other valuable thing, the police officer has no right to arrest the person or any other person under Section 13, Public Gambling Act. In trying to arrest the person the police officer is not discharging his public duty but is attempting to transgress the express provision of law. In such a case, Section 332 does not apply because the public servant is not engaged in the lawful discharge of his duty. 1961 (2) Cr LJ 504 ; *See* also 1959 MPLJ (Notes) 113.

The intent to prevent or deter public servant from discharging his duties as such public servant is an essential ingredient. AIR 1978 SC 1441 : 1978 Cr LJ 1473. If the charge is under Section 332, IPC, the appellant could at most be held guilty under Section 323, IPC, as the injuries caused are simple. (1979) 1 SCC 128. *See* 1977 Cr LJ 1669 (no offence under Section 332, IPC). No common intention for an offence under Section 333, and as such conviction was altered to one under Section 332, IPC. 1984 Cr LJ 265.

While framing a charge under Section 332, it is not essential that the hurt should be caused to the public servant when he is actually discharging his official duty. If the beating is given in consequence of anything done by him in the discharge of his duties as a public servant, then it is sufficient to attract the application of Section 332. ILR (1963) 13 Raj 999 : 1964 (1) Cr LJ 254. Sentence was reduced in (1981) 4 SCC 507 : 1982 GLR (SC) 35.

Charge-sheet against accused petitioner and his two associates—Convicted under Sections 332 and 426, IPC, and sentenced. There was hence challenging of petition and was held that the assault was by President of Union on Superintending Engineer as he refused to order to ply bus on particular route. The medical report showed 3 injuries. Concurrent findings of courts below cannot be interfered. *Judhister Gouda* v. *State*, (1994) 2 Crimes 569 (Ori).

In a case, the accused came on scooter and hurled abuses on driver questioning his driving and assaulted him with fists. He also fisted conductor when he came to the rescue of driver. After having gone one furlong, the accused again assaulted driver with stick. The attack with stick was corroborated by one of the eye-witnesses from whose shop he picked up the stick. Testimony of victims that they sustained injuries in incident was fully corroborated by medical evidence. Conviction of accused was held proper. *Mohd. Shafi* v. *State of AP*, 2004 Cr LJ (NOC) 335 (AP) : 2004(1) ALD (Crl) 67 : 2004(4) All Cri Lr 29 : 2004(1) Andh LT (Cri) AP 333 : 2004(4) Cur Cri R 86 : 2004(3) Rec Cri R 479.

2. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by a Magistrate of the first class. 1934 MWN 271.

3. Charge.—I *(name and office of Magistrate, etc.)*, hereby charge you *(name of the accused)* as follows :

That on or about the.......day of.....at......you voluntarily caused hurt to one *AB*, a public servant, in the discharge of his duties as such public servant or with intent to prevent (or deter) that person (*or* any other public servant) to wit.......from discharging his duties as such public servant (*or* in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant) and thereby committed an offence punishable under Section 332, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on that said charge.

4. Sentence.—The case was of voluntary causing hurt to deter public servant from his duty—Hence, convicted under Section 332, IPC, on which revision petition was filed.—On examination, complainant was found having two scratches and one swelling. Hence; there was no infirmity in conviction of appellant. The occurrence took place in 1982 and appellant has undergone agony of protracted trial the sentence is reduced to period already undergone. *Gopal Singh* v. *State of M.P.*, (1995) 2 CCR 721 (MP).

* * * * *

Sec. 333. Voluntarily causing grievous hurt to deter public servant from his duty.—Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Scope 2106
2. Sentence 2107
3. Procedure....................2108
4. Charge 2108
5. Conviction....................2108
6. Probation 2108

1. Scope.—Under Section 333, a person who causes grievous hurt to a public servant can be convicted under three circumstances : (1) when grievous hurt is caused while the public servant is in the discharge of his duty as such public servant—in this case motive and object are irrelevant ; (2) when a public servant is prevented or deterred from discharging his duty as such public servant—in this case it is necessary that the object of accused should be to deter the public servant from discharging his duty but is not necessary to prove any motive ; (3) when the public servant is assaulted in consequence of anything done or attempted to be done by that public servant in the discharge of his duty—in this case it is necessary that the public servant should be discharging his duty at the time of assault. The object too is irrelevant. The only thing that has got to be seen is motive. AIR 1935 All 563 : 1996 Ind Cas 602 : 36 Cr LJ 964 : 1935 Cr C 590. The offence contemplated by Section 332 and Section 333, consists hurt or grievous hurt to a public servant in the lawful discharge of his duty, or in order to deter him from it, or in consequence of it, *vide* 18 SLR 221 : 88 Ind Cas 15 : 26 Cr LJ 107 : 105 Ind Cas 899 ; 26 Cr LJ 195 ; 13 ALJ 439 : 15 ALJ 565 ; 17 All 353 ; 18 All 246 ; 22 ALJ 501 ; 85 Ind Cas 245 ; 26 Cr LJ 551 ; 83 Ind Cas 899.

"Such public servants as officers of justice, while in the execution of their officers are under the peculiar protection of the law. Without this special protection, the public tranquility cannot be maintained or private property secured ; nor in the ordinary course of things can offenders be made amenable to justice. This protection is not confined to the amount during which the public servant is upon the spot and at the scene of action engaged in the business which brought him thither. He is under the same protection of the law while proceeding to the place, while remaining there, and while returning from it".—*Morgan and Macpherson.* "The protection which the law affords to these public servants is not, it seems, confined to them but extends to persons acting in good faith by his directions. *Ibid.* 19 M 349 : 21 M 296 ; but *see* 38 All 14 : 13 ALJ 979 : 31 Ind Cas 995 : 16 Cr LJ 819 : 4 Cr LJ 92. But when public servants steps beyond the limits of law, they wholly forfeit the protection and privilege which it confers on them."—*Morgan and Macpherson.* 44 Cr LJ 92. Mere resistance is no offence under Section 333. 24 MLT 96 : 20 Cr LJ 145 : 8 LW 225 : 49 Ind Cas 337. No offence under this section is committed by rescue from improper custody of *Chowkidar.* 17 CLJ 529 : 14 ALJ 789 : 36 Ind Cas 577.

Where constable was unauthorisedly firing roughly handled by way of self-defence, to prevent him from doing further harm, no offence is made out. AIR 1922 Lah 75 : 24 Cr LJ 201 : 71 Ind Cas 665. In case of assault on public servant with in precincts of Court in open and high handed manner, 18 months' rigorous imprisonment is not sufficient. AIR 1935 All 563 : 36 Cr LJ 964. Accused was cutting timber from Government forest. His axe was seized. He is not entitled to claim private defence. 1962 Jab LJ 857 : 1963 (2) Cr LJ 95 : 1962 MPLJ (Notes) 318 (Trespasser was held to be guilty under Section 333).

The appellant abused the complainant, despite his attempt to stop from entering driver's cabin and gave a kick which resulted in grievous injury, it cannot be held that Section 333 has no application. AIR 1979 SC 1706. An accidental, causing of hurt is not an offence under Section 333. AIR 1972 SC 1277 : 1972 Cr LJ 871.

It was incumbent on the court below to have recorded *prima facie* opinion whether any grievous injury has been caused to injured person. Without recording on *prima facie* opinion he could not have framed a charge under Section 333, IPC. Hence the same is illegal. *Arun* v. *State of Uttar Pradesh,* 1994 UP Cr R 307 (All).

2. Sentence.—Causing grievous hurt to public servant is a serious offence and, therefore, reduction of sentence to custodial sentence of 6 months and 23 days that was already undergone on the ground that the accused belonged to low income group and was of 23 years of age was held not proper. *State of MP* v. *Saleem,* 2005 Cr LJ 3435 (SC) : 2005(5) SCC 554 : 23005(5) Scale 462 : 2005 SCC (Cri) 1329 : 2005(4) Supreme 733.

Lesser sentence. It is bizarre to note that there is terrible irrationality in the sentence prescribed for committing offence u/S. 333, IPC. The said offence is in combination of offence - defined u/S. 320 and the offence of assault on a public servant punishable u/S. 353, IPC. The offence of grievous hurt is punishable u/S. 326, IPC with life imprisonment or with the imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine. Whereas a higher form of manifested offence u/S. 333 is made punishable only with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine. The law-makers shall take note of the anomaly in the sentencing policy and effect necessary correction by way of amendment. Although it is belated yet the lawmakers at least should now wake up to go for thorough rational and scientific review of sentencing policy for all the offences. The different types of injuries enumerated u/S. 320 do not ensue same amount of harm, pain and disability. Therefore proportionate to the nature of grievous injuries and its consequences, the punishment should be redefined. So also the punishment for an offence u/S. 333 should be redefined. Similarly in respect of other offences rational sentence to be re-prescribed in respect of other offences. *State of Karnataka v. Mohammed Sadiq,* 2006 CriLJ 3391 (Kar).

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoun- dable—Triable by Court of Session.

4. Charge.—"I (*name and designation of Court of Sessions),* hereby charge you (*name of the accused)* as follows :

'That you on or about .... (date) at .... (time) and at .... (place) voluntarily caused grievous hurt to Shri ....(name of the person injured), a public servant in the discharge of his duties, as such public servant (or with intent to prevent or deter) him or any other public servant from discharging his duties as such public servant or in consequence of anything done or attempted to be done by him in the lawful discharge of his duty as such public servant) and thereby committed an offence punishable under Section 333, IPC and within my cognizance.

'And I hereby direct that you be tried in this Court on the said' charge".

5. Conviction.—Fist blow on the face of the public servant—Causing him simple hurt.—Conviction of the accused under Section 333, held not justified. *V.R. Murthy* v. *State,* (1995) 1 CCR 367 (Cal).

6. Probation.—Violence in hospital against doctor and staff cannot be permitted at any cost and hence, no benefit of probation can be extended to accused. *Siyasaran* v. *State of Kerala,* 1995 Cr LJ 2126 (SC).

* * * * *

Sec. 334. Voluntarily causing hurt on provocation.—Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Synopsis

1. Scope 2109
2. Procedure 2109
3. Charge 2109

1. Scope.—The punishment is mitigated because the hurt is caused on grave and sudden provocation. Causing grievous hurt on grave and sudden provocation is punishable more severely than causing hurt not grievous on such provocation. The provisions on this subject are framed on the same principles on which the corresponding portion of the law of culpable homicide has been framed.—*Morgan and Macpherson.* This section applies to the case of a person who causes "hurt" on grave and sudden provocation to the person giving the provocation. 1 BHCR 17 ; *see* also 27 Ind Cas 559 : 16 Cr LJ 175 ; 94 Ind Cas 142 : 27 Cr LJ 574 ; 14 Cr LJ 442 ; LBR (1892-1900), 484. Provocation is necessary at the time of assault. AIR 1929 Lah 739 : 11 LLJ 287 : 1929 Cr C 329. Crying counter slogan, in praise of the leader one's own party and not in disparagement of the leader of the other party may cause provocation but not grave and sudden provocation. AIR 1939 Pesh. 20 : 40 Cr LJ 821 : 182 J.C. 643 ; 1979 Raj Cr C 51 ; *see* (1979) UP Cr C (SC) 14 where on the facts of the case vicarious liability was not fastened on the accused.

2. Procedure.—Not cognizable—Summons—Bailable—Compounda-ble—Triable by any Magistrate and may be tried summarily.

3. Charge.—"I *(name and designation of the Magistrate, etc.)* hereby charge you (*name of the accused*) as follows :

That you on or about...........(dale) at...........(time) and at.........(place) voluntarily caused grievous hurt to Shri......on grave and sudden provocation, neither intending nor knowing yourself to be likely to cause hurt to the said Shri....he being the person other than the person who gave the provocation and thereby committed an offence punishable under Section 334, IPC, and within my cognizance.

"And I hereby direct that you be tried in this Court on the said charge".

* * * * *

Sec. 335. Voluntarily causing grievous hurt on provocation.—Whoever "voluntarily" causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand rupees, or with both.

Explanation.—The last two sections are subject to the same provisions as Exception 1, Section 300.

Synopsis

1. Amendment 2110
2. Notes 2110

3. Compoundable 2110
4. Evidence of eye-witnesses of accident—Credibility 2110
5. Overtaking prohibited in certain cases 2111
6. Procedure 2113
7. Charge 2113

1. Amendment.—The word within quotations has been inserted by the Indian Penal Code Amendment Act, 1882 (8 of 1882), Section 8.

2. Notes.—The accused was convicted of causing grievous hurt *(viz.* the cutting of nose) to his wife under grave and sudden provocation and was sentenced to suffer rigorous imprisonment for four months. On reference to the Sessions Judge for enhancement of sentence. *Held,* enhancing the sentence to one of two years' rigorous imprisonment, that particular act of which the accused was found guilty was one which imported deliberate design. 17 Bom LR 68 : 3 Bom Cr C 6 : 16 Cr LJ 168 : 27 Ind Cas 552. Where a person, suspecting his wife of infidility hid himself so as to see her intimation with her paramour, and seeing her do an improper act with him accused grievous hurt to her. *Held,* that though there was grave provocation, there was no sudden provocation. AWN 1889, 9 ; *see* also AIR 1932 Lah 194 : 33 Cr LJ 368 : 1932 Cr C 215 : 33 PLR 72. If the accused, under sudden provocation, caused an injury that endangered life and the deceased died as the result of that injury, the offence committed is certainly culpable homicide. AIR 1938 Mad 723 : 39 Cr LJ 871.

In 19 Cut LT 310 : ILR 1953 Cut 453 : AIR 1953 Ori 308 : 1953 Cr LJ 1714, it was held that injuries inflicted with the help of burning firewood cannot be considered as a grievous hurt as they do not come within the definition of grievous hurt nor they endanger life. In case of indecent assault made by the deceased upon accused's minor sister-in-law, provocation was held to be grave and accused deserves to be convicted under Section 335. Madh BLR 1954 Cr 73 : Madh BLJ 1954 HC 529 : 1955 Cr LJ 174 ; 19 Cut LJ 310 : 1953 Cr LJ 1713 : AIR 1953 Ori 308 : ILR 1953 Cut 453 (for grave and sudden provocation).

The test of grave and sudden provocation is whether a reasonable man of the same class or status in the society would be proved as to lose self-control. 1978 Cr LJ 411. The accused had grave and sudden provocation to cut the nose of the wife and the person in whose company shows. AIR 1972 SC 1273 : 1972 Cr LJ 871. About vicarious liability. *See* (1979) UP Cr C (SC) 14.

3. Compoundable.—Only grievous hurt coming under this section and Section 338 is compoundable.

4. Evidence of eye-witnesses of accident—Credibility.—From eye-witness in the cross-examination, it is elicited that after hearing the sound, he turned and saw the accident. He has denied all other suggestions including the suggestion that he did not see the accident. In fact, when PW. 1 was cross-examined immediately after his examination-in-chief, nothing was suggested to him regarding the accident. However, he was recalled twice for the purpose of further cross-examination, at the request of the accused and during further cross-examination, certain suggestions relating to the accident were put to him, which, he denied. Nothing is elicited from eye-witness to indicate that he could not see the accident in question. The only material suggestion put to him in the cross-examination was since the bullock-cart was going ahead of the bus he could not see the bus, but he has denied this suggestion. This suggestion is incongruous, as the bullock-cart cannot cover the bus, as the bus is taller than the bullock-cart and the seat of the driver of the bus itself will be above the height of bullock-cart. In fact it is not suggested to eye-witness that he was not present near the tea stall and he did not see the accident. Thus, the presence of eye-witness near the tea stall is not seriously disputed in the cross-examination. There is no suggestion to eye-witness that he did not witness the actual collision between the two vehicles. In fact, from the tenor of cross-examination of eye-witness behalf of the accused indicates that the accused seriously did not dispute the fact that the collision took place on the extreme western side of the tar road while the bus driver was overtaking the bullock-cart which was going ahead of him.

The learned Magistrate has disbelieved the evidence of witness on the ground that in his cross-examination he has stated that after hearing the sound he turned round and came to the place of the accident; he disbelieved the evidence of eye-witness 2 on the ground that while drinking tea near the tea stall he could not concentrate as to what happens on the road and that he could not see the bus as a bullock-cart was proceeding ahead of the bus. He disbelieved the evidence of witness on the ground that he could not identify the driver of the bus though he saw the bus coming from a distance of 10 to 15 feet and he could not say the speed at which the bus was driven. I fail to understand as to how the evidence of these witnesses could be disbelieved for the above reasons. When it is shown that was the pillion rider of the motor cycle and when it was not disputed that the accused was the driver of the bus which was involved in the accident, the fact that the pillion rider did not identify the bus driver should not be a ground to reject his evidence. On the ground that pillion rider or could not say the speed with which the bus was driven, his evidence could not have been disbelieved, as, in a prosecution for the offence under Sections 279, 338 and 304-A, IPC, the question required to be considered is whether, they accused drove the vehicle in a rash and/or negligent manner so as to endanger human life. In my opinion, the reasons assigned by the learned Magistrate to reject the evidence of witnesses are not proper and are irrelevant reasons. The evidence of other witnesses clearly establish that they were present near the tea stall and they had seen the accident. The evidence of pillion rider who was the pillion rider is convincing and acceptable. For improper and irrelevant reasons, the learned Magistrate has disbelieved the evidence of PWs witnesses Therefore, the finding of the learned Magistrate in this behalf is perverse and illegal *State of Karnataka vs. Kumayian*, 2010 (3) CriLJ 3376 (A) (Karn).

5. Overtaking prohibited in certain cases.—The Central Government in exercise of its power under Section 118 of the Motor Vehicles Act has framed the regulations called "Rules of Road Regulations, 1989" and the same has come into force from 1.7.1989. Regulation No.6 deals with over, taking prohibited in certain cases. According to this regulation, the driver of a motor vehicle shall not pass a vehicle travelling in the same direction as himself if his passing is likely to cause danger to other traffic proceeding in any direction. In the light of this, the accused as driver of the KSRTC bus before overtaking the bullock-cart going ahead of him should have seen as to whether his act would cause danger or inconvenience to the vehicle/s coming from opposite or any other direction. Without taking such care or caution, the respondent - accused proceeded to overtake the bullock-cart and unmindful of the fact that a motorcycle was coming from the opposite direction on the correct side of the road, the accused proceeded further and dashed against the motor-cycle. In the light of the above^ there is no substance in the argument that the rider of the motor-cycle ought to have stopped the vehicle after seeking the bus and avoided the collision. As the rider was moving on the correct side of the road, and he was not overtaking any vehicle, there was no duty cast on him to stop the vehicle. Thus the respondent - accused did not take such care and caution which a prudent and reasonable man was required to take in the circumstance of the case and in spite of the fact that two wheeler was coming from opposite direction, by keeping to its correct side, the respondent instead of stopping the bus and avoid overtaking the bullock-cart going ahead of him as it was likely to cause danger to the two wheeler coming from the opposite direction, proceeded further wantonly and ultimately caused injury to both the rider and pillion rider of the two wheeler. Thus the facts and circumstances of this case clearly indicate that there is culpable rashness and neglignece on the part of the accused. He did not act as a prudent and reasonable driver would have done in such circumstance.

Ex.P. 4 is the sketch prepared by the Investigating Officer during the investigation and Ex. P. 2 is the spot mahazar. If the contents of Exs.P. 2 and P. 4 are read together, it is clear that the actual collision took place at a distance of about 5 feet from the western edge of the tar road. The correctness of the contents of Exs.P.2 and P.4 is not disputed by the accused. Thus from the contents of Exs. P.2 and P.4, it is clear that the accident occurred almost at the western edge of the road, which was wrong side to the direction in which the bus was proceeding. The evidence on record indicates that the right front portion of the bus dashed against the motorcycle and the motor-cycle came under the right front wheel of the bus and ultimately the bus after dragging the motor-cycle to a distance of about 20 feet stopped on the foot path situated on the western side. From this, it is manifestly clear that the bus driver drove the bus in a rash and negligent manner and the vehicle was not under his control. He was not in a position to bring the bus to halt and in the absence of any tyre mark on the road, it appears the accused also did not make any effort to apply break to stop the bus. No doubt there is no clear evidence as to whether the driver of the bus drove the vehicle at a great speed. However, the speed by itself is not the sole factor to decide the culpability of the driver of the vehicle, and it is the rash and negligent act which is very much necessary to be considered. The question as to whether a person drove the vehicle in a rash and negligent manner depends upon the facts and circumstances of each case. The totality of the circumstances has to be taken to find out as to whether there was rash and negligent act on the part of the accused person. In the case on hand by taking the entire evidence on record as a whole and the silence on the part of the accused, it is clearly established that the respondent - accused drove the bus in a rash and negligent mannen and that was responsible for the accident which resulted in the death of one person and injury to another. Accused who was the driver of the bus which involved in the accident had the special knowledge as to how the accident occurred and as to whether or not he was responsible for the accident. Unfortunately, during the examination under Section 313 CrPC, the accused has not come out with any explanation. He has merely denied all the incriminating circumstances put to him. *State of Karnataka vs. Kumayian*, 2010 (3) CriLJ 3376 (A) (Karn).

6. Procedure.—Cognizable—Summons—Bailable—Compoundable with permission of the Court—Triable by a Magistrate of the first class.

7. Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :

That on or about the..............day of..........at........you voluntarily caused grievous hurt to *AB* on grave and sudden provocation given to you by the said *AB* (or if the person hurt is another) say, on grave and sudden provocation given to you *CD* and not intending to (or knowing to be likely that you would thereby) cause hurt to *AB* and thereby committed an offence punishable under Section 335 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 336. Act endangering life or personal safety of others.—Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.

Synopsis

1. Scope 2113
2. Rashly 2114
3. Procedure 2115
4. Charge 2115

1. Scope.—"Hitherto cases in which hurt has been voluntarily caused have been provided for. But hurt may be caused involuntarily yet culpably. There may have been no design to cause hurt, no expectation that hurt would be caused. Yet there may have been a want of due care not to cause hurt. For these cases of involuntary, yet culpable, infliction of bodily hurt, and also for the like cases of causing, risk of hurt, this and the following sections are provided".—*Morgan and Macpherson.* Many specific acts of rashness or negligence likely to endanger life or to cause hurt or injury, are made punishable by Chapter XIV. "This section punishes similar acts, of whatever kind, which cause risk to human life or to the personal safety of others, although no hurt may have been caused thereby".—*Morgan and Macpherson.* For the conviction of an offence under this section, the fact that human life or the personal safety of others was endangered must be proved. It is not merely a question of the words "rashly or negligently". 1 LBR 45. *see* also AIR 1937 Rang 273 : 170 Ind Cas 278 : 38 Cr LJ 897. For an act to amount to an offence under Section 336, it must be such as will endanger the life of a person or the personal safety of others. Throwing of stones not bigger than the size of a piece does not bring the act of the person under Section 336. 1958 NLJ (Notes) II.

Sections 336, 337, 338 and 304A do not apply to act which amount to offence and which are deliberately and intentionally committed. AIR 1966 Bom 13 : 1966 Cr LJ 7 : 1953 (2) Cr LJ 718 ; (1976) 42 Cut LT 207 : 1974 Cut LR (Cr) 380 : AIR 1965 All 496.

2. Rashly.—A rash act is primarily an overhasty act and is thus opposed to a deliberate act but it also includes an act which though it may be said to be deliberate, is yet done without deliberation and caution. LBR (1893-1900), 426. The phrase "rashly" means something more than mere inadvertance or inattentiveness or want of ordinary fare. A rash act is indicative of disregard of consequences. ILR (1963) 2 Punj 611 : 1963 (2) Cr LJ 718. An act which is in itself unlawful is neither rash nor negligent. UBR 1905, Penal Code 15 : 2 Cr LJ 475.

This section applies to acts which are in themselves lawful but which are done so rashly or negligently as to endanger human life, *etc.* LBR (1872-1892). 595. This section applies to illegal acts also. 140 Ind Cas 99 : 33 Cr LJ 889 : 1932 Cr C 291 : 1932 ALJ 224 : AIR 1932 All 322 : 33 Cr LJ 889. This section is meant to deal with cases of rashness or negligence in doing a lawful act, but not when the act is criminal in itself. Sel. Case No. 31 of 1887. The imputability of culpable rashness arises from acting despite consciousness that mischievous consequence may follow but with the hope that they will not, and often with the belief that sufficient precautions have been taken to prevent their happening. *In re : George Loveday.* 1 Weir 337. The only questions in a case under Section 336, Penal Code, are ; (1) whether the act done is a rash and negligent act and (2) whether it was as was likely to endanger life. In re : *Thippana Reddi,* 1 Weir 337. The provisions of the above sections are intended to meet cases where acts which are in themselves lawful are done so rashly or negligently as to endanger human life or the personal safety of others. LBR (1872-1892), 91. Section 336 is not appropriate for the punishment of a person deliberately throwing stone at a house. LBR (1872-1892) 595 : AIR 1926 All 745. Where the house of the accused was stoned by the people of the neighbourhood and the accused fired shots to frighten them his act was not a rash and negligent act but a deliberate act, and therefore, this section has no application. AIR 1937 Rang 273 : 38 Cr LJ 897.

In order to convict a person under the above section, the prosecution must prove rashness or negligence on the part of the accused, and also that by such rashness or negligence human life or the personal safety of others was actually endangered. LBR (1872-1892), 9, A village headman having a licence to conduct swing during the *charak pujah* in his village was charged under Section 336 for allowing a person to swing by looks inserted in the flesh, instead of by being attached to the swinging apparatus by clothes. *Held,* that the headmen was not guilty under Section 336, Penal Code. 5 CWN 376. Doing an act endangering human life or the safety of others, is an offence under this section. 18 CWN 1176 : 27 Ind Cas 195 : 16 Cr LJ 131. An offence under Section 336 is not one of those which may be lawfully compounded. UBR (1892-1896) Vol. I, 219. Where the accused threw brick-bats, at the back of the complainant's house which had hit and fallen to the ground, and there was no evidence to show that human life or personal safety of anybody was endangered by the accused's acts no offence is committed under Section 336 5 LBR 100 : 4 Ind Cas 293 : 10 Cr LJ 552. The case of an accident to a motor car due to the negligent and reckness driving of another motor car ought to be tried within a week. AIR 1929 Cal 776 : 1929 Cr C 520. Where during the occurrence of communal riots, the accused threw brick-bats from his roof on to passers by and fired two shot from his gun and no one was hurt by the brick or the gunshot and he was convicted under Section 336. *Held,* that the accused committed no offence. 23 ALJ 356 : 87 Ind Cas 523 : 47 All 606 : 26 Cr LJ 987 : AIR 1925 All 396 ; *see* also

AIR 1928 All 745 : 51 All 465 : 112 Ind Cas 592 : 1929 ALJ 175. Where a taxi-driver was licensed to drive wearing spectacles on account of his defective eye sight, he cannot be convicted under this section for driving without spectacles. 42 Bom 396 : 20 Bom LR 376 : 45 Ind Cas 506 : 19 Cr LJ 695. It is one thing to say that no act was rash and negligent and it is another thing to say that it was such as to create apprehension in the mind of another. Therefore, in the absence of a charge in the alternative under Section 352, the conviction under Section 336, cannot be allowed to be altered to one under Section 352. 1958 NLJ (Note) 11. *See* also AIR 1957 Ori 130 : 23 Cut LT 88 : 1957 Cr LJ 769 (the rashness or negligence is to be stated in that first information report for bringing a case under Section 336).

3. Procedure.—Cognizable—Summons—Bailable—Not compounda-ble—Triable by any Magistrate.

4. Charge.—"I, (*name and designation of the Magistrate*), hereby charge you, (*name of the accused*) *as* follows :

That you on or about........(date) at........(place) and at....... (time) did an act, to wit.......so rashly (or negligently) as to endanger human life (or the personal safety of others) and thereby committed an offence punishable under Section 336, IPC and within my cognizance.

"And I hereby direct that you be tried in this Court on the said charge"

* * * * *

Sec. 337. Causing hurt by act endangering life or personal safety of others.—Whoever causes hurt to any person by doing an act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Synopsis

1. Scope 2115
2. Procedure 2116
3. Charge 2116
4. Acquittal 2117
5. Local witnesses 2117
6. Sentence 2117

1. Scope.—This section applies only to acts done without any criminal intent, personal injury intentionally caused is neither a rash nor a negligent act. UBR (1904) 1st Qr. Penal Code, 6. Where an operation was needlessly made by a physician in a primitive way without taking the most ordinary precautions and where the instruments used were not disinfected and sterilized and where the result was that the operation was unsuccessful and the complainant's eye sight was permanently damaged to a certain extent, *held*, that the accused's physician was rightly convicted under this Section 39 Bom 523 : 17 Bom LR 384. Causing hurt by negligence in the use of gun would fall under this section. 28 All 464 : 3 ALJ 332 ; AIR 1948 Rang 220 : 49 Cr LJ

692. Where a wife administered to her husband a *Dhatura* poison to make him less quarrelsome which portion he received from her lover without enquiring what that poison is, she is guilty under this section. 19 Bom LR 54 : 38 Ind Cas 1003 : 18 Cr LJ 443 ; *see* also 39 Cal 855. The words "rash and negligently" are distinguishable and one is exclusive of the other. The same act cannot be rash as well as negligent. Shooting pigs on foot always carries with it a certain amount of risk and if by chance a shot hit one of the beaters or spectators, the matter must be treated as that of a pure accident. AIR 1931 Lah 54. The accused's liability is determined by what is the proximate cause, AIR 1925 Sind 233 : 18 SLR 199 : 27 Cr LJ 257 : 92 Ind Cas 433. Negligence must not be presumed merely because car hits something else. 1933 Cr C 1146 : AIR 1933 Rang 329 ; 1938 NLJ 44.

When the applicant's rash and negligent driving of his lorry has led to a collusion as a result of which hurt is caused to a person sitting in a jeep, the applicant can be properly convicted under Section 337, although the hurt was not caused knowingly. The word "Voluntarily" is not used in Section 337. AIR 1962 Guj 318 : 1962 (2) Cr LJ 760 ; 1995 Cr LJ 173 (2) ; Mere rashness or negligence is not enough to bring a case within the ambit of Section 337 or Section 338 of the Penal Code. Negligence or rashness proved by evidence must be such as should necessarily carry with it a criminal liability, whether such liability is present may depend on the degree of culpability having regard in each case to the particular time, place and circumstances. AIR 1962 Mad 362 : (1962) 2 Mad LJ 146 : 1962 (2) Cr LJ 386 : 1962 Mad LJ (Cr) 444. If it is merely a case of compensation or reparation for injury or damage caused to a person or property, it is clearly not punishable under either of the sections. *Ibid.*

Where the evidence showed that the act to be deliberate, the accused could be convicted under Section 352 rather than under Section 336 or Section 337, notwithstanding absence of charge. 1961 BLJR 277 ; 1971 Cr App. Rep. (SC) 244 (overspeeding of truck without sounding horn and collision with other truck). Criminality is gross culpable neglect or the failure to exercise that reasonable and proper care and precaution to guard against injury either to the public or to an individual in particular which having regard to all the circumstances out of which the charge arose, it was the imperative duty of the accused person to have adopted. AIR 1968 SC 1319 : 1968 Cr LJ 1501.

Death was the direct result of negligent act—Cyclist fell down as a result of opening of door of car by car driver in meantime lorry coming from behind running over Cyclist, car driver cannot be convicted of offence under Section 304-A but can be convicted for offence under Section 337. Lorry driver not liable. *P.S. Jose* v. *State of Kerala*. 1994 MLJ (Cri) 666 (Ker).

Where the evidence showed that the accused was driving vehicle at a very high speed in a very busy locality when the vehicle hit the motor-cycle driven by injured, it was held that the fact that the motorcycle was dragged established that the accused was driving jeep rashly and negligently. *Ram Bahadur* v. *State*, 2004 Cr LJ (NOC) 199 (MP) : 2003 Cri LR (SC&MP) MPJ 669 : 2003(2) MPHT 510 : 2003(3) MPLJ 45.

2. Procedure.—Cognizable—Summons—Bailable—Compoundable with permission of the Court—Triable by Magistrate of the first class.

3. Charge.—The charge should run as follows :

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of accused*) as follows :

That on or about the.........day..........at......you caused hurt to *AB*......by doing any act, to wit...... so rashly or negligently as to endanger human life or the personal safety of others and thereby committed an offence punishable under Section 337 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge".

4. Acquittal.—Offence under accused while driving jeep hit an auto rickshaw—Driver of auto died and passengers suffered injuries—Negligence of jeep driver alleged—Auto came from a side and waited to cross the double road to keep on its side—Auto driver having while crossing ought to have taken care—Accused could not have anticipated auto to enter on main road—Hence acquittal order was upheld. *State of Karnataka* v. G. *Radhakrishna*, (1994) 3 Crimes 307 (Kant) (DB).

5. Local witnesses.—There is no rule of law nor of prudence that local witnesses should not be believed. If an accident occurs on a public road in a village and is witnessed by one or more witnesses, the eye witnesses are more likely to be the residents of the locality or the persons visiting that locality on business or some other purpose. Merely because the persons are residents of the village or the locality where the accident occurred, they cannot be called as interested witnesses. Moreso when on merits, nothing has been shown why the witnesses should have been disbelieved. *Digamber Baburao Ingavale v. State of Maharashtra*, 2008 CriLJ 2418 (Bom).

6. Sentence.—*Mitigating circumstances.*—Sentence it is said is the most public face of the criminal justice system. A sentence imposed by the Courts should have a deterrent effect more so when accident cases are on the rise. Courts are required to ensure that whenever an accused is found guilty, he does not escape the clutches of law very lightly. Sentencing discretion has to be exercised considering the fact of each case. In this case, the age of the accused as well as the fact that he promptly took the injured to the hospital are certainly mitigating circumstances but deterrence also remains one of the main object to be achieved while imposing the sentence. Considering the facts of the case, the accused sentenced to undergo SI for one day till rising of the Court each under Secs. 279 and 337, IPC to run concurrently. In addition the accused directed to pay compensation in the sum of Rs. 1000/- each to injured passengers and in default to undergo SI for three months. *State v. Mohandas S. Gawade*, 2007 CriLJ 850 (Bombay).

Whether conviction of accused under both Sec. 279 & Sec. 337 and imposition of separate sentence. Accused caused injuries to victim as he drove jeep so negligently that victim was dashed by it. Offences having been outcome of same act. Accused is liable for conviction only under Sec. 279, sentence under Sec. 279 being higher.

But the question remains whether a Court can convict a person under Section 279 and 337, IPC for commission of the same act of offence and accordingly pass sentence under both the Sections. According to this Court, as the offence having been outcome of the same act, the Court should punish the accused for one offence and at the same time, while passing the order of sentence, the Court should also consider that when the sentence prescribed under Section 279, IPC being higher it is a grave offence than the offence prescribed under Section 337, IPC, the accused could be punished under Section 279, IPC only.

As this Court noted earlier that even if the accused is convicted for offence under Sections 279 and 337, IPC, the offences having been outcome of the same act, he could be punished for one offence only and that is under Section 279, IPC as sentence under Section 279, IPC being higher. As aforementioned, that the quantum of sentence mposed by the trial Court for commission of offence under Section 279, IPC is the maximum, this Court is of the opinion that it would meet the ends of justice if the sentence is reduced to pay a fine of Rs. 1000/- within a period of two months from today, in default of payment of the fine money, the judgment of the trial Court affirmed by the appellate Court shall stand operative and the trial Court shall take necessary step to re-arrest the accused petitioner to undergo the original sentence. *Hiran Mia vs The State of Tripura*, 2010 Cri LJ 189 (Gauhati).

* * * * *

Sec. 338. Causing grievous hurt by act endangering life or personal safety of others.—Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

Synopsis

1. Notes.....2118
2. Procedure.....2120
3. Charge.....2120
4. Identification.....2120

1. Notes.—Causing death of a child by having sexual intercourse with wife is an offence under this section. 18 Cal 49. For other cases under this section, *vide* 16 Ind Cas 511 : 18 Cr LJ 703 : 6 MHCR App. 31; 100 Ind Cas 831 : 28 Cr LJ 351 : AIR 1927 Lah 65 : 28 PLR 99. Where a person allowed his cart to proceed unattended along a road and run over a boy who was sleeping on the road, he could not be convicted under Section 239, but convicted under Section 337 or 338, IPC. Rat Un Cr C 198. Only grievous hurt coming under the provisions of Section 335 or 338, IPC, is compoundable. Where the accused was driving a motor lorry through a public road a little boy apparently, in crossing the road, came into contact with the lorry and his left foot was run over and fractured. It was found that the speed was moderate and the accused was driving on the correct side of the road. It did not appear that the accused when called upon to stop could have swerved the lorry and saved the boy. *Held*, that on those facts, the accused could not be convicted of an offence under Section 338, IPC. 32 CWN 612. The contributory negligence would not be a defence entitling a person convicted under Section 338, IPC, to acquittal, but that it would be a factor for consideration in determining the sentence. 28 PLR 99 : 100 Ind Cas 831 : 28 Cr LJ 351 : AIR 1927 Lah 165. Where an accused in charge of motor vehicle permitted an unlicensed person to drive it while sitting by his side and the unlicensed person knocked down a passer by rash and negligent driving and caused him grievous hurt, both the accused and the unlicensed person are liable to be convicted under this section. 47 Cr LJ 968 : AIR 1947 Nag 113 : ILR 1947 Nag 144. Where a car driven at moderate speed and on correct side of road runs over a boy crossing the road, conviction under Section 338 is not sustainable. 32 CWN 612 : 30 Cr LJ 402 : 115 Ind Cas 96. Where rash and negligent driving actually results in grievous hurt being caused to any person, an offence under Section 338 is committed. AIR 1939 Pat 388 : 40 Cr LJ 759 ; AIR 1953 T.C. 617 ; AIR 1954 T.C. 25 ; AIR 1953 Pat 56 (for rash and negligent driving) : *Vide* Section 279 *ante*. Failure to sound horn by a person driving a motor car is not necessarily negligence. AIR 1939 Rang 209 : 40 Cr LJ 701. A person who is not guilty under Section 116 of the M.V. Act. cannot be convicted under section. AIR 1950 Mad 71. Motor car cannot be said to have been used by accused for offence under Section 338 and cannot be detained pending conclusion of trial. 136 Ind Cas 724 : 33 PLR 386 : 33 Cr LJ 347 : AIR 1933 Lah 565. In a case under this section a sentence of three month's rigorous imprisonment and a fine of Rs. 150 were held to be excessive. AIR 1933 Oudh 568 ; *see* also 147 Ind Cas 698 : 10 OWN 1349 : 1934 Cr C 80 : AIR 1934 Oudh 18. If a man fires blindly in the dark with a shot gun in the direction from which he has heard sounds coming from a distance away and injures a man, it cannot be held that his act must in all probability cause death or such bodily injury as was likely to cause death. Such person cannot possibly be convicted under Section 307 but should be convicted under Section 337. AIR 1938 Rang 220 : 39 Cr LJ 692. When it is found that meticious examination is necessary to detect the defect in pull and push road of bus. the driver is not bound to under take such examination before driving the vehicle. 1962 Raj LW 281 : ILR (1962) 12 Raj 103.

This section applies to case where grievous hurt has been caused is an act done rashly or negligently as to endanger human life or personal safety of other. AIR 1969 Ori 49. *A* cannot be compelled to get down from the vehicle or walk or proceed in any other manner than in the usual direction by *B*, who by such act commits offence under this section. AIR 1964 Cal 286 : 1964 (2) Cr LJ 20 ; 1973 Cut LR (Cr) 496. Where ater the tenant has locked the premises after closing them. the landlord puts another lock on the premises, he commits an offence under this section. 1963 (2) Cr LJ 543 : *see* 1964 BLJR 371 (a case covered by the exception). A Magistrate has no power to pass an order under this section that the obstruction be removed. 1954 Cr LJ 1203 : AIR 1959 Ori 171.

Where there was complaint on behalf of minor against Dentist—Accused who extracted a healthy teeth instead of decayed one—Exonerated by civil court—It was held that the revision petition herein has been exonerated of charge of extracting the wrong and healthy tooth, the very same petitioner cannot once again put on trial for offence under Section 338, IPC. Hence lower court was not right in dismissing the petition of the accused to discharge him on the basis of findings of civil court. *Dr. Veerabagu* v. *Deveraj*, (1995) 2 LW (Cr) 435 (Mad).

Evidence of pillion rider. Collission between motor cycle and bus. In the cross-examination of Pillion rider there was no suggestion that he was not proceeding as pillion rider on the motor cycle. In fact, the evidence on record shows that he was injured in the accident and for several days he was treated as in-patient in the hospital. Therefore there is no difficulty in believing his evidence that he was proceeding as pillion rider on the motor cycle, as such he was the best witness to speak as to the manner in which the accident occurred. However. the learned Magistrate for strange and peculiar reasons has disbelieved the evidence of pillion rider. The learned Magistrate has disbelieved the evidence of witness on the ground that in his cross-examination he has stated that after hearing the sound he turned round and came to the place of the accident; he disbelieved the evidence of eye-witness 2 on the ground that while drinking tea near the tea stall he could not concentrate as to what happens on the road and that he could not see the bus as a bullock-cart was proceeding ahead of the bus. He disbelieved the evidence of pillion rider on the ground that he could not identify the driver of the bus though he saw the bus coming from a distance of 10 to 15 feet and he could not say the speed at which the bus was driven. I fail to understand as to how the evidence of these witnesses could be disbelieved for the above reasons. When it is shown that witness was the pillion rider of the motor cycle and when it was not disputed that the accused was the driver of the bus which was involved in the accident, the fact that the pillion rider did not identify the bus driver should not be a ground to reject his evidence. On the ground that pillion rider or could not say the speed with which the bus was driven, his evidence could not have been disbelieved, as, in a prosecution for the offence under Sections 279, 338 and 304-A, IPC, the question required to be considered is whether, the accused drove the vehicle in a rash and/or negligent manner so as to endanger human life. In my opinion, the reasons assigned by the learned Magistrate to reject the evidence of witnesses are not proper and are irrelevant reasons. The evidence of other witnesses clearly establish that they were present near the tea stall and they had seen the accident. The evidence of the pillion rider is convincing and acceptable. For improper and irrelevant reasons, the learned Magistrate has disbelieved the evidence of witnesses. Therefore, the finding of the learned Magistrate in this behalf is perverse and illegal. *State of Karnataka vs. Kumayian*, 2010 (3) CriLJ 3376 (Karn).

2. Procedure.—Cognizable—Summons—Bailable—Compoundable with permission of the Court—Triable by Court of Presidency Magistrate of the first or second class.

3. Charge.—Same form as under Section 337 with the substitution of the word "grievous hurt" for the word "hurt".

4. Identification.—In absence of satisfactory evidence of identific-ation of accused conviction is justified. *Mangoo Prasad Gupta* v. *State of Bihar*, 1997(2) East Cr C 448 (Pat).

* * * * *

OF WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

Scope.—"The provisions under this head are for the punishment of offences in which the offender, although he may have no design against human life, and no intention to inflict bodily hurt, either wholly deprives the injured person of his freedom, or in some-degree abridges his personal liberty. The personal restraint or confinement may, in some cases, be so slight as to deserve little more than a nominal punishment, but the arbitrary imprisonment of a person, which is often a quiet and convenient made of prosecuting him, is a most serious offence, deserving of exemplary punishment". *Morgan and Macpherson.*

Sec. 339. Wrongful restraint.—Whoever voluntarily obstru-cts any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Exception.—The obstruction of a private way overland or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Illustration

A obstructs a path along which *Z* has a right to pass. *A* not believing in good faith that he has right to stop the path. *Z* is thereby prevented from passing. *A* wrongfully restrains *Z*.

Synopsis

1. Scope 2121
2. Exception 2124
3. Liability of Director of Company 2124

1. Scope.—The expression "proceeding in any direction" within the meaning of this section must mean only proceeding in that direction and in any other direction much less in any reverse direction. 62 LW 864 : (1949) 2 MLJ 703. So an offence under this section is committed if a person is prevented from proceeding in the direction in which he wants to proceed. 3 DLR (Pat) 3 : 49 Cr LJ 418 : AIR 1948 Pat 299 ; AIR 1947 Mad 124 : 49 Cr LJ 459. This section relates to the voluntary obstruction by a person, and not obviously, at least, to obstruction, which are not voluntarily continued by the persons accused of the obstruction, throughout the time this obstruction lasts. 9 Bom LR 30 ; 36 M, 547. Restraining a horse on which a person is riding so as to prevent him from proceeding at the moment of wrongful restraint, amounts to wrongful restraint within meaning of Section 339 of the Penal Code. 100 Ind Cas 544 : 28 Cr LJ 320 : AIR 1927 Mad 506. Sections 339 and 441 do not cover cases where there is no ordinary or special reason for persons to proceed in the direction which is obstructed 29 Bom LR 494 : AIR 1927 Bom 369. No doubt, there is authority for the view that all that Section 339 protects is the obstruction of any person and that it does not cover a case where he himself is free to proceed in a direction in which he has a right to proceed but without any impediments that he may have with him. On the other hand, this view of personal obstruction must obviously have some limits. 27 Bom 118 : 27 Bom LR 1419. Obstructing a person going with bullocks to a place where he had a right to go is an offence under Section 339. AIR 1926 Bom LR 1419 : 27 Cr LJ 139 : 91 Ind Cas 811. Obstruction to a person having a right to go upwards is an offence. But projecting a shed over a wall not obstructing any person is not an offence. AIR 1927 Bom 369 : 29 Bom LR 494 : 28 Cr LJ 1023 : 106 Ind Cas 111. Voluntary obstruction of a vehicle or cart can not be held to amount to wrongful restraint under Section 339, IPC, where there is nothing to show that either the carter or any human being is prevented from proceeding anywhere. Section 339 only makes punishable wrongful restraint of a person. 155 Ind Cas 444 : 36 Cr LJ 740 : 30 CWN 143 : 60 Cr LJ 472 : 1935 Cr C 334 : AIR 1935 Cal 252. The word "proceed" in Sections 339 and 340 is not confined to the case of a person who can walk on his own legs or can move by physical means within his own power. It includes the case of proceeding by outside agency, which in the case of a child of tender age means the agency of his natural protector or guardian. Such a child can, therefore, be the subject of wrongful confinement, and offence under Section 365, IPC, is capable of being committed in respect of a child unable to walk. 62 Cal 629 : 39 CWN 396.

Wrongful restraint. Accused landlord merely stopped entry of vehicles where shop of complainant tenant was situated. Not allowing entry of vehicle within compound of building is totally different from obstructing a person from proceeding in a particular direction in which he has right to proceed. Held, no offence of wrongful restraint made out. *Bharat Kishormal Shah & Ors vs State of Maharashtra & Anr.*, 2010 (4) CriLJ 4088 (Bom).

When officers gone for enquiry were detained in house of accused and there is no apprehension doubt of use of force in case they attempt to go out, no offence is made out. *State of Gujarat* v. *Keshavlal Maganbhai Jogani and others*, 1993 Cri LJ 248 (Guj).

Under this section, the obstruction should be so complete and successful as to prevent the person obstructed from proceeding in any direction in which he has a right to proceed. 15 Bom LR 103. Physical presence of the obstructor is not necessary as an ingredient of the offence of wrongful restraint. To constitute the offence, the obstructor must intend or know or have reason to believe it to be likely that the means adopted would cause the obstruction of the complainant. 9 MLT 103. There must be obstruction attributable directly to the person charged. 5 MLT 207. An obstruction made by a person who acts in good faith in the supposed exercise of any right is not an offence. And it is not apparent why the exception appended to the definition is confined to the case of obstructing a private way. The obstruction must be voluntary; that the act or the illegal omission which causes, it must be intended or known to be likely to obstruct. If there is this intention or knowledge, it is not necessary that there should be actual obstruction by physical means, by some act done, *etc.—Morgan and Macpherson.* This obstruction must be against a person. 15 Bom LR 103; but see 10 WR 35. The obstruction must be a physical obstruction. 1 Weir 339.

The mere ploughing up a path does not amount to an obstruction within the meaning of Section 339. 2 LW 1035. A person will not be justified in complaining of wrongful restraint against a *pariah*, who being lawfully in the public street on his own business, refused to move when directed to remove himself to a distance, knowing that, if he remained, the complainant would be debarred by fear of pollution, from passing near him. So where *A* caused certain *pariah* to stand in the public street in the vicinity of a temple, with the object of preventing *B* from conducting a procession from the temple through the street, *held*, the act of A did not amount to an obstruction within the meaning of Section 339, and it was *B* a distinction to go near the *pariahs*, and not presence of the *pariah*, which prevented him from going where he would and that *A* did not therefore commit the offence of wrongful restraint. 7 MLT 366 : 15 Ind Cas 851 : 11 Cr LJ 263. No offence of wrongful restraint is committed where the complaint is detained by the moral influence. Rat Un Cr C 89. A police officer refusing to let a person to go home until he had given bail would be guilty of wrongful restraint. 10 WR Cr 10. The act of preventing a person from proceeding in a certain direction, with his carts and extracting from him a sum of money on a false plea would constitute an offence of wrongful restraint. 10 WR Cr 35. The accused landlord, prevented a tenant of his who was holding over, from entering the room which the tenant had rented from the accused. *Held*, that the accused has committed an offence under Section 339, IPC. 43 Bom 531 : 21 Bom LR 261 : 20 Cr LJ 417. To justify a conviction for an offence under Section 341, IPC, it must be found that the person complaining has a right to proceed along the path and that he was obstructed from doing so. 2 LW 1035 : 16 Cr LJ 701 : 30 Ind Cas 749. Where a landlord by locking the door prevents a tenant from entering and making use of a bathroom and a privy which he may be entitled to use as a tenant. the landlord is technically guilty of the offence of wrongful restraint under this section. However a dispute of this kind can be tried more suitably in a Civil Court than in a Criminal Court. AIR 1950 Cal 157.

When the passage through the plot on which the complainant's son was proceeding with the complainant's cart full of manure had been sued for a long time as passage for carts to the complainant's fields, and the accused prevented the son of the complainant along with the cart to proceed towards the complainant's field by erecting a wall across the passage, the offence under Section 341 was clearly made out. 1953 Raj LW 199. Where the person, by, standing in front of a motor van, prevent the van from proceeding further, they wrongfully restrain the persons travelling by the van from proceeding further and punishable under Section 341. 1960 Ker LJ 856 : 1960 Ker LT 789 : 1961 Mad LJ (Cr) 67 : 1961 (1) Cr LJ 656. The fact that an act of an accused indirectly results in the complainant not proceeding in the direction in which he wanted to proceed originally would not make the accused guilty of causing obstruction to the person so as to prevent him from going in that direction. The gist of the offence defined in Section 339 is causing obstruction directly to a human being. 1955 Andhra WR 143 : 1955 Andh LT (Cr) 79. Unvoking of buffaloes tied to plough does not amount to wrongful restraint of persons. *Ibid.*

The offence of wrongful restraint is clear in its scope ; while wrongful confinement is circular in its character. Wrongful restraint is keeping a man out of a place when he wishes to be and has a right to be. The obstruction must be physical. A verbal prohibition or remonstrance does not amount to such obstruction. The offence is the abridgement of the liberty of a person against his will. AIR 1954 Mad 247 : (1952) 1 Mad LJ 164 : 1952 Mad W.N. 163 : 65 Mad LW 446 : 1952 Mad W.N. (Cr) 39 : 1954 Cr LJ 283. Where the passage through the plot on which the complainant's son was proceeding with the complainant's cart full of manure had been used for a long time as a passage for carts to the complainant's fields and the accused prevented the son of the complainant field by erecting a wall across the passage, the offence under Section 341 was clearly made out. 1953 Raj LW 199 : 1955 Cr LJ 1005.

The word "proceed" in Sections 339 and 340 is confined to the case of a person who can walk on his legs or can move by physical means with own power. Surely the word "proceeding" in Section 340 includes the case of proceeding by outside agency. To contemplate that when a person driving in a motor vehicle along a highway is stopped and prevented from moving forward would not be said to have been wrongfully restrained it, he is asked to get down from the vehicle and left free move on his foot would, take away a very large part of the content and meaning of the word "proceed" occurring in the definition in Section 339. That word cannot be given the limited meaning of proceed on foot only. 67 CWN 1029 : 1964 (2) Cr LJ 20 : AIR 1964 Cal 287.

In case of a joint owner of a house having a large share preventing co-owner having smaller share for using a door opening into *sehar*, the action does not constitute wrongful restraint. 1963 Kash. LJ 117 : 1964 (1) Cr LJ 40 : AIR 1964 J&K 4.

2. Exception.—Where the accused believed that they had a right to prevent the complainant from passing over their ground, and erected a wall between their permises in good faith, held, that their case was covered by the exception. 2 P.R. 1886 Cr ; *see* also 30 CWN 921 ; 24 Cal 885 ; 47 Cal 818 ; 15 Cr LJ 532 ; 12 Bom 377 ; 5 PWR 1914 ; 34 M 547 ; 16 Cr LJ 701 ; AIR 1950 Ass. 82 : AIR 1950 Cal 157.

3. Liability of Director of Company.—Indisputably, the dispute arose in regard to construction/tarring of the road by reason whereof, the first respondent might have faced difficulties in ingress and egress to and from his house for a short while. However, evidently, first respondent went to the Police Station and made a complaint thereabout. The work was stopped for some time, but allegedly the same was started again. Accused were called to Police Station. However, first respondent again went to Police Station to lodge a first information report after he allegedly found that the work had been continuing.

It is one thing to say that the Accused were its Directors, the same, in our opinion, would not be sufficient to fasten any criminal liability on them for commission of an offence under Sec. 341 of the IPC or otherwise.

Appellants herein were not at the site. They did not carry out any work. No overt act or physical obstruction on their part has been attributed. Only because legal proceedings were pending between the Company and the Bombay Municipal Corporation and/or with the first respondent herein, the same would not by itself mean that appellants were in any way concerned with commission of a criminal offence of causing obstructions to the first respondent and his parents. We have noticed hereinbefore that despite of said road being under construction, the first respondent went to the Police Station thrice. He, therefore, was not obstructed from going to Police Station. In fact, a firm action had been taken by the authorities. The workers were asked not to do any work on the road. We, therefore, fail to appreciate that how, in a situation of this nature, the Managing Director and the Directors of the Company as also the Architect can be said to have committed an offence under Sec. 341 of the IPC.

The learned Additional Chief Metropolitan Magistrate, therefore, in our opinion, was not correct in issuing summons without taking into consideration this aspect of the matter. The Managing Director and the Directors of the Company should not have been summoned only because some allegations were made against the Company.

For the reasons aforementioned, the impugned judgment and order of the High Court is set aside. The appeal is allowed. The order summoning the appellant is quashed. *Keki Hormusji Gharda vs. Mehervan Rustom Irani,* AIR 2009 SC 2594 : 2009 (6) SCC 475 : 2009 CrLJ 3733 : 2009 (3) Crimes 243 (SC) : 2009 (13) JT 540 : 2009 (9) SCR 183 : 2009 (8) Scale 289 : 2009 (5) Supreme 343 : 2009 (4) SLT 579 : 2009 (3) JCC 2086 : 2009 (150) CompCas 70.

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Sec. 340. Wrongful confinement.—Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.

Illustrations

(a) *A* causes *Z to* go within a walled space, and locks *Z* in. *Z* is thus prevented from proceeding in any direction beyond the circumscribing line of wall. *A* wrongfully confines *Z*.

(b) *A* places men with fire arms at the outlets of a building, and tells *Z* that they will fire at *Z* if *Z* attempts to leave the building. *A* wrongfully confines *Z*.

Synopsis

1. What constitutes 2125
2. When authority 2125

1. What constitutes.—The use of physical force is not a necessary ingredient of the offence of wrongful confinement. The mere detention of a person at a police-station by moral force, exercised by the police or other persons guarding him, would be sufficient to constitute the offence. 1 Weir 341 ; 4 Bom LR 79 A person may be guilty of wrongful confinement though he acts without malice. 13 Bom 376. Confinement of a prisoner already undergoing imprisonment in a cell within the jail tor the purpose of administering *enema*, against his will, and without legal authority, amounts to wrongful confinement. 30 Cal 95 : 6 CWN 511. Illegal arrest and custody fall within this section. 1 Weir 338 ; 1 Weir 341 ; AIR 1923 All 34 : 26 Cr LJ 428 : 85 Ind Cas 44 ; AIR 1940 Nag 186 : ILR 1940 Nag 232 : 41 Cr LJ 757. There can be no wrongful confinement when a desire to proceed has never existed, nor can a confinement be wrongful if it was consented to by the person affected. 36 P.R. 1894 Cr. As regards wrongful confinement for the purpose of extortion *vide* 27 Cal 925 : 4 CWN 755. Where the landlord prevent his tenant from entering his house he is guilty under this section. 43 Bom 531 ; *see* also 42 Bom 141 : 20 LR 70. Confinement by reason of mistake of fact is not an offence under this section. 47 Cal 818.

Where there was no desire to proceed in a certain way on the part of complainant it can be said that there was obstruction. AIR 1957 Ori 130 : 1957 Cr LJ 769. If the wife is not detained against her will and without her consent by her parents and she is not a minor, the petition for *habeas corpus* by the husband for production fails. AIR 1982 SC 938 : 1982 Cr LJ 855. A person is charged under Section 368 but there is no proof that the accused had knowledge that the person wrongfully confined was an abducted or kidnapped person, the accused can be convicted under Section 340. 1967 Jab. LJ 234. The constable who arrested a person without warrant on the ground that he is likely to commit breach of public peace and tranquillity is liable for peace under Section 342, Penal Code. AIR 1965 All 164.

2. When authority.—Vests with State or Central Government, detention order under National Security Act passed by Judicial Magistrate amounts to wrongful confinement. *Paothing Tangkhul* v. *State of Nagaland*, 1993 Cri LJ 2514 (Gau).

* * * * *

Sec. 341. Punishment for wrongful restraint.—Whoever wrongfully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Synopsis

1. Scope 2126
2. Essentials of an offence 2127
3. Procedure 2131
4. Charge 2131
5. Separate conviction 2131
6. Punishment 2131
7. Sentence 2131
8. Proof of offence 2132
9. Liability of Director of Company 2132
10. FIR 2133

1. Scope.—Directors herein were not at the site. They did not carry out any work. No overt act or physical obstruction on their part has been attributed. Only because legal proceedings were pending between the Company and the Bombay Municipal Corporation and/or with the first respondent herein, the same would not by itself mean that appellants were in any way concerned with commission of a criminal offence of causing obstructions to the first respondent and his parents. We have noticed hereinbefore that despite of said road being under construction, the first respondent went to the Police Station thrice. He, therefore, was not obstructed from going to Police Station. In fact, a firm action had been taken by the authorities. The workers were asked not to do any work on the road. We, therefore, fail to appreciate that how, in a situation of this nature, the Managing Director and the Directors of the Company as also the Architect can be said to have committed an offence under Sec. 341 of the IPC.

Indian Penal Code, save and except some matters does not contemplate any vicarious liability on the part of a person. Commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated. The Managing Director or the Directors of the Company, thus, cannot be said to have committed an offence only because they are holders of offices.

The learned Additional Chief Metropolitan Magistrate, therefore, in our opinion, was not correct in issuing summons without taking into consideration this aspect of the matter. The Managing Director and the Directors of the Company should not have been summoned only because some allegations were made against the Company. In *Pepsi Foods Ltd. and Anr. vs. Special Judicial Magistrate and Ors.* (1998) 5 SCC 749 : 1997 AIR SCW 4084, this Court held as under :

> "28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent

spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused." *Keki Hormusji Gharda and Ors. v. Mehervan Rustom Irani and Anr.*, AIR 2009 SC 2594 : 2009 (9) SCR 183 (SC) : 2009 (6) SCC 475 : 2009 (13) JT 540 (SC) : 2009 (8) Scale 289 (SC) : 2009 (5) Supreme 343 (SC) : 2009 (4) SLT 579 (SC) : 2009 CrLJ 3733 (SC) : 2009 (3) Crimes 243 (SC) : 2009 (3) JCC 2086 (SC) : 2009 (150) Comp Cas 70.

The submission of the learned senior Counsel for the appellants that since deceased received only one and two fatal injuries respectively, the common object at the most could be to cause injuries and not fatal injuries hardly merits acceptance. The deadly weapons with which appellants were armed, the number of injuries inflicted on deceased, and the murderous assault lead to a certain inference that the appellants shared common object of committing murder with other accused. That they were more than five and formed unlawful assembly is beyond doubt. deceased died on the spot. Witness fortunately survived after surgery and hospitalization for more than month. *Anna Reddy Sambasiva Reddy vs. State of Andhra Pradesh*, AIR 2009 SC 2661 : 2009 (3) Crimes 17 (SC) : 2009 (12) SCC 546 (SC) : 2009 (5) JT 617 : 2009 (6) Scale 223 : 2009 (6) SCR 755 : 2009 (4) Supreme 506.

2. Essentials of an offence.—To justify a conviction for an offence under this section, it must be found that the person complaining has a right to proceed along the path and that lie was obstructed from doing so. 2 LW 1035 : 3 DLR (Cal) 42 : 60 Cr LJ 211 : AIR 1949 Cal 112. The slightest unlawful obstruction to the liberty of the subject to go when and where he likes to go provided, he does so in lawful manner, cannot be justified, and is punishable as an offence under this section. 1 Weir 339. There can be wrongful restraint only when a person voluntarily obstructs another. 3 DLR (Cal) 42 : 83 Cr LJ 99 : 49 Cr LJ 753 : AIR 1949 Cal 85 ; 2 DLR 712 : 52 CWN 782. To constitute wrongful restraint a person must voluntarily obstruct any person so as to prevent that person from proceeding in any direction in which the person has a right to proceed. 53 CWN 822 ; AIR 1941 Pat 384 : 42 Cr LJ 526 ; 48 LW 379 : 1938 MWN 1010. Where a person in assisting a police-officer stopped a bullock cart in finding out a kidnapped girl, he is not guilty under this section. AIR 1939 Pat 256 : 40 Cr LJ 720.

In a charge under this section against a public servant, summary trial is not advisable. D' *Souza* v. *Annappa.* 1932 MWN 478. Where the accused was convicted under Section 448, but he put forward overt fact necessary for a conviction under Section 341. he is not prejudiced if the charge was altered from one under Sections 448 to Section 341. AIR 1937 Rang 350 : 38 Cr LJ 989. Where accused was originally *challaned* under Section 341 but subsequently the charge was framed under Section 506 against them, the procedure was not in any way irregular in view of the fact that they were not taken unawares inasmuch as they and their counsel had heard all the evidence. AIR 1931 Oudh 73 : 32 Cr LJ 330. Any person travelling in a vehicle is entitled to travel in that vehicle, and should not be compelled to get down from that vehicle and walk or proceed in any other manner the obstructor wants. That is elementary common sense. Where, therefore, a driver of a bus makes his bus stand across a road in such a manner as to prevent another bus coming from behind to proceed further, he is guilty of an offence under this section, of wrongfully restraining the driver and the passangers of the other bus. AIR 1950 Mad 233 ; *see* also AIR 1947 Mad 124 : 48 Cr LJ 459 : 1946 MWN Cr 118 ; but *see* AIR 1942 Mad 539 : 44 Cr LJ 45 (which relates to wrongful confinement). Mere direction or demonstration will not constitute wrongful restraint. 4 MLT 141 ; 1 Weir 339.

'The offence of wrongful restraint, which consists in keeping a man out of place where he wishes to be and has right to be, when it does not amount to wrongful confinement and when it is not accompanied with violence or with the causing of bodily hurt, is seldom a serious offence. It is, therefore, visited with light punishment." *Morgan and Macpherson.* Unreasonable delay on the part of a plague passport officer to issue a passport, to a person who cannot lawfully proceed to another place, though highly reprehensible, cannot amount to wrongful restraint or imprisonment of such person, in the absence of anything to show that the officer objected to such person going on without passport, or that he either physically or by the show or suggestion of force prevented such person from proceeding. 2 MLT 159 : 5 Cr LJ 357. If a watchman prevents an intending immigrant from leaving the Emigration Depot, he commits an offence under this section. 21 MLJ 439 : 10 Ind Cas 107 : 12 Cr LJ 212 : (1911) 1 MWN 369. Voluntary obstruction to any person from entering upon the land under *bona fide* colour of title and possession is not such an obstruction as can be made the subject of a criminal prosecution under Section 341, of the IPC, 5 PWR 1914 Cr : 34 PLR 1914 : 15 Cr LJ 533 : 24 Ind Cas 844. Mere obstruction to carts and bullocks passing by a particular road, without interfering with the free passage persons by the same, does not amount to an offence of using criminal force under Section 341, IPC. 2 LW 185 : 1951 MWN 203 : 16 Cr LJ 176 : 20 Ind Cas 560. Addressing a respectable gentleman in the singular is not offence under this section. Rat Un Cr C 933. Offence can be compounded before filing a complaint. AIR 1927 All 375 : 25 ALJ 396 : 28 Cr LJ 495 : 46 All 484 : 131 Ind Cas 671. A conviction under Section 341 is bad where there was no physical restraint of complainant's person. 19 Cr LJ 445 : 44 Ind Cas 973. A Magistrate has no Jurisdiction to try an offence summarily under Section 342 nor can he create a jurisdiction charging for the lesser offence under Section 341, 1932 MWN 478.

A person cannot be convicted of wrongful restraint where he locks up a house under a *bona fide* claim to the same. Rat Un Cr C 451 : Cr Reg. 10 of 1889. Where a Civil Court peon, in executing a warrant of arrest against a judgment-debtor, stopped a *palki with* closed doors coming out of the male apartments of the judgment debtor's house believing that the judgment-debtor was making his escape thereby, and a *pardanashin* lady of rank was in the *palki, held,* that having regard to the terms of Section 79, the peon could not be convicted under Section 341 of the Code. 24 Cal 885 : 1 CWN 655. A person preventing his neighbours from building a party-wall within their back yards is not guilty of wrongful restraint within the meaning of Section 341. 1 Weir 339. An accused had not committed an offence within the definition of this section, where he has not prevented a person from proceeding in any direction in which that person had a right to proceed, 1 Weir 340. Removing a ladder and thereby detaining a person on the roof is an offence under this section. 1 Weir 340. Where the accused came up and ordered the complainant not to remove certain things he was removing from a shop to another, and overturned the cart with the things, and the complainant went to the other shop leaving the things lying on the road, *held*, the accused would not be convicted under Section 341 of the Penal Code, but that an offence under Section 425 had been established. 12 Cal 55.

Where a person accused of wrongful restraint by erection of a fence over a way contended that he had acted in accordance with a decree of a Civil Court, *held*, that a Magistrate should confine his attention to observing or enforcing the terms of the decree of Civil Court without obtaining evidence to modify or question it. 5 CWN 215. Mere excessive and mistaken exercise of powers not civilly excusable in a police-officer, would not amount to the offence of wrongful restraint. 24 WR Cr. 51. The complainants in this case charged six accused persons with the offence of wrongful restraint, inasmuch as they had restrained the complainants from passing through certain fields on the way to their well. *Held*, that the accused cannot be convicted of an offence under Section 341, IPC, because complainant's right of way is not sufficiently established. 22 PR 1910 Cr : 120 PLR 1910 : 7 Ind Cas 493 : 11 Cr LJ 495. Section 341 does not cover the case of a person reasonably wanting to go vertically upward if he has a right to do this and being prevented from doing by a voluntary obstruction. 29 Bom LR 494 : AIR 1927 Bom 369. All members of the public have equal rights in public streets in a Municipality and no one section of the community can interdict another section of it from the lawful use of such streets. 50 Mad 673 : 1927 MWN 279 : 102 Ind Cas 481 : 28 Cr LJ 545 : AIR 1927 Mad 938. Obstruction by certain members of Hindu community to Harijans or Christians in taking a corpse along a public road is an offence punishable under Section 341, IPC. (1963) 2 Mad LJ 80 : 1963 Mad LJ (Cr) 337. The exception to Section 339 *i.e.* obstruction caused in good faith and believing to have a lawful right to do so is not an offence, applies only to private way. *Ibid.* Where a person obstructed his co-owner from using a mot to which he had yoked his blocks on the slope to a well which existed for that purpose on the ground that he had not paid his share of expenses on the well, held, that he was guilty of the offence of wrongful restraint under Section 341, IPC, as his co-owner had a right to use the mot. 27 Bom LR 1419.

A private citizen has a right to arrest or put under restraint a person who is not only threatening to commit a breach of the peace, but is a danger to the other villagers except where a statute expressly or by implication abrogates it, the common law (criminal law) of England may be applied to India. 44 M, 913 : 14 LW 189 : 61 Ind Cas 652 : 22 Cr LJ 412. If a joint owner puts his own lock without the consent of his co-owner he commits an offence under this section. 20 Bom LR 106 : 44 Ind Cas 463 : 19 Cr LJ 351. Where the passage through the plot on which the complaint's son was proceeding with the complainant's cart full of manure had been used for a long time as a passage for carts to the complainant's fields and the accused prevented the son of the complainant along with the cart to proceed towards the complainant's field by erecting a wall across by passage, the offence under Section 341 was clearly made out. 1953 Raj LW 199 : 1954 Cr LJ 1005. Before convicting a person of wrongfully restraining the other from making use of a particular place or thing it is necessary for the Court to determine if the other person has right to use it. AIR 1930 Cal 760. Slightest unlawful obstruction to liberty of subject is punishable. ILR (1952) 1 Cal 251.

It is doubtful whether, without physical obstruction, by mere words a person can be said to commit an offence under Section 341 Penal Code. Even if it is considered an offence, still Section 95 will apply. 52 Cr LJ 716 : AIR 1951 Mad 759 : 5 A.I Cr.D. 520 : (1951) 1 MLJ 13.

In a wrongful restraint there need not be any stoppage of the movement ; it may be directed into a channel different from the direction in which the victim intends to move. Physical presence of the accused is not necessary ; nor is an actual assault necessary and fear of immediate harm restraining a man out of a place where he wishes to be and has a right to be is sufficient to constitute an offence under this section. (1952) 1 MLJ 164 : 65 LW 446 : 1952 MWN 63.

Their obstruction means physical obstruction which may be by force or menances and threats. The offence under Section 339 or Section 341, is determined more by nature of effect caused and not by nature of act. ILR (1952) 1 Cal 251 ; *see* also AIR 1959 Punj 134 : ILR (1958) Punj 2319 : 1959 Cr LJ 368. The word "obstruction" or "restraint" implies a desire, to proceed in a certain way no movement of the body but a desire to cause motion. If there was never any such desire, there could be no obstruction, though the accused may have intended it, and even expressed his intention to restrain another, should the move from his present position and wrongful confinement is a species of wrongful restraint. AIR 1957 Orissa 130 : 23 Cut LT 88 : 1957 Cr LJ 769.

A fisher woman occupying on payment of rent daily a particular stall in a fish market is prevented from exercising her right to go there, without any due process of law. The offence under Section 341 is committed. Similarly, where an order diminishes the utility of the property, to wit, dumping of the property by the landlord's men by rubbish, such prevention amount to mischief punishable under Section 427. AIR 1944 Cal 192 : 1954 Cr LJ 551.

A person can not be convicted of wrongful restraint if he locks up a vacant house under *bona fide* belief that it belonged to the village community. 1960 MPLJ (Notes) 106 ; 1972 Ker LT 544. Where a police officer summons witness to be questioned and during investigation keeps him under restraint and there is no evidence that he is wrongfully confined, the guilt will be under Section 341 and not under Section 342. 1970 SCD 449. No offence is committed under Section 341, if the tenant is obstructed partially by closing one of the door leaves of the main entrance. 1981 Cr LJ 1002 : 85 CWN 944. No offence is committed under Sections 341 and 348 of the Penal Code for the loss suffered by shifting of partnership business from '*A*' place to '*B*' place in breach of partnership business. 1980 (U.C.) Cr LR 325. Where the accused stopped the bullock cart as desired by the police, he did not commit any offence under Section 341. 1977 Cr LJ 1725. An order passed by a Magistrate directing a police officer to break the lock was set aside on opposition filed by the accused that he was the owner and the complainant was never a tenant before in as much as the order amounted to preceding a case. 71 CWN 752. The net result of the rulings in such cases is that the Magistrate has the jurisdiction to order removal of obstruction only in case of wrongful restraint which is attended by use of criminal force has not in any other case. AIR 1960 Bom 139 : ILR 1939 Bom 1749.

In a Delhi case, the petitioner constructed a building on a plot acquired from Delhi Development Authority. Gift deed made by the petitioner in favour of respondents gifted ground floor. However under a clause of gift deed the petitioner reserved his right to live in front drawing room of ground floor portion. It was held that the allegations of the petitioner that respondents restrained him from entering drawing room of ground floor and thereby committed an offence of unlawful restraint punishable under Section 341, IPC were satisfactorily established. *Mohinder Singh Verma* v. *State*, 2004 Cr LJ (NOC) 349 (Delhi) : 2004 (113) DLT 877 : 2004 (77) DRJ 199.

3. Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate and may be tried summarily.

4. Charge.—The charge, if necessary, should run thus :

"I (*name and office of the Magistrate, etc.)* hereby charge you (*name of the accused)*, as follows :—

That on or about the.........day of.......at........you wrongfully restrai-ned one....... (*name the person restrained*) and thereby committed an offence punishable under Section 341 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by the said Court on the said charge.

5. Separate conviction.—Where offence under Section 341 is involved in offence under Section 143, separate fine under Section 341 is illegal. AIR 1941 Mad 445 : (1941) 1 MLJ 362.

Specific charges—Non-mentioning of specific Section 149 in charge—Effect of. A careful reading of Charge No. 4 and Charge No. 5 leaves no manner of doubt, since the transaction mentioned in Charge No. 1 has been made integral part thereof, that all the necessary ingredients of Sec. 149 IPC are implicit therein except mentioning of Sec. 149 IPC specifically. The particulars stated in Charge Nos. 4 and 5 are reasonably sufficient to give the appellants adequate notice of Sec. 149 IPC although not specifically mentioned. Is non-mentioning of Sec. 149 in Charge No. 4 and Charge No. 5 a fundamental defect of an incurable illegality that may warrant setting aside the conviction and sentence of the appellants? We do not think so. Non-framing of a charge under Sec. 149 IPC, on the face of the charges framed against the appellants would not vitiate their conviction; more so when the accused have failed to show any prejudice in this regard. The present case is a case where there is mere omission to mention Sec. 149 in Charge Nos. 4 and 5 which at the highest may be considered as an irregularity and since the appellants have failed to show any prejudice, their conviction and sentence is not at all affected. Tenor of cross-examination of PW-1 and PW-3 by the defence also rules out any prejudice to them. The offence, in the established facts and circumstances of the case, under Sec. 302 read with Sec. 149 IPC is implicit and applying the dictum laid down by the Constitution Bench of this Court in Willie (William) Slaney, the omission to mention Sec. 149 IPC specifically in the Charge Nos. 4 and 5 cannot affect their conviction. In no way their conviction is rendered bad as the appellants had assembled together armed with axes and eathapululu (sickle) and were parties to the assault on D-1 and D-2 and others. In a situation such as this it was not obligatory upon the prosecution to prove which specific overt act was done by which of the accused. *Anna Reddy Sambasiva Reddy vs. State of Andhra Pradesh*, AIR 2009 SC 2661 : 2009 (3) Crimes 17 (SC) : 2009 (12) SCC 546 : 2009 (5) JT 617 (SC) : 2009 (6) SCR 755 : 2009 (6) Scale 223 : 2009 (4) Supreme 506.

6. Punishment.—The Magistrate had no right to order the maintenance of the passage and the demolition of the wall. 1953 Raj LW 199 : 1954 Cr LJ 1005.

7. Sentence.—Treatment to Advocate—Commissioner by Police Personnel—Convicted by lower court under the Sections 341 and 355, IPC. The accused being the personnel supposed to protect law and order should not have behaved in such a manner. The sentence imposed was too meagre for offence committed by him. In cases of these nature where police personnel kept in charge of life and liberty of citizen exceed their limits the imprisonment should be preferred to fine. *M. Bhaskar* v. *Convenor, Eamcet* 1993, Andhra University College of Engineering (1994) 1 ALT (NRC) 33 ; (1994) 1 ALT (Cr) 191.

8. Proof of offence.—When victim is a girl of 13 years and her evidence is cogest and cnvincing but since no seminal Stains found on her body clothes, offence of sake is not stablished except outraging modesty of victim and thus accused to be convicted only under Sections 341 and 354, IPC, IPC. *State* v. *P. Balan*, 1996 Cri LJ 3705 (Mad).

Independent eye-witness—Reliability. The most important witness in this case is PW. 3 Vanaja, whose house is situated very near to the place of occurrence. According to her she came out of the house and when she was proceeding towards Southern side for taking water, she saw that the accused came and attacked Johnson and while PW. 1 intervened, he was also attacked. Admittedly, she is not related to the deceased family.

There is nothing to indicate that PW. 3 was having any animosity to speak falsehood against the accused. The reading of her deposition would make it clear that she is very natural and reliable witness. It is clear that the occurrence had taken place just opposite to her house and from that place, the blood stained earth was seized under Exh. P9 mahazar attested by her husband PW. 6 Gopalakrishnan on the very same day. She also stated that she had finished her S.S.L.C. and after her marriage, she was living with her husband Gopalakrishnan near the place of occurrence. On coming to know that the victim who was taken to hospital died, she went to the hospital to see the dead body. She gave the reason as to why she went to hospital immediately by stating that : "The person who does not know any thing was killed so I went to Kuhithurai Hospital to see Johnson."

In the light of the above position, it is to be emphatically stated that the evidence of Vanaja, who is an educated, independent, not related and whose house is situated opposite to the place of occurrence would inspire confidence that what all she stated before the Court is cogent and credible. *Vijaykumar vs. State*, 2009 (12) SCC 629 : 2009 CrLJ 3056 : 2009 (7) JT 36 : 2009 (6) SCR 919 : 2009 (6) Scale 364 : 2009 (8) SLT 27.

Mere absence of injury on body of victim does not mean that no rape was committed. *Shanmugham* v. *State*, 1996 Cri LJ 3808 (Mad).

9. Liability of Director of Company.—Indisputably, the dispute arose in regard to construction/tarring of the road by reason whereof, the first respondent might have faced difficulties in ingress and egress to and from his house for a short while. However, evidently, first respondent went to the Police Station and made a complaint thereabout. The work was stopped for some time, but allegedly the same was started again. Accused were called to Police Station. However, first respondent again went to Police Station to lodge a first information report after he allegedly found that the work had been continuing.

It is one thing to say that the Accused were its Directors, the same, in our opinion, would not be sufficient to fasten any criminal liability on them for commission of an offence under Sec. 341 of the IPC or otherwise.

Appellants herein were not at the site. They did not carry out any work. No overt act or physical obstruction on their part has been attributed. Only because legal proceedings were pending between the Company and the Bombay Municipal Corporation and/or with the first respondent herein, the same would not by itself mean that appellants were in any way concerned with commission of a criminal offence of causing obstructions to the first respondent and his parents. We have noticed hereinbefore that despite of said road being under construction, the first respondent went to the Police Station thrice. He, therefore, was not obstructed from going to Police Station. In fact, a firm action had been taken by the authorities. The workers were asked not to do any work on the road. We, therefore, fail to appreciate that how, in a situation of this nature, the Managing Director and the Directors of the Company as also the Architect can be said to have committed an offence under Sec. 341 of the IPC.

The learned Additional Chief Metropolitan Magistrate, therefore, in our opinion, was not correct in issuing summons without taking into consideration this aspect of the matter. The Managing Director and the Directors of the Company should not have been summoned only because some allegations were made against the Company.

For the reasons aforementioned, the impugned judgment and order of the High Court is set aside. The appeal is allowed. The order summoning the appellant is quashed. *Keki Hormusji Gharda vs. Mehervan Rustom Irani,* AIR 2009 SC 2594 : 2009 (6) SCC 475 : 2009 CrLJ 3733 : 2009 (3) Crimes 243 (SC) : 2009 (13) JT 540 : 2009 (9) SCR 183 : 2009 (8) Scale 289 : 2009 (5) Supreme 343 : 2009 (4) SLT 579 : 2009 (3) JCC 2086 : 2009 (150) CompCas 70.

10. FIR.—Sufficient explanation for Delay.—Inspector of Police Station received a telephonic message from the Nursing Home. He arrived at the Nursing Home at about 7 O'Clock, recorded the statement of Viswanathan, brother-in-law of the deceased (PW-1). The First Information Report was registered by him after coming back to the Police Station at about 8.30 p.m. He visited the place of occurrence on the next day. By that time, as noticed hereinbefore, the deceased breathed his last.

Some delay might have been caused in lodging of the First Information Report, but, the same has sufficiently been explained. It is true that PW-7 in his evidence stated that he had sent the information to the Police Station but he also admitted that the same was not recorded in the accident register. PW 7 was examined on 22.04.2003, *i.e.*, after a period of more than six years from the date of the incident. At the time of his deposition, he was working in the ESI Hospital, Salem as Medical Officer. The Inspector of Police PW-13 in his evidence categorically stated that he received the telephonic message at about 6 O'Clock in the evening from the Nursing Home and he reached there at about 7 O'Clock. We do not find any reason to disbelieve the said evidence brought on record by the prosecution.

Witness, Sekaran, son of the deceased in his deposition, who has not been cross-examined, categorically stated that he had been working in a company known as Power Held norporation of India at K.R. Thoppur. He was informed about the incident by his material aunt Chandra (PW-2) when she came in a car and took him to the Shanmugha Nursing Home where the deceased was admitted in its Intensive Care Unit. The fact that he had to be brought to the Nursing Home by PWs is again a pointer to the fact that they were busy in not only making arrangements for proper medical treatment of the deceased but also intimating the son of the deceased (PW-4) and bringing him to the hospital at the earliest possible opportunity. We, therefore, are of the opinion that the delay in lodging the First Information Report has sufficiently been explained. *Padmanaban vs. State,* AIR 2010 (SC) 47 : 2009 (10) JT 172 : 2009 (12) SCR 252 : 2009 (10) Scale 526 : 2009 (6) SLT 751 : 2009 (5) Supreme 763.

Delay in lodging--When not fatal. No doubt lodging of a First Informing Report at the earliest possible opportunity is desirable. But, the Courts cannot also ignore the ground realities that the relatives of the deceased would give priority to the treatment of a severely injured person. All attempts would first be made to save his life. The action on the part of the prosecution witnesses, in our considered opinion, in giving priority to the treatment to the injured was wholly justifiable. *Padmanaban vs. State.* AIR 2010 (SC) 47 : 2009 (10) JT 172 : 2009 (12) SCR 252 : 2009 (10) Scale 526 : 2009 (6) SLT 751 : 2009 (5) Supreme 763.

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Sec. 342. Punishment for wrongful confinement.—Whoever wrongfully confines any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Synopsis

1. Scope 2134
2. Procedure....2136
3. Summary trial....2136
4. Sanction....2136
5 Sentence 2136
6. Private defence. 2138
7. Evidence and Proof....2138
8. Cognizance of offences 2139
9. Charge 2139

1. Scope.—"This section punishes the offence defined by Section 340. Wrongful confinement, which is a form of wrongful restraint, is the keeping a man within limits out of which he wishes to go, and has a rights to go. It may, like wrongful restraint, be slight offence. But when attended by aggravating circumstances it may be one of the most serious that can be committed."—*Morgan and Macpherson.*

In the present state of the Indian Law, an arresting officer, who confines a judgment-debtor in the decree-holder's house, whilst waiting to produce him before the Court on its reopening after a holiday, is not guilty of wrongful confinement. 30 M. 179 : 16 MLJ 530 : 5 Cr LJ 102 : 2 MLT 28. In all actions taken by the police authorities, it is necessary that they should distinctly understand their responsibility in detaining witness, unduly or disobeying directions of law concerning the detention of the accused or suspected persons in custody, whether by actual physical restraint or practical coercion through fear. UBR (1892-1896) Vol. I, 221. Separate sentences for wrongful confinement and rioting are not, having regard to the provisions of Section 71, legal.

when the common object of the unlawful assembly is the wrongful confinement of the complainant, and is essential ingredient in the constitution of the offence under Section 147. 8 CWN 483 : 1 Cr LJ 365. Under certain circumstances, separate sentences can be inflicted under Sections 342 and 352, 4 Cr LJ 90 : 4 Cr LJ 69. Where five accused assaulted a constable who was acting under colour of office, accused was held rightly convicted of rioting 'and wrongful confinement. 131 Ind Cas 844 : 33 Cr LJ 706 : 13 PLT 135 : AIR 1932 Pat 171. When a person exempted from arrest under Section 135 (2), C.P. Code, was arrested after one hour of closing of Court at a place not on way to the person's residence and where no explanation was given how hour was spent, persons arresting cannot be convicted under Section 342. 141 Ind Cas 605 : 36 CWN 1071 : 1933 Cr C 31 : 34 Cr LJ 173 : AIR 1933 Cal 11.

The act of the accused in taking a woman from her house to their *haveli* in broad daylight amounts to an offence under Section 342 and not under Section 365. 109 Ind Cas 677 : 29 Cr LJ 597. A conviction under Section 342 was set aside because the incident was not mentioned in the first information report the next day at the police-station, 26 PLR 97 : 86 Ind Cas 426 : 26 Cr LJ 794 : 7 Lah LJ 121. Where all that was proved was that a woman was wrongly confined and not that her whereabouts were concealed from her relations. *Held*, that the accused can not be convicted under Section 365, IPC, but can be convicted under Section 342. 7 Lah LJ 520 : 26 PLR 633 : AIR 1925 Lah 614. Where a decree-holder gets his judgment-debtor arrested during the subsistence of a protection order, he is guilty of an offence under Sections 342 and 114 IPC, irrespective of actual presence at the time of arrest. 18 LW 167 : 1924 M. 31. Where a Government *Firka* Supply Officer entered accused's house to seize paddy without any authority to seize, the accused had the right of private defence of property, in keeping the officer locked up to protect the property and to prevent criminal trespass. But if he looked him up far beyond the limits dictated by the need, he commits an offence under this section. (1949) 2 MLJ 335. Section 347, IPC, includes offence Section 342, 42 Cr LJ 460 : AIR 1941 Sind 38. Mistaken arrest on warrant already executed in wrongful. AIR 1940 Rang. 112 : 41 Cr LJ 567. Where police-officer takes person to Sub. Inspector for examination and compel him to wait in police-station, they commit no offence under this section. AIR 1930 Oudh 505 : 32 Cr LJ 632. A decree-holder is guilty of an offence under Section 342 of the Indian Penal Code, if the causes arrest of judgment-debtor while he is returning from Court under circumstances mentioned in Section 135 of the Civil Procedure Code and the Court officer who arrests or makes over the warrant of arrest to his subordinate for compliance is also guilty of the offence. 121 PLR 1916 : 17 Cr LJ 525 : 36 Ind Cas 495 ; but *see* 157 Ind Cas 1004 : 36 Cr LJ 1252 : 39 CWN 318 : AIR 1935 Cal 551.

Submission by the complainant to arrest does not detract from the accused's acts or diminish its legal effect. *Mens rea* does not render into offence under Section 342 at all. AIR 1929 Cal 730 : 33 CWN 751 : 1920 Cr C 366. Wrongful confinement by police-officer comes under Section 342. AIR 1930 Cal 711 : 1930 Cr C 1111 : 128 Ind Cas 208. But where police acts under illegal orders, there is no wrongful confinement. 22 Cr LJ 5 : 47 Cal 818 : 59 Ind Cas 37 ; *see* also 46 Mad 604 : 24 Cr LJ 599 : 44 MLJ 655 : 73 Ind Cas 343. Where principal offenders are acquitted under Section 342, minor offender cannot be convicted under Sections 368 and 109. AIR 1929 Cal 767 : 33 CWN 891 : 1929 Cr C 479.

Accused allegedly brought victim at night to house of co-accused on wrong protect. Door of the co-accused was locked from outside due to which the victim could come out of the house in the morning. The accused was held guilty of wrongful confinement. *Raju Pandurang Mahale* v. *State of Maharashtra*, 2004 Cr LJ 1441 : AIR 2004 (SC) 1677 : 2004(4) SCC 371 : 2004(2) JT 425 : 2004(2) Crimes 204 (SC) : 2004(2) Supreme 234 : 2004(2) Recent CR 936.

While no doubt, the absence of any desire on the part of the person confined to move would detract from it being an offence under Section 342, the mere omission to an attempt to run away does not mean the absence of a desire to move. ILR 1950 Cut 185 : 1953 Ori 142.

For scope of bail *see* AIR 1965 All 161 ; AIR 1963 All 4. By no stretch of irregularities for obstruction during the course of a search in contravention of the provision of Section 65 entitle a person to force a public servant or any other person to do acts contra to the volition. AIR 1972 SC 886 : 1972 Cr LJ 638 ; *See* also 1973 ALJ 366. (What is wrongful confinement) ; 1978 Cr LJ 864 ; 1971 Cr LJ 1222. Where police-officer keeps person under wrongful restraint though there is no evidence of wrongful confinement, he is guilty under Section 341 and not under Section 342. 1978 SCD 449. The court can in its discretion allow the accused to sit behind or near his counsel but if for certain reasons the Court withdraw the privilege no offence is committed under Section 342. (1980) 1 Cal HN 276 ; 1980 Cr LJ (1) NOC 42 : 1979 Raj LW 103 (benefit of doubt).

Person acquitted of charge under Section 342 may be tried under Section 436 in view of the provisions of Sec. 300 (2) of the Criminal Procedure Code. AIR 1962 Pat. 13.

2. Procedure.—Cognizable — Summons — Bailable — Compoundable — Triable by Presidency Magistrate or Magistrate of the first or second class.

3. Summary trial.—An offence under this section is not triable summarily. (1932) MWN 478.

4. Sanction.—A police-officer cannot be tried under this section without the previous sanction of the Provincial Government, where he pleads that he is acting under Chapter IX, Cr PC. 1937 MWN 1243.

5. Sentence.—Offence of wrongful confinement in course of dacoity-separate sentences must be imposed. AIR 1962 Manipur 7 : 1962 (1) Cr LJ 168. Finding of acquittal cannot be lightly treated. 1982 Cr LR (SC) 497..

Agony of trial since four years—Released on probation claimed—Sentence insufficient undergone—Sentence reduced to four months. *Surender* v. *State of Haryana*, (1994) 3 CC Cases 352 (P & H).

Sufficient material for Conviction. Thus, it is quite clear that eye-witnesses to the occurrence have fully proved the incident and corroborated the statements mentioned in the FIR and there is no inconsistency in the statements of all the three witnesses. There is no material contradiction in the cross examination and the entire facts of the FIR which has been fully supported by the statements of all the three aforesaid witnesses.

From the perusal of the post mortem report and the statement of the doctor it is clearly evident that the injuries on the deceased persons were found to be on the chest which is a vital part of the body and the death was natural as the bullet had hit them. According to the statement of PW-7, the cause of death was the gun shot ante-mortem injury on the vital part of the body and from excessive bleeding and shock. According to the statement of PW-7 at the time of firing of the gun its barrel must have been at a distance of 3 to 6 feet from the dead bodies. As a result of which the deceased Brijesh and Rajesh had suffered injuries from the gun shots fired within 6 feet from the place where they were hit by the bullet and the same caused their instant death.

The defence towards the end of the trial tried to put up a version that the two deceased came there to the petrol pump to commit robbery by hurling bomb and in the process also caused damage to the petrol pump. Unfortunately, however, no proof in support of the said contention could be produced by the defence. There is nothing on record which can even remotely suggest that the act of the accused persons was in exercise of their right of private defence. The investigation, at the place of occurrence, soon after the incident did not reveal any remains of bomb or recovery of any firearm from the hands of the deceased or any damage to the petrol-pump. No injury was also found on the bodies of the accused. It is pertinent to mention here that no suggestion regarding recovery of any bomb materials or detection of any signs of damage to the petrol pump by the deceased persons and PW-2, was put by the defence to either PW-10 or PW-11, both of whom were present at the place of occurrence at the time when the showroom of the accused persons was searched and weapons, cartridges and other articles were seized. Thus, the submission of the defence with regard to the alleged exercise of right of private defence by the accused persons being without any basis, the same also fails.

Another submission which has been advanced by the learned Counsel for the accused is that the story of Accused No. 1 and Accused No. 2 locking the PW-2 in the showroom is completely unbelievable. As discussed hereinbefore, on altercation having taken place for petrol, PW-2 was assaulted by the accused persons and forcibly taken to the showroom and locked in there immediately thereafter. On being asked by PW-1 not to do the same, the gun shot was fired at him but he retreated to safety. Thereafter, when both deceased, Rajesh and Brijesh, the two sons of PW-1 reached the spot, two consecutive shots were fired at them which resulted in their death and thereafter again gun shot was fired towards PW-1. This fact is quite clear not only from the evidence of PW-1 but has also been fully corroborated by the evidence of PW-2 and PW-3. It is quite evident from the record that a big crowd gathered at the spot. Under the said circumstances, it was quite natural for the accused persons to keep PW-2 in their custody. Making PW-2 captive, a fact to which PW-11, the SSI who was investigating the case was also a witness, could well protect the accused persons from the crowd which had come to the place of occurrence after hearing the gun shots. Making PW-2 captive could also protect the petrol tank from being damaged by the pressure of the agitated crowd. The injuries were found on the body of PW-2 by the doctor who had examined him soon after the incident at 1.50 pm on the same day.

In view of the aforesaid discussion, facts and circumstances of the case, we are of the considered view that the High Court clearly erred in reversing the order of conviction recorded by the trial Court. Accordingly. we set aside the judgment and order of the High Court and restore the judgment and decision of the trial Court. *Raj Narain Singh vs. State of Uttar Pradesh,* 2009 (10) SCC 362 : 2009 (12) JT 342 : 2009 (12) Scale 627 : 2009 (14) SCR 755 : 2009 (8) SLT 160.

6. Private defence.—Accused entered office room of deceased, threw chilly powder into his eyes, picked up an iron hammer as well as a brick lying there and assaulted deceased in presence of complainant, a worker engaged by deceased. Trial Court finding evidence cogent, credible, recorded conviction of appellant. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

When the factual scenario is examined in the background of the principles set out above, the inevitable conclusion is that the appeal is without merit, deserves dismissal which we direct. *Arun vs. State of Maharashtra*, 2009 CrLJ 2065 : 2009(2) Crimes 6(SC) : 2009(4) SCC 615 : 2009(3) Scale 803 : 2009(4) JT 78 : 2009(3) SLT 220.

7. Evidence and Proof.—*Sufficient evidence* for murder and wrongful confinement. In the teeth of the evidence of eyewitnesses PWs. 1 and 11, corroborated by the testimony of PW-9 and PW-10 discussed above, it is established beyond any shadow of doubt that in fact the occurrence had taken place at the given time in the house of A-1 where the dead body of Dinesh was found lying by the Police which was sent to the Doctor for post mortem examination. PW-1 immediately lodged complaint (Exh. PJ) of the incident to Om Prakash, ASI (PW-14) who met him on the way leading to the Police Station. The names of all the accused were specifically mentioned in the said complaint. The accused persons were not found present in the village when the Investigating Officer visited the place of occurrence. A-1, A-2, A-3 and A-4 were produced before Rohtas Singh S.I. (PW-12) by Zile Singh, who is the resident of the same village. Recovery of two pieces of "danda" (Exhs. P-18 and P-19) and "rope" (Exh. PQ/3) taken into possession by PW-12 pursuant to the disclosure statement (Exh. PQ) made by A-1 during the course of interrogation, has been proved which were used by the appellants in the commission of the offence. The ocular version of PW-1 and PW-11, the eyewitnesses, has been further corroborated by Dr. Paramjit, who found as many as 12 injuries on the dead body of Dinesh.

In the opinion of Dr. Paramjit, the cause of death of Dinesh was shock and haemorrhage due to multiple injuries to the vital organs which were ante-mortem in nature and sufficient to cause death in ordinary course of nature.

The trial Court as well as the High Court have rightly held that there was a motive for the accused to commit murder of Dinesh because as per the prosecution evidence, A-1 was nursing a grudge against the deceased because he allegedly sexually assaulted his daughter, for which offence Dinesh was acquitted by the trial Court on 18.03.2002 whereas the prosecutrix was later on married to DW-3 on 26.05.2002. Dinesh was murdered on the intervening night of 29/30.05.2002 in the house of A-1 in village Sundana. The evidence of PWs. 1 and 11 has been found to be satisfactory, reliable, consistent and creditable by the trial Court as well as by the High Court. Both the witnesses have been cross-examined at length by the defence, but nothing tangible has been extracted from their evidence to create any shadow of doubt that they are not truthful witnesses. They have given reliable and consistent version of the crime and their evidence inspires confidence. On our examination of the judgment given by the trial Court and confirmed by the High Court, we find that both the Courts have properly and rightly appreciated and re-appreciated the entire evidence on record and there is no infirmity or perversity in the findings recorded by the Courts below to interfere with the well-reasoned judgments. *Rajender Singh vs. State of Haryana*. AIR 2009 SC 1734 : 2009 CrLJ 1561 : 2009 (11) SCC 382 : 2009 (1) JT 186 : 2009 (1) Scale 344 : 2009 (1) Supreme 400 : 2009 (1) SCR 108.

8. Cognizance of offences.—Informant a member of the Scheduled Caste community alleged that he was accosted in way by number of accused persons including petitioners and was brought in a room where he was intimidated, assaulted, insulted and was abused. Accused persons alleged to have intimidated and abused informant in a room and not within public view. Cognizance taken under provisions of SCST Act is quite bad. Parties have compromised hence order taking cognizance of offences is liable to be quashed. *Girinath Singh & Ors vs State of Jharkhand & Ors.*, 2010 (4) CriLJ 4006 (Jhar).

9. Charge.—The charge under this and Sections 343 and 344 should run thus :

"I (*name and office of the Magistrate, etc.)* hereby charge you (*name of the accused*) as follows :—

"That on or about the........day of......at.......you........wrongfully confined one.........(*name the person so confined, and add in a case of Section 343 or 344)* for days.....and thereby committed an offence punishable under Section 342 (or Section 343 or Section 344) of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried by the said Court on the said charge".

* * * * *

Sec. 343. Wrongful confinement for three or more days.—Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or fine, or with both.

Synopsis

1. Notes........2139
2. Procedure........2140
3. Charge........2140

1. Notes.—"One aggravating circumstance in this offence of wrongful confinement is the duration of the confinement. Confinement for a quarter of an hour may possibly be a mere frolic, deserving only a nominal punishment. It may indeed be so harmless as not to amount to an offence. But the like confinement if continued for a length of time may come to be a very serious offence".—*Morgan and Macpherson*. The confinement must be against the person's wishes. *Vide* 1923 Lah 274 : 5 LLJ 38. Where the prisoner was sentenced for abetment of abduction of a woman under Sections 109 and 498, Penal Code, and for wrongful confinement of her under Section 343, held that both the sentences were illegal as the essence of the case was abduction, and that the accused.

as a better therein should be sentenced for it alone. WR 1864, Cr 21. Accused No. I brought a woman who was his kept mistress from *Kolhapur* and kept her with accused No. 2, a brothel housekeeper in Bombay. On previous occasions too he had supplied woman to accused No. 2 to be used as prostitute. The woman was made to live as a prostitute in the house the entrance to which was guarded ; and watch was kept over her movements. Occasionally she was allowed to go out under surveillance. *Held*, that both accused were guilty of wrongly confining the woman. 42 Bom 181 : 20 Bom LR 79 : 44 Ind Cas 144 : 19 Cr LJ 258.

2. Procedure.—Cognizable — Summons — Bailable — Compoundable, with permission of Court—Triable by any Magistrate.

3. Charge.—*See* the form under Section 342.

* * * * *

Sec. 344. Wrongful confinement for ten or more days.—Whoever wrongfully confines any person for ten years, or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Synopsis

1. Notes....2140
2. Sentence....2140
3. Procedure....2140
4. Charge....2140

1. Notes.—Chaining an insane brother for a period of nearly three months is an offence under this section. 47 All 475 : 21 ALJ 391.

2. Sentence.—The sentence should include imprisonment. 1 BHC 39.

3. Procedure.—Cognizable—Summons—Bailable—Not compounda- ble—Triable by any Magistrate.

4. Charge.—*See* form under Section 342.

* * * * *

Sec. 345. Wrongful confinement of person for whose liberation writ has been issued.—Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any term of imprisonment to which he may be liable under any other section of this Chapter.

Synopsis

1. Notes....2141
2. Procedure....2141
3. Charge....2141

1. Notes.—'This is another circumstance of aggravation. The offender persists in wrongfully confining a person notwithstanding an order issued by a competent authority for the liberation, or for the production of such person".—*Morgan and Macpherson.*

Article 21 of the Constitution is not intended to afford protection to life and personal liberty against violation by private individuals. AIR 1952 SC 69 : AIR 1956 SC 108.

2. Procedure.—Not cognizable—Summons—Bailable—Not Compo-undable—Triable by any Magistrate of the first class.

3. Charge.—In addition to the principal charge for an offence under this Chapter, as may be proved, a charge under this section should state:

"And that you, on or about the........... day of.......... at............ wrongfully confined the same *AB*, knowing at the time of such wrongful confinement that a writ for the liberation of the said *AB* had been duly issued, and thereby you have rendered yourself liable to the additional punishment as provided in Section 345 of the Indian Penal Code, and within my cognizance *etc*".

* * * * *

Sec. 346. Wrongful confinement in secret.—Whoever wrongfuly confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any other punishment to which he may be liable for such wrongful confinement.

Synopsis

1. Scope 2141
2. Procedure 2142
3. Charge 2142

1. Scope.—To render a person liable under this section, it must be shown that the wrongful confinement was of such a nature as indicate an intention that the person confined should not be discovered. 9 Cal 221. No separate sentence is to be passed in cases of restraint in attempt of kidnap. 6 NWP 293. "The offence consists in wrongful confinement aggravated by the offender's endeavour to deprive his prisoner and those interested in him or bound to protect him, of the remedies which the law gives against this wrong. This intention of the offender is not expressly made part of the definition".—*Morgan and Macpherson.*

Mere delay in lodging FIR with some delay by itself is not a ground to brush aside the case of prosecutrix. *Guntuboyin Gangulu* v. *State of A.P.*, (1995) 2 Crimes 356 (A.P.).

2. Procedure.—Cognizable—Summons—Bailable—Compoundable with permission of the Court—Triable by any Magistrate.

3. Charge.—The charge under this section may be independent of or additional to the wrongful confinement for which the offender would be liable according to the duration and purpose of the confinement. It should run thus.

"And whereas you confined the said *AB* in such manner as to indicate an intention that the confinement of the said *AB* may not be known to any person, wit...... interested in the person so confined, (or to any public servant, to wit......) or that the place of such confinement may not be known to (or discovered by) any such person (or public servant), you are liable to the additional punishment provided in Section 346 of the Indian Penal Code and within my cognizance, *etc*".

* * * * *

Sec. 347. Wrongful confinement to extort property, or constrain to illegal act.—Whoever wrongfully confines any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security or of constraining the person confined or any person interested in such person to do anything illegal or to give any information which may facilitate the commission of any offence shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Synopsis

1. Notes....................2142
2. Procedure....................2143
3. Charge....................2143

1. Notes.—Where the charge was one under Section 347 of the Penal Code and the evidence of the prosecutor and other evidence had been taken, and the case was postponed for the evidence of further witnesses which is considered necessary by the Magistrate, and they failed to appear, an order by the Magistrate dismissing the case for want of sufficient evidence was held to be legal. 7 BLR 8. Where it was alleged that the police-officer illegally detained a person with the object of extorting money but the Court found that no money passed, *held*, that the elements of an offence under Section 347 were wanting. 7 OWN 957 : AIR 1930 Oudh 505. Separate conviction under Sections 147 and 347 are legal. 140 Ind Cas 752 : 34 Cr LJ 81 : 13 PLT 288 : AIR 1932 Pat 335. Where a person by fear of injury was induced to place thumb mark on blank paper and such paper is valuable security, a conviction under Section 347 is legal. *Ibid.* An offence under Section 342 is included in the offence under this section. AIR 1941 Sind 37 : 42 Cr LJ 460. Where a Police Sub-Inspector wrongfully confined certain persons on charge of gambling and extorted money from them by putting them into fear of prosecution, he should be convicted under Section 220 and not under this section. *Ibid.*

Dismissal of the complaint under Section 347 amounts to acquittal and no subsequent complaint under the same offence is permissible. 1973 All Cr R 101. The sections Judge would be competent under Section 376, Cr PC to frame a charge under section which commuted to it under Section 363. 1977 All Cr R 251.

2. Procedure.—Cognizable—Summons-search warrant for the person confied—Bailable—Not compoundable—Triable by any Magistr-ate.

3. Charge.—The charge under this section should run thus :

"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

'That on or about the......day of.....at.......you wrongfully confined one *AB* (*the person confined or another interested in him*) for the purpose of extorting from the said *A, B* (*or* from a certain person....... *C, D* interested in the said A, *B*) (a certain property) to wit......(or a valuable security, to wit.......) or for the purpose of constraining the said *A, B* or *C, D* to do anything illegal, to wit.......or to give any information, to wit..... (*specify it*) and thereby committed an offence punishable under Section 347 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge".

* * * * *

Sec. 348. Wrongful confinement to extort confession, or compel restoration of property.—Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Synopsis

1. Scope 2143
2. Procedure 2144
3. Charge 2144
4. Conviction 2144

1. Scope.—Where a village Magistrate was present at the beating and the wrongful confinement by a police constable, of a person suspected of, having committed theft and it was proved that the village Magistrate actually encouraged the ill-treatment by the constable, *held*, that he was guilty of abetting the offences punishable under Sections 333 and 348, Penal Code. 14 Weir 50 ; *see* also 1930 MWN 723. The words "to satisfy a claim or demand" in this section, cannot be limited to claim or demand to property, and claim for restitution of conjugal rights is within the meaning of this section. 160 Ind Cas 668 : 8 *R. Pesh.* 123 : 37 Cr LJ 344 : 1936 Cr C 124 : AIR 1936 Pesh. 19. Police-officer detaining persons for more than 24 hours not in connection with any investigation is guilty under this section. AIR 1941 Mad. 720 : 43 Cr LJ 3. For sanction for prosecution so. AIR 1967 All 579 : 1967 Cr LJ 1463 (prosecution of police officer under Sections 323, 330, 342, 194, 195 and 186).

2. Procedure.—Cognizable—Summons-the Court is entitled to search warrant for the person confined—Bailable—Not compoundable—Triable by any Magistrate.

3. Charge.—The charge should run thus :

I *(name and office of Magistrate, etc.)* hereby charge you (*name of the accused)* as follows :—

'That on or about the.......day of......at......you wrongfully confined one *A, B* for the purpose of extorting from the said *A, B (or from* one *C, D* in whom the said *A, B* was interested) any confession (or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined to restore or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security) and thereby committed an offence punishable under Section 348 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

4. Conviction.—Conviction of the police officials cannot be based upon unreliable evidence in the case of death in police custody. Such conviction was not held, justified. *T.* V. *Eachare Warrier* v. *T.O. Kunchiraman Nambiar,* 1994 JIC 13 (SC).

* * * * *

OF CRIMINAL FORCE AND ASSAULT

Of Criminal Force and Assault.—"A large proportion of acts designated as assaults, will also be offences falling under the heads of hurt and restraint. Thus a stab with a knife is an offence falling under the head of hurt, and it is also an assault. The seizing a man by the collar, and thus preventing him from proceeding on his way, is unlawful restraint, and is also an assault. But there will be many assaults which it is absolutely necessary to punish, yet which cause neither bodily hurt nor unlawful restraint. A man who impertinently puts his arm round a lady's waist, who aims a severe stroke at a person with a horse whip, who maliciously throws a stone at a person, squirts dirty water over him, or sets a dog at him, may cause no hurt and no restraint, yet it is evident that such acts ought to be prevented."—*Morgan and Macpherson.*

Sec. 349. Force.—A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact effects that other's sense of feeling ;

Provided that the person causing the motion, or change of motion or cessation of motion, causes that motion, change of motion or cessation of motion in one of the three ways hereinafter described:

First.—By his own bodily power.

Secondly.—By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly.—By inducing any animal to move, to change its motion, or to cease to move.

Synopsis

1. Raisinga lathi 2145
2. Force 2145

1. Raising a lathi.—Where the accused raised a *lathi* to strike the complainant, and the latter ran away to save himself the offence under this section is completed. 12 ALJ 154 : 23 Ind Cas 183 : 15 Cr LJ 231 ; 74 Ind Cas 1049 : 24 Cr LJ 857 : 1923 All 333.

2 Force.—Where violence has been caused to an inanimate object only and not to any person, there was no criminal "force" as defined in this section. 18 CWN 1150 : 15 Cr LJ 720 : 26 Ind Cas 168 ; 17 NLJ 27. "Force" as defined in this section contemplates the presence of the person to whom it is used, that is to say, it contemplates the presence of the person using the force and of the person to whom the force is used, 152 Ind Cas 162 : 36 PLR 91 : 1934 Cr C 702 : AIR 1934 Oudh 454. As regards other cases of criminal force, *vide*, 28 Cr LJ 191 : 4 P.R. 1880 ; 72 Ind Cas 616 : 24 Cr LJ 456. Where it is proved that a person broke open the lock of the pantiff's house threw out all the property belonging to him therefrom and put a lock of his own on the house, thereafter, the offence of criminal force within the meaning of Section 349 of the Penal Code is made out, 99 Ind Cas 863 : 28 Cr LJ 191 : AIR 1927 Nag 131. Causing an animal to cease to move, amounts to use of force within the meaning of this section AIR 1930 All 820 : 32 Cr LJ 306. According to this section, force cannot be said to be used by one person to another by causing change in the position of another human being. AIR 1939 Oudh 81 : 40 Cr LJ 221. This section and Section 351 contemplate the use of it to a person and not to a thing. AIR 1939 Lah 184 : 40 Cr LJ 781. The word 'another' refers to human beings. AIR 1969 Goa 45 : 1969 Cr LJ 469 : 1982 Cr LJ (NOC) 11 : 1981 Ker LJ 475.

* * * * *

Sec. 350. Criminal force.—Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

Illustration

(a) *Z is* sitting in a moored boat on a river. *A* unfastens the mornings, and thus intentionally causes the boat to drift down the stream. Here *A* intentionally causes motion to *Z*, and does this by disposing substance in such a manner that the motion is produced without any other action on any person's part. *A* has therefore intentionally used force to *Z* ; and of he has done so without *Z's* consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause Injury, fear or annoyance to *Z*. *A* has used Criminal force to *Z*.

(b) *Z* is riding in a chariot. *A* lashes *Z*'s horses, and thereby causes them to quick-their pace. Here *A* has caused change of motion to *Z* by inducing the animals to change their motion. *A* has, therefore, used force to *Z* ; and if *A* has done this without *Z's* consent, intending or knowing it to be likely that he may thereby injure, frighten, or annoy Z, *A* has used criminal force to Z.

(c) *Z* is riding in a palanquin. A, intending to rob Z, seizes the pole, and stops the palanquin. Here, *A* has caused cessation of motion to Z ; and he has done this by his own bodily power. *A* has therefore, used force to ; and as *A* has acted thus intentionally, without *Z*s consent, in order to the commission of an offence. *A* has used criminal force to *Z*.

(d) *A* intentionally pushes against *Z* in the street. Here *A* has by his own bodily power moved his own person so as to bring it into contact with *Z*. He has therefore intentionally used force to *Z* ; and if has done so without *Z*s consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy *Z*, he has used criminal force to *Z*.

(e) *A* throws a stone intending or knowing it to be likely that stone will thus bring into contract with *Z*, or with *Z*s clothes, or with something carried by *Z* or that it will strike water, and dash up the water against *Z*s clothes or something carried by *Z*. Here, if the throwing of the stone produce the effect of causing any substance to come into contact with *Z*, or *Z*s clothes, *A* has used force to *Z* ; and if he did so without *Z*s consent. Intending hereby to injure, frighten or annoy *Z*, he has used criminal force to *Z*.

(f) *A* intentionally pulls up a woman's well. Here *A* intentionally uses force to her and if he does so without her consent intending or knowing it to be likely that he may thereby injure, frighten or annoy her, has used criminal force to her.

(g) *Z* is bathing. *A* pours into the bath water which he knows to be boiling. Here *A* intentionally by his own bodily power causes such motion in the boiling water as brings that water into contact with *Z*, or with other water so situated that such contact must affect *Z*s sense of feeling. *A* has therefore intentionally used force to *Z* ; and if he has done this without *Z*s consent intending or knowing it to be likely that he may thereby cause injury, fear or annoyance to *Z*, *A* has used criminal force.

(h) *A* incites a dog to spring upon *Z*, without *Z*s consent. Here, if *A* intends to injury, fear or annoyance to *Z*, he uses criminal force to *Z*.

Synopsis

1. Intentionally 2146
2. Without his Consent 2146
3. Criminal Force 2147
4. Scope 2147

1. Intentionally.—The word "intentionally" shows that all involuntary, accidental, or merely negligent acts are excluded. (*Vide Mayne's Criminal Law*, Section 415).

2. Without his consent.—There is a difference between doing an act without the consent of a person, and against his will. The latter implies mental opposition to an act which is anticipated before it takes place. Where it is an element of an offence that the act should have been done without the consent of the person affected by it, some evidence must be offered that the act was done to him against his will or without his consent. *Reg. v. Fietcher*, LRICC 89 cites in *Mayne's Criminal Law*, Section 415.

3. Criminal force.—"Criminal force" in Section 350 contemplates criminal force used against a person and not against any matter of substance. 22 Cr LJ 329 : 2 Pat LT 120 : 61 Ind Cas 57 ; AIR 1940 Pesh 51 : 42 Cr LJ 272 (1). Breaking open a lock is not use of criminal force. AIR 1927 Lah 830 : 26 PLR 500 : 28 Cr LJ 676. The offence of being members of an unlawful assembly is one in the composition of which the use of criminal force does not enter, though the show of criminal force may exist. 25 Cal 434 : 2 CWN 305. To support an order under Section 522, for restoration of possession of immovable property there must be a finding that the dispossession was by the criminal force as defined in Section 350 of the Penal Code. 27 Cal 174 : 4 CWN 307.

Force refers to a person used either directly or indirectly causing injury, fear or annoyance, to that person. That excludes force or violence to property. AIR 1968 Mad 310 (1928) 1 MLJ 266 ; 1982 Cr LJ (NOC) 11 : 1981 Ker LT 475. Force if used against the consent of the person on whom the same is used the use of force will be criminal force. AIR 1968 Raj 2419 : 1968 Cr LJ 1304. No criminal force in refusing the accused to give his specimen of hair for purposes of identification. 1971 Cr LJ 1905.

4. Scope.—"This definition of criminal force appears to include what is termed by the English Law 'battery,' that is, any event the least hurt or violence inflicted on the person of another. If there is the use of force as defined in the proceeding section, and this is intentional on his part who uses it, and is also without the consent of the person against whom it is used such use of force becomes criminal when it has for its object the commission of an offence (*see* Section 40), or the causing of injury (*see* Section 44), or the causing of fear or annoyance. It will be observed that the definition of the offence does not included anything that the door does by means of another person".—*Morgan and. Macpherson.* No clear distinction between 'force' defined in Section 349 and criminal force in Section 350. 1951 Ker LT 475 : 1982 Cr LJ NOC 11.

* * * * *

Sec. 351. Assault.—Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation on is about to use criminal force to that person, is said to commit an assault.

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.

Illustrations

(a) *A* shakes his fist at *Z*, intending or knowing it to be likely that he may thereby cause *Z* to believe that *A* is about to strike *Z*. *A* has committed an assault.

(b) *A* begins to unloose the muzzle of a ferocious dog, intending, or knowing it to be likely that he may thereby cause *Z* to believe that he is about to cause the dog to attack *Z*, *A* has committed an assault upon *Z*.

(c) *A* takes up a stick, saying to *Z*. "I will give you a beating". Here, though the words used by *A* could in no case amount to an assault, and though the mere gesture unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

Synopsis

1. Scope 2148
2. Gesture or preparation 2149
3. Cases 2149

1. Scope. An assault is something less than the use of criminal force, the force being cut short before the blow actually falls. It seems to consist in an attempt or offer by a person having present ability with force to do any hurt or violence to the person of another. And it is committed whenever a well-founded apprehension of immediate from a force already partially or fully, put in motion is created. An assault is included in every use of criminal force. Mere words, it is explained, do not amount to an assault. Such acts as the following a blow which is purely accidental, an injury received in playing at any lawful sport by consent, reasonable chastisement of a child by his parent or guardian, or of a scholar of a school master, a blow or other violence in self-defence, the use of force by a public servant within the sphere of his duty, force used in defence of a man's property, and like, *vide*, 24 Cr LJ 276 : 71 Ind Cas 996—are not offences, either under the head of criminal force or assault, or under any other provision of the Code. By the chapter of General Exception such assaults are saved from being accounted offences."—*Morgan and Macpherson* ; *See* also (1963) 2 Andh WR 403 : AIR 1964 AP 548.

Any gesture calculated to excite in the party threatened a reasonable apprehension that the party threatening intends immediately to offer violence or is about to use criminal force to the person threatened, constitute if coupled with a present ability to carry such intention into execution, an assault in law. 1 BHCR, 204. To substantiate a charge of assault upon a particular person, it is necessary that a gesture or preparation should be made by a person which would cause another person to apprehend that the person was about to use criminal force to him then and there. It would not be enough to prove that the words used and the preparation made were calculated to cause that person to apprehend that criminal force would be used to him, if he persisted in a certain course of conduct, 30 Cal 97 : 6 CWN 342. Whether particular act amounts to assault depends on circumstance. AIR 1935 Pat 214.

Where the accused for the purpose of inducing the revenue inspector to desist from distraining his properties, threatens to kill the revenue inspector, he is guilty of criminal intimidation under Section 503 and not under Section 352, IPC. When there is no evidence to show that the words were accompanied by any gesture, which is essential for constituting assault. AIR 1959 Mad 342 : 1959 Cr LJ 1084 : 1959 Mad LJ (Cr) 266.

The essential elements in the term "assault" are that the gesture is made in the presence of the person in respect of whom the gesture is made and that the accused knew or intended that such gesture or preparation would use criminal force against him. (1974) 40 Cut LT 155. *See* (1969) 35 Cut LT 788. In case of attack on human being mere preparation by itself may amount to a offence under Section 351 but preparation for slaughter of animal is no offence. AIR 1962 All 22.

2. Gesture or preparation.—Mere words do not amount to assault. But the words which the party threatening cases at the time may either give to his gestures such a meaning as may make them amount to an assault or on the other hand, may prevent them from doing so. 1 BHC 205. Mere threatening attaining attitude is not sufficient. 8 MLT 118 : 7 Ind Cas 416.

3. Cases.—Throwing a bottle into a house with the intention of frightening the inmates, constitutes an offence under this section. 4 Cr LJ 201 : 3 BLR 194. Causing the death of a man, who had an enlarged spleen, by striking him is an offence under this section. 21 PR 1876 Cr. Where an accused breaks into another's house he could be convicted under this section, as throwing of breaks would be a gesture which would cause apprehension that criminal force was about to be used, AIR 1932 All 322 : 33 Cr LJ 889. An internal medical examination of a lady, if not voluntarily submitted by her would amount to assault and battery. AIR 1932 All 524 : 1932 ALJ 221. According to this section apprehension of the use of criminal force must be from the person making the gesture or preparation and if it arises from some body else, it is not an assault on the part of the person making the gesture. AIR 1939 Oudh 81 : 40 Cr LJ 221. Where a number of persons aim *lathi* blow at another, it is an act which irrespective of whether the blow hit the mark, renders the weilder guilder of assault as defined under Section 351. 1957 All WR (HC) 149 : 1957 ALJ 308. In case of a charge under Section 323, it was pleaded that there was no medical evidence about the injury but there was positive evidence about the injury of the complaint by the accused the offence would be under Section 351. 1980 Cut LR 139 : 1981 Cr C 14; sec also (1981) 3 WLR 131 (notwithstanding that there was common consent in the sport in the course of which the injury was caused).

* * * * *

Sec. 352. Punishment for assault or criminal force otherwise than on grave provocation.—Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine may extend to five hundred rupees, or with both.

Explanation.—Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

if the provocation is given by anything done is obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant, or if the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.

Synopsis

1. Criminal force 2150
2. Scope 2151
3. Procedure 2152
4. Charge 2152
5. Sentence 2152

1. Criminal force.—To constitute 'criminal force', the offender must intentionally use force to any person without that person's consent, in order to the committing of any offence or intending by the use of such force to cause, of knowing it to be likely that by the use or such force he will cause injury, fear or annoyance to the person for whom the force is used. Unless all these elements are present a person cannot be convicted under this section. UBR (1892-1896), Vol. 1, 226 ; UBR (1892-1896), Vol. 1, 228. An assault made by parties proceeding together and acting in conjunction as to time, place, and assault is one single act, and not a divisible and district act. In such a case, it cannot be said that the cause of action is not one common to all the parties. 14 WR Cr 419. Where harm is very slight, accused cannot be convicted under this section. AWN 1887, 73. The fact that a person, who was assaulted, brought a criminal complaint does not prevent him from subsequently bringing a suit for damages. AWN 1887, 104 ; AWN 1893, 62. A person tried and acquitted on a charge of using criminal force under Section 352 (which includes the offence of battery) cannot be tried in respect of the same criminal matter on a charge of hurt. 7 BLR App. 25 : 16 WR Cr 3. Illegal seizure of carts for Government officer's use is an offence under this section. 9 Bom 558 ; *see* also 4 ALJ 132 : 9 All 272 : AWN 1907, 42. Where the petitioners are convicted under Sections 352 and 242 of the Code, and sentenced separately for each of the offences, the acts found against them being, that they seized, dragged and pushed the complainant to a certain place, in order to punish him, *held*, that the petitioners have been punished for the whole series of acts, and that series of acts comes within the definition both of wrongful confinement and of using criminal force, and, accordingly the case falls within the second paragraph of Section 71 of the Code. 4 CLJ 90 : 4 Cr LJ 69. The complainant, a young woman, was going with an earthen jar through a public thoroughfare to fill water at a well, after sunrise, when the accused who was standing, leaning against his *lathi*, caught hold of the complainant's hand which prevented her from going in the direction in which she was going. It was also alleged that the accused had also solicited her to commit adultery with him. The Magistrate, finding the latter part of the charge unproved, convicted the accused under Section 352, IPC. *Held*, that though there was evidence to sustain a charge of criminal force under Section 352, IPC the principle of Section 95, IPC, applied to the act of the accused in the case as it was a mere piece of foolish and vulgar chaff, which seriously to treat as a crime would be absurd. AWN 1887, 73 ; AIR 1939 Sind 19 : 45 Cr LJ 247. When the accused, a coolie, was charged under Section 352 of the Penal Code with using force to a peon in the *momlatdar's* office who prevented his running away from service, *held*, that no offence was committed, since the accused had a right to defend himself from the illegal act of the peon in wrongfully restraining him. Rat Un Cr C 605. Where a Police Sub-Inspector attempts to search a house outside the circle and if the inmates of the house assault to as to prevent the search they are not guilty of an offence under Section 352, IPC, 71 Ind Cas 996 : 24 Cr LJ 276 : 1933 All 433 ; *see* also AIR 1933 Pat 66 : 13 PLT 62 : 33 Cr LJ 233 : 136 Ind Cas 60 ; *see* also AIR 1944 Sind 89 : 45 Cr LJ 550 ; but *see* AIR 1944 Pat 222 : 45 Cr LJ 806 ; 41 Cr LJ 250. An offence under this section has been committed where the victim is assaulted by the accused and his thumb impression was forcibly taken on blank paper. AIR 1941 Pat 129 : 42 Cr LJ 361. The conviction under Section 75, Madras City Police Act is no bar to the trial of an offence under Sections 325 and 352 of the Penal Code, AIR 1940 Mad 224 : 41 Cr LJ 401. Where two persons were improperly arrested on an illegal warrant by a forest watcher and they were marched from the place of arrest to the police-station and while so doing the accused came on the scene and gave a slap on the cheek of watcher. *Held*, that it was a trivial offence and was not a case in which the accused should be convicted under Section 252, IPC, 51 M. 873 : 28 L.W. 141 : 109 Ind Cas 365 : 29 Cr LJ 541 : AIR 1928 Mad 624 : 55 MLJ 220. Where a police-officer was assaulted in a private place where he was deputed to control traffic, the offence falls under this section. AIR 1928 Lah 230 : 29 Cr LJ 905 : 111 Ind Cas 665 ; *see* also AIR 1923 All 87 : 45 All 142 : 20 ALJ 921 : 24 Cr LJ 151 : 71 Ind Cas 503 *see* also AIR. 1933 Sind 174 : 27 SLR 209 : 146 Ind Cas 43. Where co-operative extension officer while proceeding to his headquarters after attending a meeting of a co-operative society was assaulted by the accused at a bus stop, the offence committed would be one under Section 352 and not under Section 353 can only apply when the public servant was discharging the duty imposed on him by virtue of his office. AIR 1960 Ker 200 : 1959 Ker LT 1269 : 1959 Ker LJ 1310 : ILR 1960 Ker 146 : 1960 Cr LJ 828.

An assault on a citizen for appealing to the police needs a deterrent sentence. AIR 1926 Bom 255 : 28 Bom LR 291 : 27 Cr LJ 496 : 93 Ind Cas 896. Putting trigger of unloaded gun is not an attempt to murder but is only an assault. AIR 1923 Rang 251 : 1 Rang 209 : 2 Bur LJ 76 : 24 Cr LJ 850 : 74 Ind Cas 1042. Person may not without actually committing an offence under Section 352 and the theory that Section 147 embraces Section 352 is fallacious. AIR 1928 Mad 21 : 29 Cr LJ 2 : 106 Ind Cas 338. In a charge under Section 147 conviction under Section 352 can be given but not for abetment of assault, 23 Cr LJ 206 : 65 Ind Cas 862 : AIR 1922 Mad 110. Where the charge was that the accused threatened to kill the Revenue inspector for lawfully distraining his properties that would not amount to an offence under Section 352 of the IPC. If the words had been accompanied by gesture that would certainly amount to an assault. The mere threat however would clearly fall under Section 503. AIR 1959 Mad 342 : 1959 MLJ (Cr) 266 : 1959 Cr LJ 1094.

The act of the petitioner in dragging the complaint opposite party upto the road where assault was committed amount to offence under the section. (1977) XLIV Cut L.T. 194.

2. Scope.—"This section provides for the ordinary punishment for an assault or for using criminal force. A mitigation of punishment when there is grave and sudden provocation is admitted here as in cases of culpable homicide and of hurt. The several general Exception concerning the right of private defence, acts done by consent, *etc.*, should be borne in mind."—*Morgan and Macpherson.*

Where the constables were taking the accused to dispensary for his examination, the accused refused to go and resisted the attempt of the constables to drag him to the dispensary, and in so doing, gave blows to the constables and made good his escape the question arose whether the accused was guilty under Section 352 or Section 353. The answer was in the negative inasmuch as the accused had the right of defending himself against the force sought to be illegally exercised against his person. AIR 1959 Bom 284 : ILR 1959 Bom 852 : 1959 Cr LJ 825 : 61 Bom LR 30.

In order to claim protection under Section 197, Cr PC a person accused of an offence under Section 353, must show that there was a reasonable connection between his official duty and the act. (1971) 12 Guj LR 473 ; 1982 UP (Cr C) 60 : 1982 All Cr C 291 (justifiability for assault and intimidation by the *Amin*).

The accused was charged with abusing and assaulting a police constable. The accused had abused and slapped the constable when he was waiting for a bus for going back to police station after making search of some known depardator. It was observed that constable was merely waiting for a bus to reach police station, it could not be said that he was engaged in executing the duty. *Held*, that accused was guilty of offence punishable under Section 352 and not under Section 353. 1987 Cri LJ 950 (Kant).

3. Procedure.—Not cognizable—Summons—Bailable—Compounda-ble—Triable by any Magistrate and may be tried summarily.

4. Charge.—The charge, if necessary, should run thus :

"I *[name and office of the Magistrate, etc.]* hereby charge you *(name of the accused)* as follows :

'That on or about.......day of......at.....you assaulted (or used criminal force) to AB *(the person aggrieved)* and thereby committed an offence under Section 352, of the IPC and within my cognizance."

"And I hereby direct that you be tried on the said charge."

5. Sentence.—Where the accused was a railway officer of some station and as such it was his duty to behave fairly and courteously to passangers, his conduct in forcibly trying to occupy a seat occupied by a woman passanger and her bale and assaulting her when she resented, calls for censure and where he had added to insult to injury in casting as persons on the character of that passenger the Court must award the maximum sentence permissible under Section 352. AIR 1954 SC 711 : 1954 Cr LJ 1793 ; See 1979 Cr LJ 1275 (for reduction of sentence).

* * * * *

Sec. 353. Assault or criminal force to deter public servant from discharge of his duty.—Whoever assault or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Synopsis

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1. Assault.—Whether a particular act does or does not amount to an assault depends on the circumstances of each case; a particular act may not amount to an assault in one case, but the same act taken along with the other surrounding circumstances may amount to an assault in another case. 155 Ind Cas 421 : 36 Cr LJ 714 : 16 Pat L.T. 295 : 1935 Cr C 577 : AIR 1935 Pat 214 (S.B.). The terms "prevention" and "deference" are not synonymous. In the first place, prevention does not mean only deference by physical force but by other means as well. Secondly, the distinction seems to be with reference to the stage of interference by the accused. 1953 Cr LJ 1780 : AIR 1953 Mad 936.

Father of the complainant was assaulted according to the prosecution case by the accused in an inhabited part of the village, but none was a witness of the locality and "chance" witnesses only deposed against the accused. In an appeal from acquittal, it was held that no injury to the victim was proved from the record of the case. Appeal dismissed. [(1986) 2 Crimes 525 (Cal)].

2. Scope.—"The assault is aggravated because a public servant is the object of it. To support a charge under this section, besides proof of the assault or use of criminal force, and that it was used against one who either was or was acting as a public servant—it should be shown that the accused had knowledge of the official character of the person assaulted. It will of course be open to the accused to show illegality or excess on the part of the public servant".—*Morgan and Macpherson*. The prosecution must prove that person assaulted is a public servant and that the assault was made on him while he was discharging his duties as such. 18 Cr LJ 803 : 15 ALJ 565 : 41 Ind Cas 323 ; 154 Ind Cas 740 : 36 Cr LJ 558 : AIR 1935 All 516 ; 1963 (1) Cr LJ 559 ; 1964 (2) Cr LJ 571 : MR 1964 Pat 493. If the action of the public servant, was not valid in law, using criminal force against him will not amount to an offence under this section. AIR 1948 Mad 472 : 3 DLR (Mad) 62 : 49 Cr LJ 705; AIR 1947 Pat 232 : 48 Cr LJ 60 ; AIR 1946 Sind 166. But if an arrested person endeavours to escape and assaults the officer when the latter prevents him from escaping, he commits an offence punishable under this section- AIR 1948 Cal 68 : 49 Cr LJ 62, An offence under this section has not been committed where the Sub-Inspector was not acting in the lawful discharge of his duty or in the execution of his duty as a Sub Inspector. AIR 1944 Pat. 222 : 45 Cr LJ 806 ; *see* also AIR 1944 Cal 79 : 45 Cr LJ 384 ; AIR 1942 All 424 : 44 Cr LJ 67 : ILR 1942 All 914 ; AIR 1941 Rang 346 : 43 Cr LJ 292 : AIR 1942 Oudh 57 : 43 Cr LJ 60 ; AIR 1941 Pat 560 : 42 Cr LJ 752 ; 196 IC 731.

An offence is committed under this section by sinking a potcarried by a public servant in discharge of his duties. AIR 1941 Lah 297 : ILR 1941 Lah 370 : 42 Cr LJ 812- Mere utterance of some threats, unaccompanied by any gesture or preparation suggesting intention to use criminal force does not constitute an offence under this section. 43 CWN 756. An offence under this section is committed where a Police constable in uniform has been assaulted. AIR 1939 Nag 95 : 40 Cr LJ 905. Sections 353 and 185 do not pre-suppose the existence of a legal warrant. AIR 1938 Mad 659 : 39 Cr LJ 879. But unless a particular officer is empowered by the District Magistrate to use force to prevent contravention of Berar Foodgrains Export Restrictions Order, it cannot be held that the official is acting in the discharge of his duty as a public servant or in the discharge of his public functions within the meaning of Sections 186 and 353, IPC, when uses force to prevent *juar* without a permit. 47 Cr LJ 636 : ILR 1949 Nag 714 ; *see* also AIR 1946 Nag 261 : 47 Cr LJ 638 : ILA 1946 Nag 395.

Persons engaged in affray, if arrested unlawfully, are entitled to inflict the necessary minimum injuries from unlawful custody. However, if constable is subjected to criminal force by pelting stones, after the person have escaped from his custody and where there is no need to inflict any criminal force on him for the purposes of such escape, an offence under Section 353, Penal Code, will be made out. AIR 1950 Mad 365. Officer executing orders under the repealed Act if the orders are passed by a competent Court is acting in discharge of his duty. 18 Cr LJ 689 : 13 NLR 87 : 40 Ind Cas 689. Rescuing a person arrested under a valid order is an offence under Section 353, 42 All 283 : 22 Cr LJ 210 : 19 ALJ 196 : 60 Ind Cas 322. Where warrant of arrest is not illegal, resistance amounts to offence under Section 353. 132 Ind Cas 244 : 35 CWN 328 : 58 Cal 940 : 32 Cr LJ 886 : AIR 1931 Cal 443. Arrest or apprehension must be lawful in every way. AIR 1932 Pat 171 : 1932 Cr C 347 : 13 PLT 135 : 33 Cr LJ 706. *Tahsildar* removing unauthorised encroachment is acting in execution of duty as public servant. 1933 Cr C 1067 : AIR 1933 Nag 295. Apprehension by executing peon is lawful and resistance cannot be justified. 142 Ind Cas 160 : 34 Cr LJ 269 : 13 PLT 502 : 11 Pat 743 : 1932 Cr C 853 : AIR 1932 Pat 315.

Where criminal force is used in obstruction to attachment, a sentence of fine of Rs. 100 was upheld. AIR 1933 Nag 392. Finding of guilty knowledge and person assaulted was public servant to knowledge of accused must be recorded. 146 Ind Cas 43 : 1933 Cr C 538 : 27 SLR 209 : AIR 1933 Sind 174. Where Excise Inspector in attempting to make search does not act lawfully, conviction of accused for assaulting such Inspector cannot stand. 146 Ind Cas 43 : 1933 Cr C 538 : 27 SLR 209 : AIR 1933 Sind 174. An officer exercising official duties in grossly illegal and outrageous manner is not "public servant in execution of his duty". 132 Ind Cas 711 : 1931 Cr C 665 : 32 Cr LJ 939 : AIR 1931 Rang 169 ; *see* also 132 Ind Cas 214 : 32 Cr LJ 853 : 1931 Cr C 748 : AIR 1931 Lah 524 ; 148 Ind Cas 818 : 35 Cr LJ 782 : 1934 MWN 275 : 39 L.W. 388 : 1934 Cr C 351 : AIR 1934 Mad 206 : 66 MLJ 408 ; *see* also 14 Mys LJ 316 : 41 Mys HCR 178. All that is necessary to justify a conviction under Section 353, IPC, is that the person against whom an assault is made or criminal force is used should be a public servant in the execution of his duty as such public servant. AIR 1938 All 220. When it was found that the accused had threatened to assault the authorities and no assault had actually been made, *held,* that the accused were not guilty under Section 353. 150 Ind Cas 1048 : 35 Cr LJ 1250 : 1933 Cr C 855 : AIR 1934 All 687.

A person resisting the execution of an illegal warrant does not commit an offence under Section 353. 1934 Cr C 1313 : AIR 1934 All 1016. Where act constituting an offence was done when accused had lost temper, and no force or violence was used, a sentence of fine is sufficient. AIR 1935 Pat 214 : 16 Pat L.T. 295 : 36 Cr LJ 714. Where a person was charged under Section 353, for having assaulted a police-officer in the discharge of his public duties, but it was found in the course of the trial, that he committed an assault on a private individual, a witness in the case, and not on the police-officer, *held,* that he could not be convicted of the latter offence. 6 CWN 202. The Mysore police do not answer the description of public servant within the meaning of the Penal Code. They have no authority to enter British territory and make an attempt to arrest persons suspected of crime. Persons using criminal force to them cannot be convicted under Section 353, Penal Code. 1 Weir 342 : 1 Weir 837 ; *see* also 105 PLR 1904 : 1 Cr LJ 956. Where under a time-expired warrant a public servant attaches property, resistance to the attachment is no offence under Section 353. 19 NLR 183 ; *see* also 2 Pat LJ 11 : 18 Cr LJ 370 : 38 Ind Cas 744. A warrant was executed by the *Amin of* a Civil Court after the expiry of the time fixed by the *Amin* and before the expiry of the time fixed by the Court for its return and the *Amin* was obstructed in the course of the execution by the accused. *Held,* that the accused was guilty of an offence under Section 353, IPC. 45 MLJ 78 : 1923 MWN 444 : 32 MLT 248 : AIR 1923 Mad 687. Assaulting a police-officer when he is discharging his duties as such amounts to an offence under Section 353, IPC. 18 SLR 221 : 88 Ind Cas 15 : 26 Cr LJ 1071 : AIR 1925 Sind 280.

The definition of a public servant in Section 21 of the Indian Penal Code, includes every officer in the service or pay of Government. 21 LW 704 : 78 Mad 867 : AIR 1925 Mad 1093 : 49 MLJ 192. Where it is doubtful whether the person alleged to be assaulted is a public servant within the meaning of Section 21 of the Code, the accused should be given benefit of doubt and convicted under Section 353 and not under Section 352. AIR 1952 Ajmer 13 : 1932 Cr LJ 217. The expression "in consequence of" used under Section 353 of the Penal Code includes the motive which actuated an assault as the cause of such assault. 99 Ind Cas 935 : 28 Cr LJ 199 : AIR 1927 Lah 162. A police servant was approached with a certain prayer by the accused in his capacity as a public servant and as such he expressed his inability to accede to his prayer. Subsequently, the accused assaulted the public servant. *Held,* that the accused was guilty of an offence under Section 355 of the Penal Code though the person assaulted was not acting as public servant when the assault was made. 99 Ind Cas 935 : 25 Cr LJ 199 : AIR 1927 Lah 162. While a police-officer was deputed in a private place to control the traffic on the road leading from the private place to the public road and he was assaulted while discharging his duty. *Held,* the police-officer was acting in the lawful discharge of his duty and the accused was guilty of an offence under Section 353, 111 Ind Cas 665 : 29 Cr LJ 905 : AIR 1928 Lah 230 ; *see also* AIR 1924 Lah 257 : 4 Lah 448 : 76 Ind Cas 29.

To bring the act of the accused within the purview of this section, it must be established that he assaulted the complainant in consequence of anything done by the latter in the lawful discharge of his duty as such public servant. 7 Mys LJ 136. Where a police party goes to arrest an offender in connection with a cognizable offence and the offender merely runs away with a gun in hand without attempt on his part to aim it at the police in order to deter them from arresting him, he cannot be said to have committed assault on the police and therefore, cannot be convicted under this section. AIR 1950 Kutch 23.

Mere use of force is not enough to bring an act within the term of Section 353. It must be shown that the force was used intentionally without the person's consent. AIR 1967 SC 170. It is a defensive act when search has ended and the person conducting the search have left the premises to hiring them back and to make them to do things against their will is not an obstruction to an act but a computer to make tham act which makes the accused guilty under Section 353. 1973 ALJ 366. Who is a public servant ? (1975) 1 SCWR 617 (when a public servant is appointed under the instruction of the Govt., the Chairman of the committee).

Section 353 can only apply when he is performing an act which is so integently connected with the duty attached to his office as to form part of it. AIR 1960 Ker 200 : ILR 1960 Ker 146 ; AIR 1960 Pat 213 ; 1978 Cr LJ 1062 ; 1977 Cr LJ 1665 ; 1976 Cr LJ 274 ; 1971 All Cr R 610.

Assault on public servant not committed in consequence of anything done as a public servant is not a case under Section 353. 1978 Cr LJ 1514 ; 1963 (1) Cr LJ 569 (assault or use of criminal force is a necessary ingredient of the offence ; 1971 All Cr R 610 (assault on invigilator while discharging his duties).

Accused speeding the car violating the police-officer's command to stop the same, no offence is committed under Section 353. 1964 Cr LJ 27. The act must be done with the intention to prevent or deter the public servant from discharging his duty as such public servant. (1972) 1 Cut LR (Cr) 422 : AIR 1972 SC 886 : 1972 Cr LJ 638 (in consequence of anything done).

When petitioner employee was not performing his public duty at time he was assaulted and obstructed, complaint under Section 353, IPC, dismissed but offence under Section 504, IPC made out. *Ramesh Kumar* v. *Smt. Shushila Srivastava*, 1997 Cri LJ 282 (Raj).

Forest guard complained that while he was going from his quarter to place of work to attend duties he was assaulted by accused. It was said that at the relevant time the complainant could not be said to be on duty at the time of occurrence. It was held that the conviction was liable to be set aside. *Mohd. Kutty* v. *State*, 2004 Cr LJ 1603 (Ker) : 2004(3) All Cri LR 183 : 2004(2) Crimes 469 : 2004(2) Cur Cri R 143 : 2004(2) Rec Cri R 660.

The Commissioner was in his office, *i.e.*, Town Hall, when the offence took place. He was not there for any purpose other than his duty. For causing obstruction to his duty it is not necessary that the Commissioner is physically obstructed. Such a view will be too pedantic. No public servant can discharge his duties if he is humiliated in the manner in which the petitioner humiliated the Commissioner. Such acts are direct obstructions to functioning of a public servant. Obstruction was caused not only at the moment when the offence was committed but the obstruction must deemed to have continued for a fairly long time not for that day but also for days that followed. Mr. Sunil Sharma, learned counsel appearing for the State, says that the day of the Commissioner was lost because the Commissioner could not work till his stained clothes were replaced. The act itself was sufficient obstruction and it is not necessary to seek how long the Commissioner took to regain his poise. If such activities are deemed no obstruction to the performance of duty of a public servant, no public servant can be said to be safe in the place of his duty. If the offence committed is looked upon as a simple non-cognizable offence, there would be no way of keeping up the dignity of a public servant which is so very essential for efficient functioning of the Government or a local body. *Virendra Sharma* v. *State*, 2005 Cr LJ 2644 (Del) : 2005 (120) DLT 249 (Del).

3. In the execution of his duty.—In a place where vaccination is not compulsory, a vaccinator is not discharging any duty under the law, when he is attempting to vaccinate a child against the will of his parents. 19 MLJ 238 : 4 Ind Cas 1116 ; 1 Weir 345 ; AIR 1954 Madh B 33 : 1954 Cr LJ 531. To sustain a conviction under Section 353, it must be shown that the accused assaulted or used criminal force to a person who was a public servant and was discharging his duty as a public servant. *Ibid*. 1965 All Cr R 85 : 1965 All LJ 449 : 1965 All WR (HC) 69. But where a thing is done by a public servant in the execution of his duty, an assault on him to deter him from doing that duty will make the accused liable under this section. 24 PR 1880 Cr : 8 Ind Cas 881 : 9 MLT 168. An assault made on a public servant acting in obedience to the orders of his superiors is punishable under the section, the question whether those orders were right or wrong being immaterial in the case. 14 Cr LJ 141 : 78 Ind Cas 891. But where the servant exceeds his power and where he is not empowered the offence under this section will not be committed. 1 Weir 343 ; 13 ALJ 691 : 16 Cr LJ 589 : 30 Ind Cas 141 ; 31 Cal 424 : 1 Cr LJ 442 ; 59 Ind Cas 321 ; 25 Cr LJ 742 ; 73 Ind Cas 731 ; 76 Ind Cas 655 ; 75 Ind Cas 768 ; 47 MLJ 447 ; 1 Weir 344 ; 19 NLR 183 ; 1937 MWN 176 ; 1965 (2) Cr LJ 116 : AIR 1965 Punj 264. Persons assaulting a collector *peadah*, who had been directed to keep the peace during a distraint are guilty under Section 353 of assaulting a public servant while in execution of his duty. 3 WR Cr 49. An attempt by a vaccinator to take the lymph from the arm of a person who objects to it, notwithstanding the objection, is unlawful, and resistance to such an attempt will not be an offence under Section 353, Penal Code. 3 CWN 627. The public servant who ignores the mandatory provisions of law cannot be said to be acting in good faith unless such public servant makes an honest mistake as to the law and believes that he is acting within the law, he cannot be said to act in good faith. 1937 MWN 569. Where no warrant is produced in evidence, an accused cannot be convicted under this section for assaulting a process-server while executing the warrant. 3 LBR 128. The assaulting of a *malguzar*, who was holding an enquiry in the matter of damage done to a Government Forest, is not an offence under Section 353 of the Indian Penal Code, because the holding of such enquiry is not one of the legitimate duties of *malguzar*, 9 Ind Cas 669 : 12 Cr LJ 112.

Where the petitioner resists the search by the Land Customs officer duly empowered to search the petitioner, by pushing him, he commits an offence under Section 353. AIR 1955 Cal 470 : ILR(1957) 2 Cal 106 : 1965 Cr LJ 1243 : 1963 (1) Cr LJ 559.

Where a vaccinator attempted to vaccinate a child forcibly, his relations can assault the vaccinator in the exercise of their right of private defence. AWN 1906, 98 : 3 ALJ 327 : 3 Cr LJ 368 : 28 All 481 : *see* also 3 CWN 627 : 38 PWR 1913 Cr : 14 Cr LJ 512 : 20 Ind Cas 992 : 28 Cal 399 : 5 CWN 413 : 1 Weir 344.

But where a public servant is acting in colour of office, no right of private defence can arise. 18 CWN 548 : 15 Cr LJ 427 : 24 Ind Cas 163. Even though the act done or attempted to be done by the Inspector of Labour directorate may not be strictly justifiable by law, he would be protected by Section 99, and some irregularity in the act of the Inspector does not absolve the person using force against the officer from being convicted under Section 353. 1953 Cr LJ 173 : AIR 1953 Mad 936 ; But *see* (1962) 13 STC 69 : (1962) 2 MLJ 187 : 1962 (1) Cr LJ 45. A constable even if not on duty is entitled to arrest the offender for having inflicted injuries with a knife and if the constable is assaulted while he attempts to effect the arrest, it is clearly an offence under Section 353, IPC. AIR 1958 Orissa 69 : 1958 Cr LJ 541 : 23 Cut LJ 428. Police in unifORm doing surveillance, enters the accused's house and is beaten. The accused is held guilty under Section 353, IPC. ILR (1954) 1 All 368 ; 29 Cut LJ 100 : 1963 Cr R 138 : 1963 (1) Cr LJ 826 (police constable receiving information about theft is bound to intervene assault during such intervention would be an offence under Section 353). In the absence of any evidence as to the terms of a warrant either by the production of the original or by secondary evidence, a conviction for resisting a public servant in executing the warrant cannot stand. 3 CWN 605. Searching of a house of person suspected of theft is not illegal and assault to the officer searching comes within Section 353. 20 Cr LJ 174 : 17 ALJ 115 : 49 Ind Cas 494. Absence of name of person to be arrested vitiates warrant and the arresting person is not a public servant as he acted beyond his jurisdiction. AIR 1924 Cal 959 : 51 Cal 902 : 39 CLJ 432 : 20 Cr LJ 2 : 83 Ind Cas 481. A police constable arresting a person without written order is not acting in the discharge of his duty and an assault on him is not an offence under Section 353. 20 Cr LJ 48 : 48 Ind Cas 688 ; *see* also AIR 1929 Mad 624 : 51 M 873 : 29 Cr LJ 541 : 55 MLJ 220 : 1928 MWN 310 : 109 Ind Cas 365 ; AIR 1929 All 903 : 30 Cr LJ 1145 : 120 Ind Cas 113 ; AIR 1923 Pat 388 : 4 PLT 171 : 24 Cr LJ 490 : 72 Ind Cas 594 ; AIR 1952 Orissa 93 : 1952 Cr LJ 420. Members of an unlawful assembly assaulting public servant in furtherance of common intention are guilty under Section 354 and Section 353. AIRm Pat 115. An officer exercising his official duties grossly, illegally and in outrageous manner can not be deemed to be a public servant in the execution of his duty so as to bring an assault against such an officer within the purview of Section 353. AIR 1951 MB 42. Where the accused was alleged to have attempted to seize logs of Sal wood from the Forest Guard at the time when an offence under Section 33 of the Forest Act was alleged to have been in process of being committed by others, it was found that it was not proved that the offence under Section 33. Forest Act, had at all been committed. *Held*, that the Forest guard was not acting in execution of his duty as a public servant and the conviction under Section 353, could not stand. AIR 1960 Pat 213 : 1960 BLJR 12 : 1960 Cr LJ 634 ; 1958 An LT 843.

Offence against Sales Tax Inspector duty amounts to offence under this section. AIR 1967 SC 170 : (1976) 2 SCR 151 ; AIR 1965 Pat 3. But where the entry was unauthorised and illegal, the respondents had a proper right to ask the officers to get out of the houses. (1962) 1 Cr LJ 45 ; AIR 1964 Pat 493. (1970) 2 SCR 151 (if done in execution of his duty, liable to be protected from assault).

In the instant case it was alleged that the Municipal officials were abused and assaulted by accused when they tried to prevent the construction. It was held that their presence at the spot as public servants of the Municipality was not at all warranted. Assuming for a moment that there was any assault it would not be an interference with the discharge of their public duty, since the prosecution his failed to show that those officers who went there had gone with the valid authority of preventing the alleged illegal construction. *State of Karnataka v. Ireppa Dhareppa Hosani,* 2001 Cri LJ 3566 (Kant).

Duty imposed on the public servant includes the performance of all acts which are too integrally connected with his duty. AIR 1975 SC 1685 : 1975 Cr LJ 1440. When the officials of the electric supply company go to cut off the electric connection without service of any notice under Section 24 of the Electricity Act, can not be deemed to be discharging an official duty. 1979 Srinagar LJ 201 ; (1974) 76 Punj LR Cr 87 ; 1974 Pat LR 150 ; (1973) 1 Cut WR 195.

Accused convicted under Section 353 for assaulting a public officer in execution of duty ILR (1981) MP 251 ; (1970) 2 SCR 151 but not held guilty of offence under Section 353 when the act was either illegal or not in execution of duty. (1982) MPLJ 30 ; 1982 Cr LJ 335 ; 1980 Cut LR (Cr) 151 ; 1978 Cr LJ 1082 (resistance to arrest or attachment).

4. Conviction and Sentence.—Where a charge under Section 147 has only been framed, the accused cannot be convicted under Section 353; 18 CWN 1274 : 16 Cr LJ 42 : 26 Ind Cas 634.

Separate sentences under Section 147 and under Section 353 should not be passed, when the common object of the unlawful assembly committing the riot was the offence under Section 353. 4 CWN 245. Where many people are disposed to resist process-servers when their property is attached, it is necessary to pass deterrent sentences even where such persons are not sure that the attachment is legal. 111 Ind Cas 576 : 29 Cr LJ 896 : AIR 1928 Nag 135.

But slight irregularities will not help the accused. 46 MLJ 45 ; AWN 1884, 244 ; 76 Ind Cas 186 ; 27 All 491 ; 5 CWN 843 ; 13 NLR 87 ; 30 Ind Cas 141 ; 8 All 293 ; 21 M 78 ; 27 All 49 : 2 Cr LJ 155.

5. Punishment.—*See* 1952 Cr LJ 1242 : AIR 1952 Ajmer 38 ; AIR 1953 All 494 : 1953 Cr LJ 1137 ; 1963 All Cr R 138 : 1963 (1) Cr LJ 826 ; 1964 BLJR 390 : 1965 (1) Cr LJ 60 : AIR 1965 Pat 8 ; (1963) 29 Cut LT 100.

Lesser sentence. It is bizarre to note that there is terrible irrationality in the sentence prescribed for committing offence u/S. 333, IPC. The said offence is in combination of offence - defined u/S. 320 and the offence of assault on a public servant punishable u/S. 353, IPC. The offence of grievous hurt is punishable u/S. 326, IPC with life imprisonment or with the imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine. Whereas a higher form of manifested offence u/S. 333 is made punishable only with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine. The law-makers shall take note of the anomaly in the sentencing policy and effect necessary correction by way of amendment. Although it is belated yet the lawmakers at least should now wake up to go for thorough rational and scientific review of sentencing policy for all the offences. The different types of injuries enumerated u/S. 320 do not ensue same amount of harm, pain and disability. Therefore proportionate to the nature of grievous injuries and its consequences, the punishment should be redefined. So also the punishment for an offence u/S. 333 should be redefined. Similarly in respect of other offences rational sentence to be re-prescribed in respect of other offences. *State of Karnataka v. Mohammed Sadiq*, 2006 CriLJ 3391 (Kar).

6. Procedure.—Cognizable–Warrant–Bailable–Not compoundable–Triable by any Magistrate—No sanction is required. 1970 All WR (HC) 699.

7. Charge.—I (*name and designation of Magistrate, etc.)* hereby charge you (*name of the accused)* as follows :

'That you on or about.... (date)...... (time) and..... (place) assaulted (or used criminal force to Shri........a public servant in the execution of his duty as such public servant) (or with intent to prevent or deter Shri.........a public servant from discharging his duty as such public servant or in consequence of anything done or attempted to be done in the lawful discharge of his duty as such public servant) and thereby committed an offence under Section 353, IPC, and within my cognizance;

"And I hereby direct that you be tried in this Court on the said charge."

8. F.I.R.—FIR cannot be quashed simply on ground of delay as prosecution is to explain delay at appropriate stage. *Rajinder Singh* v. *Union Territory, Chandigarh.* (1995) 3 Recent Cr R 507 (P & H).

9. Probation.—When accused was convicted under Sections 353/34, IPC, and sentenced to 2 years RI.—Appeal to Sessions Judge was dismissed. Hence, there was challenging of petition. The petitioners are not previous convict and are 1st offenders. Keeping in view the facts and circumstances of the case it is fit case where benefit of probation should be extended to petitioners. Hence though conviction is maintained he is released on probation. *Shankar Lal* v. *State of Haryana*, (1994) 3 CC Cas 247 (P & H).

10. Hurdle in discharge of duties by police personnel.—Accused in order to avoid their arrest creating hurdle in discharge of duties by police personnel. It is true that the prosecution should not be insisted upon independent witness while convicting the accused on the basis of the police personnel evidence, but the police personnel evidence should be corroborated by other evidence. Prosecution has not been able to produce a single witness pointing towards the fact that the arms used by the appellants were serviceable or not. Even for recoveries of arms from the accused appellants has also not been proved by independent witness. The findings arrived at by the trial Court is not perverse so far as acquittal of the accused appellants for the offence under Sections 3/25 Arms Act. It may be possible that in order to avoid their arrest they must not have co-operated the police personnel or hindrance was created by them in the discharge of duties by the police personnel for that the trial Court rightly convicted the accused appellants under Section 353, IPC, but so far as guilt of the accused appellants for section 307, IPC, in absence of independent evidence or any corroborative evidence such like FSL report, benefit of doubt can be given to the accused appellants. The charge of Section 307, IPC framed by the trial Court is not proved and the accused appellants are entitled to be given the benefit of doubt in absence of any other independent evidence or corroborative evidence. *Bhairon Singh & Anr. vs State of Rajasthan*, 2010 Cri LJ 1177 (Raj)

11. Identification parade.—Conviction on basis of *identification for the first time in* Court. None of the prosecution witness knew any of the accused-appellants. However, in of the FIR, not only their names but also their parentage and complete addresses were stated. It is, however, not clear as to whether the name of the accused Hemu was recorded in the said FIR or not, the translated version thereof has been placed before us.

Appellants herein admittedly were not known to the police officers. Only Sattey was known to them. Anoop Singh in his deposition categorically admitted that he did not know the assailants previously. After their arrest, no identification parade test was held. Although the first informant as also witnesses in their depositions proceeded on the basis that all the accused had been coming in a Maruti Car and they were heavily armed, no arm was recovered from any of them.

How their names could be taken is beyond anybody's comprehension. Even two persons, namely, Lilu and Vinod were called by their first names. How the Officer In-charge even could ascertain their actual names has not been disclosed. He admitted that apart from Sattey, he had not seen any accused persons on previous occasion. Why despite the same, identification parade was not held has not been explained. Appellants were identified only in Court.

It was contend that identification for the first time in Court is permissible in law. There cannot be any dispute so far as the aforementioned proposition of law is concerned. The said principle, however, should be applied having regard to the facts and circumstances of each case. Courts, as is well known, ordinarily, do not give much credence to identification made in the Court for the first time and that too after a long time.

Witnesses in their depositions admitted that they had not been knowing the accused from before the despite so, no test identification parade was held. The accused persons having been identified for the first time in the Court, it is difficult for any Court to rely upon the same and that too after such a long time.

As indicated hereinbefore, appellants were not known to the police officers; they were not involved in any other case. In fact, so far as the Hemu is concerned, no case at the relevant time was pending against him. Only because Sattey allegedly called them by their names, which appears to be wholly unlikely, they could not have been identified particularly in view of the fact that the incident had taken place in an isolated area and that too on a dark night.

Sattey furthermore could not have been instrumental in murdering Lasker Singh. Lasker Singh died of a firearm injury shot from a service revolver, *i.e.*, at the hands of the police party only. Such a revolver, thus, was not and could not have been used by any of the accused persons. *Hem Singh vs. State of Haryana*, 2009 (6) SCC 748 : 2009 (7) JT 433 : 2009 (6) Scale 784 : 2009 (7) SCR 888 : 2009 (4) Supreme 338 : 2010 (1) SLT 126.

* * * * *

Sec. 354. Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

STATE AMENDMENT

Andhra Pradesh.—Amended by Act No. 6 of 1991.

In its application to the State of Andhra Pradesh, for Section 354 of the Indian Penal Code, 1860, the following section shall be substituted namely—

> "354. *Assault* or *criminal force to woman with intent to outrage her modesty.*—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years and shall also be liable to fine :
>
> Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term which may be less than five years, but which shall not be less, than two years."

Madhya Pradesh.—After section 354, the following new section insert, namely:—*"354A. Assault or use of Criminal force to woman with intent to disrobe her.*—Whoever assaults or uses criminal force to any woman or abets or conspires to assault or uses such criminal force to any woman intending to outrage or knowing it to be likely that by such assault, he will thereby outrage or causes to be outraged the modesty of the woman by disrobing or compel her to be naked on any public place, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to ten years and shall also be liable to fine.•.

[*Vide* Madhya Pradesh Act 14 of 2004[sec. 3 (w.e.f. 2-12-2004)].

Orissa.—In the First Schedule to the Code of Criminal Procedure, 1973 in the entry under column 5 relating to section 354 of the Indian penal Code 1860 for the work 'bailable' the word 'non-bailable' shall be substituted.

[*Vide* Orissa Act 6 of 1995, sec. 3 9w.e.f. 10-3-1995)]

Synopsis

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1. Scope.—What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this Section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. The ultimate test for ascertaining whether modesty has been outraged is whether the action of the offender is such as could be perceived as one which is capable of shocking the sense of decency of a woman. *Raju Pandurang Mahale* v. *State of Maharashtra,* 2004 Cr LJ 1441 : AIR 2004 SC 1677 : 2004(4) SCC 371 : 2004(2) JT 425 : 2004(2) Crimes 204 (SC) : 2004(2) Supreme 234.

"In order to constitute an offence under this section, mere knowledge that the modesty of a woman is likely to be outraged is sufficient (without any deliberate intention having such outrage alone for its object. 1 Weir 347 ; 31 CWN 583 : 103 Ind Cas 353. But an indecent assault upon a woman does not amount to an attempt to commit rape, unless the Court be satisfied that, the conduct of the accused indicated a determination to gratify his passions at all events and in spite of all resistance. 5 Bom 403. In order to constitute the offence there must be intention or knowledge that the woman's modesty will be outraged. 14 Cr LJ 149 ; 42 PWR 1910 ; 16 PWN 1912 ; 15 Ind Cas 309. "Woman" is explained to denote a female human being of any age *(vide* Section 10). 14 Bom LR 961 : 13 Cr LJ 858 : 17 Ind Cas 794. The phrase "to outrage modesty" is indefinite ; and would be an outrage to the modesty of one woman to do her what would be though nothing of by another. The taking indecent liberties with females will be punished by this section ; but the provision is not confined to such cases. In a country, where many women consider themselves as dishonoured by exposure to the gaze of strangers may gross insults of a different kind, such as a man rudely thrusting his head into the covered palanquin of a woman of rank, may well be deemed to outrage female modesty. Assaults committed with intention to commit rape are not, it seems, here contemplated".—*Morgan and Macpherson.* The mere acts of assault and outraging the modesty of woman are covered by this section and not by section 366. AIR 1934 Pesh 69 : 35 Cr LJ 1273. No injury is found on private parts or any other part of the body. The accused was found lying over her. *Held,* that he was guilty under Section 354 and not under Section 376, 1953 Raj LW 243 ; 63 Punj LR 546 : 1961 All Cr R 211 : 1961 All WR 32 : 1962 (1) Cr LJ 843 ; 1961 MPLJ (Notes) 73. Where the process-servers and the decree-holder acted in good faith and in exercise of their legal right in removing the female occupant refusing to vacate by which the *dhoti* of the woman got loose, no offences under this section have been committed. AIR 1936 Oudh 379 : 37 Cr LJ 892. Section 354 does not offend against Article 14 of the Constitution. AIR 1953 Mad B 147 : 1953 Cr LJ 964 : 37 Cr LJ 892. It is not the act of outraging modesty that is made an offence under Section 354. In order to constitute an offence under Section 354, there must be assault or use of criminal force to any woman with the intention or knowledge that the woman's modesty will be outraged. 1953 Cr LJ 964 : AIR 1953 MB 147. The distinction between an attempt to commit rape and to commit indecent assault is sometimes very meagre. For the forms there should be some action on the part of the accused which would show that he is just going to have sexual connection with the prosecutrix. For an offence of an attempt to commit rape the prosecution must establish that it has gone beyond the stage of preparation. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the degree of determination. The accused making girl naked and running away on seeing her nude is guilty of offence under Section 354. AIR 1960 MP 155 : 1960 Cr LJ 612.

Where an accused is tried for an offence under Section 354 and an assault is proved, the next question to be considered is whether he did so with the intent to outrage the woman's modesty, or with the knowledge that it would be outraged. The story of a person trying to outrage the modesty of two women in the presence to two gentlemen is so unnatural that there must be clear and unimpeachable evidence before it can be accepted. AIR 1954 SC 711 : 1954 Cr LJ 1793. The culpable intention of the accused is the crux of the matter irrespective of the reaction of the woman. AIR 1967 SC 63 : 1967 Cr LJ 1.

The difference between mere preparation and actual attempt to commit offence consists chiefiy in the greater degree of determination. 1984 Cr LJ 786 ; 1982 (2) Cr LJ 715 ; *see* also AIR 1967 Raj 149.

There is no abstract conception of modesty that can apply to all cases. AIR 1967 SC 63 (commission of the offence with necessary intent or knowledge) (overruling AIR 1963 Punj 443; AIR 1933 Cal 142; AIR 1928 Pat 336 and AIR 1953 Madh B 147) ; 1982 BLJ 23 ; 1980 Cr LR 446.

Where in a case girl of 4 years old sitting on the stomach of accused, no body seen naked, no indecent act, no assault, girl came out when door was opened after knock, no signs of stress or emotions, no complaint made by girl to her father in presence of witnesses, not established that girl was detained forcibly, it was held that no case for conviction under Section 354 or 342 is made out. 1987 Cr LR (MP) 11.

The case was of outraging the modesty of a woman for the act should be capable of shocking the sense of decency of a woman. The ultimate test for ascertaining whether modesty has been outraged is, the action of the offender such as could be perceived as one which is capable of shocking the sense of decency of a woman. *Rupan Deol Bajaj (Mrs.)* v. *Kanwar Pal Singh Gill*, 1995 JIC 1155 at p. 1162 (SC).

Victim being a little child of 3-1/2 years old—Her statement taken after 6 years of the occurrence—Stating the commission of rape upon her by the appellant which was not corroborated by medical evidence—Conviction was held, to be not sustainable—However conviction modified from under Section 376 to under Section 354 IPC.—

Though at the relevant time she was 3-1/2 years old she was examined in court after about six years of the occurrence. Not only this she claims in the witness-box that she was taken to the bath room of the school where she was subjected to sexual intercourse and that the Principal had come into the bath room and hadasked the appellant to go away. Had there been a rape the Principal, would not have acted that way. In any case the Principal has not been examined. Since the material witness has been kept back without any explanation the presumption would be that he had been examined he would not have supported the prosecution version. Yet another point also needs to be noticed. The father of Kalpana states that on 10th December, 1983, he had contacted Mr. D.S. Dalal who was managing the school and had told him everything. Mr. Dalal was examined by prosecution and what is significant is that he has not said a word about the incident or about what, if any. had been told to him. Any how, it is the statement of the mother of Kalpana which clinches the issue. She has been examined as PW-4 and as per her Kalpana had never told her about her having been subjected to sexual intercourse and that what had been told to her by the victim had led her to form the impression that the appellant had only tried to fondle her vagina 'with his fingers. Thus rape or attempt to rape is ruled out. The case consequently squarely falls within the mischief of Section 354 of the Indian Penal Code. *Ranji Lal* v. *State*, (1994) 53 DLT 829 at pp. 830. 831.

When accused entered house of complainant, dragged her out, torn her clothes and misbehaved her *prima facie* offence under Section 354, IPC, made out. *Shakuntala Devi* v. *Sumeat Kumar*, 1997 Cri LJ 335 (Del).

Holding a woman by her breast by a person who is not her husband in public and particularly by a person who is an utter stranger will be by an act very such likely to outrage the modesty of a woman *State of H.P.* v. *Ram Das*, 1999 Cri LJ 2802 (HP).

2. Attempt to commit rape.—Since evidence on record clearly show that accused catching hold of hand of victim and when one of prosecution witnesses came there on hearing alarm of victim, accused fled away, conviction of accused under Section 376/511, IPC converted into one under Section 354 of IPC. *Bisheshwar Murmu* v. *State of Bihar*, 2004 Cr LJ 326 (Jhar) : AIR 2003 Jhar HCR 1366 : 2003(4) JCR JHA 468.

Attempt to rape—Outraging modesty of women. Action of lifting victim, putting her on bed, removing her underwear and lifting her frock did outrage the modesty of victim. There was no attempt to rape as there was no attempt to penetrate. Held, offence under S. 354 made out. *Tika Ram Chettri vs State of Sikkim*, 2010 (4) CriLJ 4025 (Sikkim).

The accused attempted to commit rape. Section 375 IPC defines rape whereas Section 376 envisages punishment for rape. There is explanation in Section 375 IPC to the effect that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. So, the natural corollary is that provisions of Section 376 / 511 IPC would be attracted in case the accused tried a penetrate his penis in the vagina of prosecutrix. In the present case, from the testimony of the prosecutrix, it is revealed that neither the accused undressed himself nor he undressed the prosecutrix. The only attribution to the accused is that he caught hold of the prosecutrix, laid her on the ground and then caught hold of her neck.

In the present case, there is neither allegation of ejaculation of accused nor undressing both the prosecutrix and himself. So, I am of the view that the finding of the learned trial Court whereby the accused stands convicted under Section 376 and / IPC is without any basis and the accused stands acquitted under the said provision of law.

The above said ingredients are complete, in the present case. By invoking the provisions of Section 222, Criminal Procedure Code, the accused stands convicted under Section 354 IPC. *Pawan Kumar vs. State of Haryana*, 2010 (2) CrLJ 2077 (P & H).

The woman in conservative society is not generally used as a pawn to wreak the vengeance. Courts have a duty to make deeper scrutiny of the evidence and decide acceptability or otherwise of the accusation. False implication of accused is remote possibility. When outraged woman belongs to scheduled caste, the offence is aggravated. Essential ingredient of offence is mere knowledge that the modesty of a woman is likely to be outraged and intention is not sole criteria. *Vidyadharan* v. *State of Kerala*, 2004 Cr LJ 605 (SC) : Air 2004 (SC) 536 : 2004(1) SCC 215 : 2003(9) JT 89 : 2003(4) Crimes 497 : 2003(8) Supreme 1210.

3. Cases.—Where the accused took off the clothes of a woman, threw her on the ground and then sat down besides her but said nothing, he committed an offence under this section. 116 PLR 1912 : 14 Bom LR 961 : 13 Cr LJ 858. But where evidence proves that the accused stripped a girl nearly naked and was lying upon her, when her cries attracted people to the spot, he committed an offence under Sections 376, 511 and not merely under this section. 8 Ind Cas 257 : 42 PWR 1910 Cr. In such cases Magistrates should not try the case under Section 354, in order to give themselves jurisdiction. UBR (1892-1896) Vol. I, 234 ; UBR (1897-1901) Vol. I, 84. Where the only evidence against the accused is that he removed his cloth and showed his private parts to a lady, that by itself will not amount to an offence under Section 354. It may amount to indecency but not to assault or use of criminal force. (1963) 1 Cr LJ 391. Whoever uses criminal force to a female, young or old intelligent or imbecile he is guilty under the section. 1972 Cr LJ 658, but *see* 1982 Cr LJ 19 (putting of hand on the belly of a female without the intention to committing offence) : 1972 All Cr R 274. (catching woman by neck) ; 1982 Raj Cr C 297 (abusing and chasing this girl and ladies).

Where the accused committed house trespass and used criminal force to outrage the modesty of the informant he is guilty under Sections 354 and 451 Penal Code. (1979) BLR 11. The integral part of the complaint was given to go by and it was held that improvements and orientations made after the FIR throw a great doubt as to the truth of the prosecution story. 1979 CLR (SC) 696.

Quashing of proceeding. Although FIR itself does not disclose offences under Sections 323 and 354, IPC against the revisionist, the Investigating Agency proceeded with the investigation on the very date of lodging of inordinately delayed FIR and examined all the five witnesses on the very date of initiation of the P.S. case in question under Sections 323, 354, 309 and 34, IPC. On completion of investigation the charge-sheet was, however, submitted on 09.05.2002 in a very mechanical fashion. On perusal of the DB the perfunctory nature of investigation is manifestly clear. Further, it is also a clear case of sheer non-application of mind on the part of the I.O. Rather, he has neglected to scrutinize the materials brought on record in its proper perspective prior to formation of his opinion that a *prima facie* charge under Sections 323, 354, 309 and 34, IPC has been well established. None of the five witnesses examined by him stated anything implicating the revisionist as the molester of the alleged victim and there was also nothing in the statements to suggest that the *de facto* complainant was assaulted by the revisionist. In fact, the *de facto* complainant herself has also not levelled any allegation of molestation or assault against the revisionist within the four corners of the FIR.

In such a factual scenario, Court has no hesitation in holding that contents of the FIR even taken at their at face value accepting in its entirety do not constitute *prima facie* offences under Sections 354 and 323, IPC against the accused revisionist. Court is also to hold further that the evidence collected in support of allegations made in the FIR also do not make out any case under Sections 354, 323 and 34, IPC against the accused revisionist. In submission of charge-sheet claiming that offences under Sections 354 and 323, IPC have been established *prima facie* against the accused is of no consequence since evidence and materials so collected by the I.O. were not properly appreciated by the I.O. for the reasons best known to him.

Therefore, viewing the entire matter on the anvil of the viability of the persecution case, this Court convinced to hold that it is a baseless case of a *mala fide* and malicious prosecution and as such continuance of this criminal proceeding would be a sheer abuse of the process of the Court. So, Court of the clear opinion that it is a fit case where the entire proceeding including the charge-sheet should be quashed so far as it relates to the accused revisionist in exercise of the power under Section 482, Criminal Procedure Code. *Biplab Kumar Chatterjee vs. State*, 2010 (3) CrLJ 2638 (Cal).

It is to be further noted that as per the prosecution version when P.W.1 was fetching the water all the accused attacked her and abused her and committed the offense under Section 354 I.P.C. and upon interference of PW.3 she was also attacked and assaulted physically committing them under Section 354 IPC and her modesty was outraged. But P.W. 1 did not speak anything about this outraging of modesty of PW3 at all. She only spoke about the physical assault against PW3 by the accused. Therefore, it is not safe to convict the accused under the circumstances as stated by PWs 1.3 and 6. *Public Prosecutor, High Court of A.P. Hyderabad. v. Potharlanka Venkateswarlu and Others.* 2002 Cri LJ 3145 AP : 2002(4) All Cri LR 466 : 2002(1) Andh LT (Cri) AP 395.

The accused numbering 6 were charged for sexually assaulting a minor girl of 14 years of age but medical evidence was weak and there were infirmities in evidence of victim. Three accused were already acquitted as they were not specifically referred to by the victim before the Court. Three remaining accused were given benefit of doubt under Section 376/109 but were convicted under Section 354 as an offence of outraging the modesty of woman was made out. *State* v. *Chandrayya Hannumanthappa Mellapanavar*, 2003 Cr LJ 258 (Kant) : AIR 2002 Kant HCR 2962 : 2003(1) All Cri LR 623.

In a MP case, where the prosecutrix simply stated that the accused had committed "*ulta kam*" with her, it was held that all "*ulta kam*" did not mean sexual intercourse but on facts of case offence of outraging the modesty of woman was made and his conviction was altered to one under Section 354, IPC. *Narayan* v. *State*, 2003 Cr LJ 268 (MP) : 2003 Cri LR (SC&MP) MP 16 : 2002(4) MPHT 190.

The accused propelled complainant into his car against her wishes. The complainant resulted advances made by the accused. It was held that the fact that he said "thank you" when he was dropped near Railway Station could be no ground for drawing adverse inference against prosecution. The victim has stated her case on oath.

which was corroborated by her complaint to the police and therefore the acquittal of accused was liable to be set aside. *State of Maharashtra* v. *Satyendra Dayal Khare*, 2004 Cr LJ 3399 (Bom) : 2004 All MR (Cri) 2339.

In a charge for gang rape it was alleged that accused entered the house at night and raped the victim and took away some small item of jewellery from her person. Delay in prosecution resulted into total lack of medical evidence, forensic evidence and other supportive evidence. The prosecutrix, though a rustic woman, her evidence was Cogent and clear. It was held that accused though entitled to benefit of doubt under Section 376 but were liable to be convicted under Section 354/34 and Section 451/34. *State* v. *Desgowda*, 2004 Cr LJ (NOC) 53 (Kant) : AIR 2004 Kant HCR 228 : 2004(2) All Cri LR 999 : 2004(1) Kant LJ 94.

Accused had entered the house of victim and sexually assaulted the victim but offence of rape was not proved. The Court held him liable under Section 354/451 (tresspassing and outraging of modesty). *Mangara Harijan* v. *State*, 2004 Cr LJ (NOC) 128 (Orissa) : 2004(2) Crimes 364 : 2004(2) JCJR 23 : 2004(27) OCR 869.

The accused allegedly. He modested breast of complainant. It was held that the failure on the part of defence to take out any contradiction with regard to her molestation by accused and that the conviction of accused under Section 354 was proper. *Babulal Sao* v. *State of Bihar*, 2004 Cr LJ 2465 (Jhar) : AIR 2004 Jhar HCR 1314 : 2003(3) East Cri C 140.

When the victim was returning from the "coconut cope" and going to her village, the accused with an intention to commit rape on her, forcibly caught hold of her, threw her on the ground and when tried to remove her saree, she raised alarming cry and the accused grew wild and gave a blow with his knife on her right upper arm causing severe bleeding injury. On hearing the cries the witnesses came at the place of incident and saw the accused running away. The statement of victim was corroborated with medical evidence and statements of other witnesses. Conviction of accused was held proper. *Baltina Dharma Rao* v. *State*, 2005 Cr LJ 362 (AP) : 2006(2) ALD (CRL) 784 : 2005(1) Andh LT (Cri) 381.

The parents reached the sugarcane field when accused was in process of attempting molestation and immediately he ran away from the place. There was no evidence in support of allegation of rape and accused was acquitted of charge under Section 376 but he was held liable for conviction under Section 354/511, IPC. *State of Karnataka* v. *Khaled*, 2004 Cr LJ (NOC) 10 (Kat) : AIR 2004 Kant HCR 36.

4. Evidence and Proof.—A charge under this section is one which is very easy to make and very difficult to rebut, and also one which experience shows woman are sometimes apt to make from one motive to another without the slightest foundation. So when such charges are made, it is necessary to *see* whether they are supported by independent evidence besides that of the woman herself, or are corroborated by her conduct and the surrounding circumstances and are consistent with ordinary probabilities. UBR (1892-1896) Vol. 1, 229 : UBR (1897-1901) Vol. 1, 325 ; ILR (1963) 13 Raj 650 : 1963 Raj LW 288.

Prosecution exaggarating the story, so the benefit must go to the accused and hence the conviction cannot be altered from under Section 354 to 362. AIR 1977 SC 1614 : 1977 Cr LJ 1116 ; 1983 SCC (Cr) 316 : 1983 Cr LR 554 ; 1980 WLN (UC) 334 and unreliable testimony ; 1978 WLN (UC) 423 ; 1976 WLN (UC) 1. But *see* (1979) Raj Cr C 12.

Related witnesses. Full of contradictions. The High Court has also attached unnecessary importance to the fact that one witness stated that the assault continued for 8 to 10 minutes while another said it was around three minutes. The doctor's evidence was discarded on the ground that his testimony was of poor quality and does not inspire confidence. The injury appeared to be manufactured one. The judgment is full of contradictions. As stated above, the High Court at one place noticed that it is improbable that the accused person who was cousin of PW. 4 tried to molest her. In the same breath the High Court in another place has held that the accused persons to molest PW. 4 at a particular moment took her to the Arhar field and this was done with her prior consent. The High Court goes further to say that there was no planning in the act and had appeared to be chance meeting which led to it. The absurdity of the High Court's conclusions can be gauged from the fact that the High Court found it unnatural that two girls of almost of the same age group were walking and as to why one of them would move ahead and the other would come behind is unnatural. The High Court further has held that PW. 3 stated in Court that PW. 4 on her return told him that accused persons has teased her in the field. The High Court found fault with the statement on the ground that he did not tell before the police that the girl did not tell PW. 3 that the accused persons held her hands. So far as the High Court's conclusions that there was non-mention of the source of light in the FIR it needs to be noted that the accused persons were not strangers to the witnesses. They were closely related. *State of Uttar Pradesh vs. Sheo Lal*, AIR 2009 SC 1912 : 2009 CrLJ 1162 : 2009 (1) Crimes 388 : 2009 (11) SCC 513 : 2009 (3) JT 540 : 2009 (2) SCR 343 : 2009 (2) Scale 582.

The evidence of prosecutrix was found unreliable. Hence any part of her evidence is risky to be relied upon. The possibility of prosecutrix being a willing party to entire episode cannot be ruled out. The prosecution failed to prove beyond reasonable doubt, that accused has committed an offence under Sections 354 or 323, IPC. Hence conviction and sentence set aside. *Tulshiram Murlidhar Gave* v. *State of Maharashtra*, 1994 B Cr C 198 (Bom).

In a case of molestation, the complaint itself who lodged after consultation and legal advise. FIR did not contain details of incident and the complainant in her testimony gave more graphic account of how incident took place. It was held that the evidence of complainant could not be rejected on account of so-called improvement made in evidence was illegal. *State of Maharashtra* v. *Satyendra Dayal Khare*, 2004 Cr LJ 3399 (Bom) : 2004 All MR (Cri) 2339.

Ordinarily a lady would not "put her character at stake" may not be wrong but cannot be applied universally. Each case has to be determined on the touchstone of the factual matrix. *Pandurang Sitaram Bhagwat* v. *State of Maharashtra*, 2005 Cr LJ 880 (SC) : AIR 2005 (SC) 643 : 2005(1) Crimes 104 : 2005(1) JT 92 : 2005(2) SCC 44 : 2004(8) Supreme 916 ; *See* also *State* v. *Anthony Mikolas*, 2006 Cr LJ 1582 (Kant).

5. FIR.—In *Tarachand v. State of Rajasthan* 2001 CriLJ 3604 (Raj) : 2001(1) CCR 524 (525). FIR was lodged by parents of victim girls who were Primary School students of tender age against accused. Head master of the school. Though in FIR the names of victim girls were not mentioned, but the words "daughter and niece" were used for whom it was alleged that they were frightened of attending the school because of culpable acts of the accused. FIR was proved by informant in his evidence. Nothing was elicited to show that the informant bore animosity or any grudge against the accused and in cross-examination, the informant admitted to have not disclosed the names of his daughter and niece due to shyness. It was during investigation that the Police discovered incriminating facts against the accused. The Court held that "the contents of the information other than those leading to any discovery of incriminating fact would not be admissible in evidence and would not be taken help by defence and that being so, merely because the FIR did not disclose names or particulars of each and every event, no corroboration from the FIR should have been sought regarding the presence of any version given by prosecution witness produced in witness box or any other witness. The FIR is not an encyclopedia. In these circumstances, I donut find any congruity or delay in lodging the report so as to cast aspersion on the veracity of the prosecution case or even the written report".

6. Delay in filing complaint.—In the instant case where the accused slapped the posterior of the prosecutrix, there was some delay in filing the complaint before the Magistrate but that by itself was not sufficient to reject the complaint put forward by the prosecutrix. She recounted the entire incident immediately to the Chief Secretary and other officers and raised objections and also sought for stringent action against the accused.` When she failed in all these attempt, she and her husband filed the criminal complaint before the Chief Judicial Magistrate. Conviction was not interfered. *Kanwar Pal S. Gill* v. *State (Administration UT, Chandigarh)* v. *Mrs. Rupan Deol Bajaj, IAS*, 2005 Cr LJ 3443 (SC) : AIR 2005 (SC) 3104 : 2005(6) JT 452 : 2005(6) SCC 161 : 2005 SCC (Cri) 1420 : 2005(5) Supreme 218.

So far as the delay in lodging the FIR question is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the Police Station to lodge a complaint. In a tradition bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR. *State of Himachal Pradesh vs. Prem Singh*, AIR 2009 SC 1010 : 2008 (1) SCC 420 : 2009 CrLJ 786 : 2008 (15) SCR 1058 : 2009 (15) Scale 132.

7. Abduction and outraging modesty.—From the evidence on record. It clearly appears that the prosecution has proved its case beyond all reasonable doubt against the accused appellant Shoukat, as all the ingredients, which have been mentioned above to prove the offense under Section 366 IPC, have been proved by the prosecution in the manner that the accused appellant Shoukat first induced the prosecutrix PW1 Rampyari by deceitful means that there was a Jappa, but actually there was no such Jappa and relying on the statement of accused appellant Shoukat, prosecutrix accompanied him in the night and when they were going, on the way, the accused appellant seeing lonely place outraged her modesty and thus, it is not a mere case of abduction, but purpose for which abduction was done by the accused appellant has also been proved. In these circumstances, the findings of the learned trial Judge convicting the accused appellant Shoukat for the offense under Sections 366 and 354 IPC are liable to be confirmed. Hence, the argument that no case for the offence under

Section 36 IPC is made out against the accused appellant Shoukat stands rejected. *Shoukat and Another v. The State of Rajasthan*, 2002 Cri LJ 364 : 2002(2) Raj LW 1128.

Applying the principle of appreciation to this case, it is seen that the informant does not complain that the present petitioner aimed the blow to her breast. Rather, she has very categorically stated that the petitioner pressed the Lathi (Katha) on her neck and stood on it. Then the petitioner's wife dragged him. The injury was caused to her breast for the action of the accused persons. It thus, appears that the injury to her breast was caused accidentally. The injury, which was sustained by the injured on her breast has not been attributed particularly to the present petitioner in the sense that she has not stated that due to his assault she sustained the injury. Rather she has stated that due to the assault of the accused persons, she sustained the injury. In this case, this Court comes to the conclusion that applying to the standard laid down by the Apex Court in *Rupan Deol Bajaj vs. Kanwar Pal Singh Gill*, AIR 1996 SC 309 = 1995 SCC (Cr) 1059, it cannot be held to be an affront to the normal sense of feminine decency. It is further noted that in this case there is no suggestive overtuous regarding sex. Therefore, the offence under Section 354 is not made out. The conviction of the petitioner under Section 354, IPC is not sustainable. As far as offence under Section 323 is concerned, learned trial Court as well as the learned appellate Court has come to a concurrent finding of fact which requires no interference. *Kelu Cheran Behera vs. State of Orissa*, 2010 (2) CrLJ 2280 (Orissa).

8. Conviction.—It is obviously unjust to convict an accused under this section, without calling upon him for his defence in respect of the particulars which differentiate the offence from that stated in the charge against him under Section 352. 1 LBR 287 ; *see* also 15 Cr LJ 366 : 23 Ind Cas 734.

The entire case was based on sole testimony of prosecutrix. FIR by prosecutrix that rape was committed on her which was subsequently resiled. Hence conviction set aside and benefit of doubt was allowed to accused. *Malkhan Singh* v. *State of U.P.*, 1995 JIC 690 (All).

Petitioners youngsters used criminal force to outrage modesty of a woman—They embraced complainant—Thus assault being intentional—Evidence of witnesses being cogent and credible—Delay in FIR was fully explained—Conviction was upheld. *Pratap Chandra Mohanty* v. *State of Orissa*, (1994) 3 Crimes 179 (Ori).

Where the accused was convicted and sentenced for the offence under Sections 354 and 506, Penal Code, to three month's rigorous imprisonment for each offence. *Held*, that the intimidation by throwing a knife formed part of the assault in this case ; consequently, the sentence under Section 506 was illegal and must be set aside. 12 Cr LJ 242 : 10 Ind Cas 771. The fact that *A* is in love with *B* and is jealous of *C* does not authorise him to pull *B's* hair and hand. An assault of this kind made in the presence of several persons is calculated to outrage the woman's modesty and is punishable under Section 354 of the Penal Code. 13 Cr LJ 53 : 13 Ind Cas 389 : 4 Bur LT 268. Every assault on a woman or every use of criminal force to a woman does not necessarily fall under Section 354, IPC, namely, an assault or use of criminal force to a woman with intent to outrage her modesty. In order to construct an offence under that section ,it is necessary that the assault or use of criminal force must be used with intent to outrage a woman or knowing it to be likely that he would thereby outrage her modesty. 31 CWN 983 : 103 Ind Cas 553 : 28 Cr LJ 697 : AIR 1927 Cal 505. An offence under Section 354 is only committed when a person assaults or uses criminal force to a woman intending to outrage or knowing it to be likely that he will thereby outrage her modesty. Where it is clear that the woman either had no modesty to mention or that it was not such as would be outraged by any of the acts which are attributed to the accused, such as offence cannot be said to be committed. 108 Ind Cas 81 : 29 Cr LJ 325 : AIR 1928 Pat 326. Intention to outrage or knowledge that assault is likely to outrage modesty of girl is necessary under Section 354. Per *M.C. Ghose* in 142 Ind Cas 297 : 1933 Cr C 203 : 34 Cr LJ 308 : AIR 1933 Cal 142. Offence under Section 354 can be committed on girl of five and half years though she has not developed sense of modesty. 142 Ind Cas 297 : 1933 34 Cr LJ 303 : AIR 1933 Cal 142.

The language of Section 354 does not indicate that the legislature wanted to limit its applicability only to females above a certain age as there who had attained sufficient maturity of thought or understanding. 1963 (2) Cr LJ 390 : ILR (1963) 2 Punj 723 : AIR 1963 Punj 440 (F.A.). (Victim of assault, a girl of 7 months). Where the accused threw down a girl, puts hand in her mouth and got on her chest to have intercourse with her but was prevented from doing so by arrival of some persons, his act amounts not only to preparation but an attempt to commit rape. 34 PLR 832 : AIR 1933 Lah 1002. Criminal assault of a daring nature on innocent woman should merit a substantial sentence of imprisonment. AIR 1934 Lah 36. *See* 1980 Chand LR (Cr) 29 ; 1914 All Cr R 163 ; 1980 Chand LR (Cr) 163 (in case of age or first offence relied or probation of good behaviour).

The accused attempted to commit rape. Section 375 IPC defines rape whereas Section 376 envisages punishment for rape. There is explanation in Section 375 IPC to the effect that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. So, the natural corollary is that provisions of Section 376 / 511 IPC would be attracted in case the accused tried a penetrate his penis in the vagina of prosecutrix. In the present case, from the testimony of the prosecutrix, it is revealed that neither the accused undressed himself nor he undressed the prosecutrix. The only attribution to the accused is that he caught hold of the prosecutrix, laid her on the ground and then caught hold of her neck.

In the present case, there is neither allegation of ejaculation of accused nor undressing both the prosecutrix and himself. So, I am of the view that the finding of the learned trial Court whereby the accused stands convicted under Section 376 and / IPC is without any basis and the accused stands acquitted under the said provision of law.

The above said ingredients are complete, in the present case. By invoking the provisions of Section 222 Criminal Procedure Code, the accused stands convicted under Section 354 IPC. *Pawan Kumar vs. State of Haryana*, 2010 (2) CrLJ 2077 (P & H).

The accused gently slapped on the posterior of the prosecutrix in the presence of some guests. This act on the part of the accused would certainly constitute the ingredient of Section 354, IPC. It was proved that the accused used criminal force with intent to outrage the modesty of the complainant and that he knew fully well that gently slapping on the posterior of the prosecutrix in the presence of other guests would embarrass her. Knowledge could be attributed to the accused that he was fully aware, that touching the body of the prosecutrix at that place and time would amount to outraging her modesty. Had it been without any culpable intention on the part of the accused, nobody would have taken notice of the incident. The prosecutrix made such a hue and cry immediately after the incident and the reaction of the prosecutrix is very much relevant to take note of the whole incident. The accused being a police officer of the highest rank should have been exceedingly careful and failure to do so and by touching the body of the complainant with culpable intention he committed the offence punishable under Sections 354 and 509, IPC. *Kanwar Pal S. Gill* v. *State (Admn., UT, Chandigarh)* v. *Mr. Rupam Deol Bajaj, IAS,* 2005 Cr LJ 2005 Cr LJ 3443 (SC) : : AIR 2005 (SC) 3104 : 2005(6) JT 452 : 2005(6) SCC 161 : 2005 SCC (Cri) 1420 : 2005(5) Supreme 218.

9. Procedure.—Cognizable—Warrant—Bailable—Not Compoundable—Triable by any Magistrate and may be tried summarily.

10. Charge.—"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

That on or about the......day of.......at........you assaulted (or used criminal force to) *AB*, a woman, intending to outrage (or knowing it to be likely that you would thereby outrage) her modesty, and thereby committed an offence punishable under Section 354 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

11. Sentence.—Whipping Act has no application to an offence under Section 354, IPC, where the accused is 18 years old. AIR 1942 Bom 78 : 43 Cr LJ 475. Sentence not held to be harsh in AIR 1965 Pat 8.

When accused is convicted under Section 354, IPC, which was challenged in appeal. The conviction under a well-reasoned judgment. Since cannot has suffered in terms of harassment and expenditure and had not abused conversion of bail the sentence already undergone would meet ends of justice. *Raess* v. *State of U.P.,* 1995 (32) ACC 58 (All).

Petitioners was facing trial for offence under Section 354, IPC. Assault and criminal force to any woman intending to outrage her modesty—Essence of a woman's modesty in her sex—Culpable intention of the accused was the crux of the confidence. Reaction of woman is very relevant. Custodial sentence restricted to the period already undergone. Fine of Rs. 250/- imposed in default 2 weeks RI. *Pratap Chandra Mahant* v. *State of Orissa,* (1995) 2 CCR 514 (Ori).

When accused by entering into house of neighbour in day time caught hold of both hands of lady to outrage her modesty, no lenient view can be taken even if it was his first offence. *Murma* v. *State ofU.P..* 1997 Cri LJ 274 (Alld).

In a case which occurred in 1988, the accused was 20 years of age when the offence was committed. He was in custody for some time. As per record available he was as an agricultural coolie. A sentence for a period already undergone with fine of Rs. 1000/- which was to be given to the prosecutrix was imposed. *State of Karnataka* v. *Khaleel,* 2004 Cr LJ (NOC) 10 (Jhar) : AIR 2004 Kant HCR 36.

The incident happened in 1988. Despite the accused holding a high position in the State police, the various Courts found him guilty of the offence punishable under Sections 354 and 509, IPC and that by itself is setting a model for others and would enhance the faith in the judicial system. The accused had completed the period of probation. There was no occasion for any complaint or violation of any of the terms of the bond. At this juncture, it is not just and proper to resort to any other punishment. *Kanwar Pal S. Gill* v. *State (Admn. UT Chandigarh)*, 2005 Cr LJ 3443 (SC) : AIR 2005 (SC) 3104 : 2005 (6) SCC 161 : 2005 SCC (Cri) 1420 : 2005 (5) Supreme 218 : 2005 (6) JT 452.

12. Acquittal.—The eye-witnesses produced did not support the prosecution case. Neither any recovery memo or recoveries produced nor any witness to the accused was examined. The defence evidence of fiduciary transaction between accused and husband of complainant remained unchallenged. Hence not safe to rely on the testimony of complainant. Acquittal. *Om Prakash* v. *State of Haryana*, (1995) 1 CC Cases 413 (P & H).

When prosecution story appeared to be artificial and delay in lodging complaint not explained, accused entitled to benefit of doubt. *A. Ramu* v. *Ramasway*, 1993 Cri LJ 2544 (Mad).

Where evidence of victim and other witnesses as to incident involving accused therein was full of contradictions and unreliable therefore accused persons entitled to be acquitted. *Moola Singh* v. *State of Rajasthan*, 2005 Cr LJ 1347 (Raj).

In a case of attempt to commit rape, abnormal delay of 13 days in filing FIR, it was stated that Sarpanch was contacted the next day and he advised the informant to lodge report if he wanted to. The report was not lodged immediately thereafter. Sarpanch was not examined. The witnesses who were examined were close relatives of the prosecutrix. There were a number of contradictions in their statements and there was corroborative evidence. Accused was held entitled to benefit of doubt and was acquitted. *Tan Sukh* v. *State of Rajasthan*, 2004 Cr LJ (NOC) 96 (Raj). *See also Pandurang Sitaram Bhagwat* v. *State of Maharashtra*, 2005 Cr LJ 860 (SC) : 2005(1) ALD (Crl) 1 AP : 2004(2) Andh LT (Cri) 579 : 2005(2) Bank Cas 68 : 2005(1) Rec Cri R 100 : 2005(1) Cur Cri R 486.

13. Re-trial.—Where there was appeal against conviction and retrial after lapse of 9 years. Direction of appellate court to retrial it would not be conducive to justice if retrial is allowed to continue. *Kaur Singh* v. *State of Punjab*, (1994) 2 CC Cas 263 (P&H).

Case was triable by Court of Sessions which came into force on 15.2.1992 but amendment of Section 354 in IPC (Substantive law) came into force on 1.4.1992—Substantive law always prevails over procedural law—Matter remanded back to lower court. *Ardhala Veera Venkata Vidya Sagar* v. *State*, (1994) 2 ALT 8 : 1994 (1) ALT (Cr) 615 (AP).

Amendment in Cr PC making offence under Section 354, IPC, which was triable by Court of Session came into force on 15.2.1992—Amendment in IPC, came into force on 1.4.1992—Offence committed on 18.3.1992, *i.e.*, earlier to amendment in IPC. Substantive law of IPC, always prevails over procedural law of Cr PC.—*Held*, thus offence committed is triable only by Magistrate of first class and not by Court of Session even though procedure of law was amended earlier. Matter remitted back to Magistrate for trial. *Ardhala Veera Venkata Vidya Sagar* v. *State*, (1994) 1 ALT (Cri) 615 : (1994) 2 ALT 8 (AP).

14. Probation.—Release of the convict under Section 3 of the Probation of

Offenders Act—It was, hence, held that Courts should not be lenient in awarding punishment for the said offence after amendment and provisions of Probation of Offenders Act should not be invoked readily. *Public Prosecutor v. Godise Devaiah*, (1994) 1 ALT (Cri) 76 : 1994 Cr LJ 349 (AP).

15. Intention.—The accused caught prosecutrix and pulled her hand. She put up resistance established by shouts raised by her, injuries on her hand and broken pieces of bangles on the spot. This was corroborated by evidence of eye-witness. The same is sufficient to prove knowledge and intention to outrage modesty on part of accused. Hence, acquittal set aside and accused sentenced to pay fine and part of which may be paid as compensation to prosecutrix. *State of Maharashtra* v. *Manohar*, 1994 Cri LJ 2536 (Bom).

16. Quashing of.—Although FIR itself does not disclose offences under Sections 323 and 354, IPC against the revisionist, the Investigating Agency proceeded with the investigation on the very date of lodging of inordinately delayed FIR and examined all the five witnesses on the very date of initiation of the P.S. case in question under Sections 323, 354, 309 and 34, IPC. On completion of investigation the charge-sheet was, however, submitted on 09.05.2002 in a very mechanical fashion. On perusal of the DB the perfunctory nature of investigation is manifestly clear. Further, it is also a clear case of sheer non-application of mind on the part of the I.O. Rather, he has neglected to scrutinize the materials brought on record in its proper perspective prior to formation of his opinion that a *prima facie* charge under Sections 323, 354, 309 and 34, IPC has been well established. None of the five witnesses examined by him stated anything implicating the revisionist as the molester of the alleged victim and there was also nothing in the statements to suggest that the *de facto* complainant was assaulted by the revisionist. In fact, the *de-facto* complainant herself has also not levelied any allegation of molestation or assault against the revisionist within the four corners of the FIR.

In such a factual scenario, Court has no hesitation in holding that contents of the FIR even taken at their at face value accepting in its entirety do not constitute *prima facie* offences under Sections 354 and 323, IPC against the accused revisionist. Court is also to hold further that the evidence collected in support of allegations made in the FIR also do not make out any case under Sections 354, 323 and 34, IPC against the accused revisionist. In submission of charge-sheet claiming that offences under Sections 354 and 323, IPC have been established *prima facie* against the accused is of no consequence since evidence and materials so collected by the I.O. were not properly appreciated by the I.O. for the reasons best known to him.

Therefore, viewing the entire matter on the anvil of the viability of the persecution case, this Court convinced to hold that it is a baseless case of a *mala fide* and malicious prosecution and as such continuance of this criminal proceeding would be a sheer abuse of the process of the Court. So, Court of the clear opinion that it is a fit case where the entire proceeding including the charge-sheet should be quashed so far as it relates to the accused revisionist in exercise of the power under Section 482, CrPC. *Biplab Kumar Chatterjee vs. State*, 2010 (3) CrLJ 2638 (Cal).

17. Essential Ingredients of offence.—In order to constitute the offence under Sec. 354 IPC mere knowledge that the modesty of a woman is likely to be outraged is sufficient without any deliberate intention of having such outrage alone for its object. There is no abstract conception of modesty that can apply to all cases. (See *State of Punjab vs. Major Singh*, AIR 1967 SC 63). A careful approach has to be adopted by the Court while dealing with a case alleging outrage of modesty. The essential ingredients of the offence under Sec. 354 IPC are as under :

(i) that the person assaulted must be a woman;

(ii) that the accused must have used criminal force on her; and

(iii) that the criminal force must have been used on the woman intending thereby to outrage her modesty.

Intention is not the sole criterion of the offence punishable under Sec. 354 IPC, and it can be committed by a person assaulting or using criminal force to any woman, if he knows that by such act the modesty of the woman is likely to be affected. Knowledge and intention are essentially things of the mind and cannot be demonstrated like physical objects. The existence of intention or knowledge has to be culled out from various circumstances in which and upon whom the alleged offence is alleged to have been committed. A victim of molestation and indignation is in the same position as an injured witness and her testimony should receive the same weight. *Shekara vs. State of Karnataka*, 2009 (1) Crimes 472 : 2009 (4) JT 360 : 2009 (3) Scale 104 : 2009 (2) SCR 744 : 2009 (2) Supreme 301 : 2009 (2) JCC 1074.

18. Rape is most serious offence then outraging modesty.—Section 354 is attracted when a person assault or uses criminal force to outrage the modesty and the offence is punishable with imprisonment upto 2 years. Offence of rape is actually entering the private part of a man into the private part of woman. Thus, these three offences stand on different grades. The offense under Sections 354 and 509 are minor in relation to the offence under Section 376, IPC. The offence under Sec. 509 is complete as soon as the accused makes certain sound or gesture even though he does not assault or uses any force against the woman. Offence under Section 354 is complete as soon as assault or criminal force is used against the woman even though no attempt is made to commit rape. Offence of rape punishable under Sec. 376 is the most serious offence against a woman. Normally, to commit the offence of rape, the accused assaults and uses criminal force and it is followed by the penetration. In view of this, when a person is convicted for the offence under Section 376, IPC there is no logic or reason to separately convict and sentence the accused for the offence punishable under Section 354 also, if it pertains to the same woman and the offence is committed in the same transaction. It is possible that the accused may assault on another, during the same transaction. In that case he may be convicted and sentenced for both the offences separately. But in the present case, the accused committed rape on the prosecutrix. No other woman or any other transaction was involved in this case. Therefore, there could be no justification for the conviction of the accused for offence under Sec. 354 also when he is convicted for the offence punishable under Section 376, IPC. *Salim Alim Shamsher Shaikh vs State of Maharashtra*, 2010 (4) CriLJ 4064 (Bom).

19. Attempt to rape—Outrage Modesty of Woman—An attempt to commit an offence can be said to begin when the preparations are complete and culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. This is what exactly provisions of Sec. 511 IPC require. In the present case accused has made preparations, his preparations were complete when he had put off his pant and took out his male organ in order to fulfill his lust, he put his male organ into the mouth of the prosecutrix and then struck against her private part or vice versa the accused had commenced his act and it was subjected towards the commission of offence, but in the meantime he was interrupted by the calls of the mother of the prosecutrix and fled away from the spot. Thus, series of acts inevitably leads to the commission of the offence which accused neither foresaw nor intended, happens to prevent this. Therefore, there is no escape but to hold accused guilty of the offence of attempt to rape and outraging the modesty of the prosecutrix. *Kamal Kumar v. State of H.P.*, 2009 CriLJ 36 (HP).

* * * * *

Sec. 355. Assault or criminal force with intent to dishonour person otherwise than on grave provocation.—Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

STATE AMENDMENT

Andhra Pradesh.—Offence under section 355 is non-congnizable, bailable and triable by any Magistrate.

[*Vide* Andhra Pradesh Act 3 of 1992, sec. 2 (w.e.f. 15-2-1992)]

Synopsis

1. Provocation 2177
2. Intention 2177
3. Cases 2178
4. Sentence 2178
5. Procedure 2178
6. Charge 2178

1. Provocation.—The complainant who was not a pleader, intruded into the pleader's room at Belgaum in order to *see* a pleader. The accused, a pleader, objected to the complainant's presence in the room and had read out to him one of the rules which required an outsider to withdraw from the room if his presence was objected to. The complainant refused to leave the room and sat resolutely down. The accused went to him and put him out of the room. *Held*, that no offence was committed under this section since complainant's intention is remaining in the room, after his presence was objected to, was to annoy the accused, and the accused did not exceed his rights in putting the trasspasser out of the room. *Emperor* v. *More Balvant*, 15 Bom LR 1039. In order to convict a person under this section, absence of grave and sudden provocation should be proved. 96 Ind Cas 859 : 27 Cr LJ 1003 : AIR 1927 Nag 47.

2. Intention.—The intention to dishonour may be supposed to exist when the assault or criminal force is by means grossly insulting, such as kicking a man, pulling a man's nose, or laying a which across the shoulders.—*Morgan and Macpherson. See* 1978 BLJ 824.

3. Cases.—An accused person while under trial struck a Sub-Inspector of Police, who was in the witness-box giving evidence against him. *Held.* that the offence of which the accused was guilty in this respect was rather that provided for by Section 355 of Penal Code, than that punishable under Section 332 of the Code. AWN 1907, 186 : 6 Cr LJ 22. In order to prove that the assault by the accused was made with intent to dishonour a woman, absence of grave and sudden provocation has to be proved. 96 Ind Cas 859 : 27 Cr LJ 1003 : 9 NLJ 157.

An assault on a police officer can be presumed to be with intention to dishonour him. (1970) 6 Cr LJ 22 ; AIR 1975 SC 1685 ; 1978 Cr LJ 734.

4. Sentence.—(1935) MWN 478. Where the accused in convicted under Section 355 and does admit that he beats the complainant with a shoe and his story in defence is not believed, it was held that it cannot be said that a sentence of one year's RI, is improper. 5 AJ Cr D 471 : 6 DLR (AM) 15.

5. Procedure.—Not Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate.

6. Charge.—"I, (*name and office of Magistrate etc.*), hereby charge you, *(name of the accused)* as follows :

That on or about the......day of.......at.......you assault (or used criminal force to) *A*, *B* intending by such assault (or criminal force) to dishonour the said *A*, *B* and thereby committed an offence punishable under Section 355, Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

* * * * *

Sec. 356. Assault or criminal force in attempt to commit theft of property carried by a person.—Whoever assaults or uses criminal force to any person in attempting to commit theft on any property which that person is then wearing or carrying shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Synopsis

1. Application 2178
2. Procedure 2179
3. Charge 2179

1. Application.—This section applies to a case where criminal force is used in an attempt to commit theft and not where theft has been committed. The latter offence amounts to robbery. *Reg.* v. *Mukam.*, Rat Un Cr C 3.

"The aggravation consists in the attempt to commit theft on property which is in personal use or under personal protection. Attempts to pick-pocket or to commit theft from thereon, when the offence is not completed, and even when the offence could not be completed (as where the pocket contains nothing) will be punishable under this section, if the thief in his attempt does anything which amounts to an assault or use of criminal force". *Morgan and Macpherson.*

2. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by a Magistrate.

3. Charge.—I (*name and office of Magistrate, etc.)* hereby charge you (name *of the accused*) as follows :—

That on or about the.......day of....at.....you assaulted (or used criminal force to) *AB* in attempting to commit theft of certain property, to wit......which the said *AB* was then wearing (or carrying), and there committed an offence punishable under Section 356 of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

* * * * *

Sec. 357. Assault or criminal force in attempting wrongfully to confine a person.—Whoever assaults or uses criminal force to any person, in attempting wrongfully to confine that person, shall be punished with imprisonment of either description for a term which may extend to one year or with fine which may extend to one thousand rupees or with both.

Synopsis

1. Notes 2179
2. Procedure 2179
3. Charge 2179

1. Notes.—Where the accused put his *safa* round the neck of a boy on his refusal to accompany him to a certain place and proceeded to drag him for a distance of about 50 or 60 yards as a result of which the boy subsequently died. Held, that an offence under Section 357 had been committed by the accused and not one under Section 304-A. AIR 1931 Lah 275.

2. Procedure.—Cognizable—Warrant—Bailable—Compoundable—with permission of the Court before whom the prosecution is pending—Triable by Magistrate of the first class.

3. Charge.—"I (*name and office of Magistrate, etc.*). hereby charge you (*name of accused*), as follows :

That on or about the...........day......at.......you assaulted (or used criminal force to) *AB* in attempting wrongfully to confine the said *AB* and thereby committed an offence punishable under Section 357 of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried by the said Court on the said charge."

* * * * *

Sec. 358. Assault or criminal force on grave provocation.—Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both.

Explanation.—The last section is subject to the same explanation as Section 352.

Synopsis

1. Notes 2180
2. Procedure 2180
3. Charge 2180

1. Notes.—In case of use of criminal force to canal patrol on being abused should be punished under Section 358. 1934 Cr C 1081 : AIR 1934 All 872 : 3 AWR 699.

2. Procedure.—Not Cognizable—Summons—Bailable—Not Compoundable—Triable by any Magistrate of the first class.

3. Charge.—"I (*name and office of the Magistrate, etc.*), hereby charge you (*name of the accused*), as follows :—

'That on or about the.......day of......at......you assaulted (or used criminal force to) *AB* (the person aggrieved) and thereby committed an offence under Section 358 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried by the said Court on the said charge".

* * * * *

OF KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR

Notes.—"The former division of this Chapter of offences against the human body have gradually led to the present. Pain or hurt of body is not necessarily a part of the offence comprised under this head. And some of these offences may be committed without any such abridgment of personal liberty as amounts to wrongful restraint or confinement".—*Morgan and Macpherson.*

Sec. 359. Kidnapping.—Kidnapping is of two kinds kidnapping from India and kidnapping from lawful guardianship.

Synopsis

1. Amendment 2180
2. Notes 2180

1. Amendment.—In India for "British India" the word "India" have been successively substituted by Adaptation of Laws Orders of 1948 and 1950 and Act 3 of 1951, Section 3 and Sch.

2. Notes.—Accused separately charged with kidnapping and abduction can be tried for each of such offences in one trial. 146 Ind Cas 305 : 37 CWN 1074 : AIR 1933 Cal 676.

Procuration of minor girl. Provisions of Ss. 359 and 361 clearly shows that the legislature did not confine to constitute the offence only if a minor girl is taken away from the place where she used to reside but the emphasis is upon taking away the girl from the "lawful guardianship". Sections 359 and 361, IPC do not spell-out any territorial jurisdiction for committing the offence. Thus the rigour of the law travels with the ward/subject and any person involving himself or herself in the offence of kidnapping or procuring a minor girl at any point of time would also come within the purview of Sections 359 and 361, IPC. Therefore, even if the victim girl was initially enticed by the co-accused, giving company to the main accused in the half-way for taking the girl to different places would be sufficient to affirm conviction of appellant-accused under S. 366A as well. *Taru Das v. State of Tripura*, 2008 CriLJ 3143 (Gau).

* * * * *

Sec. 360. Kidnapping from India.—Whoever conveys any person beyond the limits of *India* without the consent of that person, or of some person legally authorised to consent on behalf of that person, is said to kidnap that person from India.

Vide notes Section 359 under the head "Amendment".

Scope.—The offence of kidnapping from British India, consists, according to this definition, in conveying any person out of the protection of law without his consent, *vide* 8 MLT 91; 1910 MWN 262 ; 20 Bom LR 372 : 19 Cr LJ 602 or the consent of some person legally authorised to consent on his behalf ; or with such consent, when it is not freely or intentionally given, but is obtained by deception or under any of these circumstances which have been explained ; *vide* Section 90 to invalidate a consent). This offence is sometimes committed by means of assault, and in sometimes attended with restraint. But this will not always be the case. For example, a labourer who has been induced to embark on board of a ship by false assurances that he shall be taken to a country where he shall have good wages, but when the captain of the ship intends to sell for a slave, or otherwise illegally to dispose of, may be conveyed beyond the limits of British India and so kidnapped without being either assaulted or restrained. This offence may be committed on a child, or on a grown up man or woman. The carrying of a grown up person by force from on place in British India to another ; and the enslaving him within the British territories, are offences sufficient for under the heads of restraint and confinement.

The enticing a grown up person by false promises to go from one place in British India to another place also within British India may be subject for a civil action and under certain circumstances for a criminal prosecution. But it does not come under the head of kidnapping. The offence can only be committed on a grown up man by conveying him beyond the limits of the British territories in India.—*Morgan and Macpherson.*

* * * * *

Sec. 361. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under "sixteen" years of age if a male, or under "eighteen" years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This action does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

STATE AMENDMENT

Manipur.—In section 361 for the words 'eighteen' substitute the work ' fifteen'

[*Vide* Manipur Act 30 of 1950, Sec. 3 9w.e.f. 16-4-19500, read with Act 81 of 1971. sec/ 3 (w.e.f. 25-1-1972)].

Synopsis

1. Amendment 2183
2. State amendment, Manipur 2183
3. Object 2183
4. Application 2183
5. Essence of the offence 2183
6. Age 2184
7. Scope 2185
8. Word "takes or entice" 2187
9. Minor 2188
10. Unsound mind 2188
11. Consent of minor 2188
12. Keeping out of the lawful guardian 2189
13. Constructive guardianship 2189
14. Lawful 2189
15. Consent 2191
16. Charge 2191
17. When the offence is completed 2191
18. Explanation 2191
19. Exception 2193
20. Cases 2193
21. Abetment of kidnapping 2194
22. Sentence 2194
23. Procuration of minor girl 2195

1. Amendment.—In India, for the words "fourteen" and "sixteen" the words "sixteen" and "eighteen" have been substituted by Act 42 of 1949.

2. State amendment, Manipur.—In its application to the State of Manipur for the word "eighteen" substitute the word "fifteen".—Act 80 of 1949, read with Act 81 of 1971.

3. Object.—The object of this section and cognate sections is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the protection of the rights of parents and guardians. 8 Cal 971. The object of the section is to protect the minor children from being seduced for improper purposes as to protect the rights and privileges guardian having the lawful charge or custody of the minor wards. AIR 1973 SC 819.

The object of Section 361 seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The graveman of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words takes or entices any minor . . . . out of the keeping of the lawful guardian of such minor' in Section 361 are significant. The use of the word 'keeping' in the context connotes the idea of charge, protection, maintenance and control; further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. Section 361 is designed to protect the sacred right of the guardians with respect to their minor wards. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the Section. *Parkash* v. *State of Haryana*, 2004 Cr LJ 595 : AIR 2004 SC 227 : 2004(1) SCC 339 : 2003(10) JT 58 : 2004(1) Crimes 98 (SC) : 2003(8) Supreme 555 : 2004 SCC (Cri) 290.

The gravemen of the offence lies in the taking or enticing a minor under the age specified in the section out of the keeping of lawful guardianship without consent. AIR 1961 Jab LJ 870.

4. Application.—"This offence consists in taking a minor, or a person of unsound mind, out of the keeping of his lawful guardian, without the consent of such guardian. This mode of kidnapping, like that defined in the last proceeding section, may be committed with assault or the use of criminal force, and without being attended with any restraint. A child, for example, who is decayed from its guardians, who soon forgets his home, and who consents to remain with the kidnapper, cannot be said to have assaulted or restrained, but it is nonetheless kidnapped. The consent of the kidnapped person is immaterial and it is not necessary that the taking, or enticing should be shown to be by means of force or fraud".—*Morgan and Macpherson.*

5. Essence of the offence.—The essence of the offence of kidnapping as defined in this section is the taking of the minor out of the keeping of the guardian without the guardian's consent. 17 PR 1916 Cr ; 4 WR 6 ; 10 WR 33 ; 3 NWP 146 ; 95 Ind Cas 372 ; 27 Cal 1041 ; 28 Cr LJ 820.

Consent of the minor who is taken or enticed is wholly immaterial, it is only the guardian's consent which takes the case out of the purview of Section 361, IPC. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section. The use of word 'keeping' in Section 361 is designed to protect the sacred right of the guardians with respect to their minor wards. *Parkash* v. *State of Haryana*, 2004 Cr LJ 595 (SC): (2004) 1 SCC 339 : 2004 SCC (Cri) 290 : AIR 2004 SC 227 : 2004(1) SCC 339 : 2003(10) JT 58 : 2004(1) Crimes 98 (SC) : 2003(8) Supreme 555 : 2004 SCC (Cri) 290.

Motive has nothing to do with the offence under this section. 31 All 448 ; 18 Ind Cas 653. No hard and fast rule can be laid down as to the circumstances which should be considered sufficient for holding whether the accused is guilty of such 'taking' as is punishable under the law. Each case has to be decided on its own facts. 1951 Jab LJ 870. It is difficult to advance direct evidence of intention in most cases. It can only be inferred from circumstances. AIR 1955 All 78 : 1955 Cr LJ 252. Use of bruten force or fraud in kidnapping is not necessary 1961 Jab LJ 870 (the word takes or "entices" are comprehensive enough and are of widest importance so that no one' who is responsible for removing in children the keeping of his or her guardian whether physically or inducent, may escape from the penalty of law). *See* also 1978 Cr LJ 1494 (if the ingredients of the offence under Section 363, IPC, are proved along with the intention or knowledge that the girl might be compelled to marry against her will, a charge under Section 366, IPC, is established) ; AIR 1955 SC 574 ; AIR 1956 SC 116 ; (1970) 2 Cr LJ 1348 : AIR 1976 Guj 178 ; AIR 1968 Punj 439 ; (1969) 71 Punj LJ 672 ; AIR 1967 All 158 ; AIR 1965 SC 942 (overruling AIR 1958 Ker 121 : 1958 Cr LJ 637 ; AIR 1973 SC 2313 ; 1977 Cr LJ 1255 : 1977 *Kant* LJ 45 ; 1966 Guj LR 378 ; 1976 Cr LJ 363. The fact that the kidnapped minor girl is of easy visha is no defence to a charge under this section. 1976 Cr LJ 363. The two words "takes" and "enters" are intends to be read to the so that each takes to some extent its to him and content from each other. AIR 1973 SC 2313 : 1973 Cr LJ 1541 ; 1983 Cr LJ 1819 : 1983 Cr LJ 459.

Kidnapper induced minor girl to marry him and kidnapped her for this purpose from lawful guardianship of her parents—Minor girl even consented to marry him without consent of her parents—Such inducement for unlawful purpose of marrying a minor girl is illegal attracting Section 361—Mere persuation or enticement is sufficient for penal action even if use of force or fraud is not proved. *Meharunnissa Khan* v. *Kamlesh Naik*, 1994 B Cr C 111 (Bom).

It requires movement of any person from one place to another by force or by deceitful means. In instant case, there was no use of force for purposes of taking. Further, no deceitful misrepresentation was made. Hence, offence of kidnapping is not made out. *Santosh Kumar* v. *State of UP*, 1994 (31) ACC 587.

6. Age.—Although it may be recognized that ossification is an important test for determining the age. yet having regard to the practical difficulties which would attend the application of this test, it cannot be said that ossification is an indispensable test for determining the age of a girl. 15 Pat 817 : AIR 1937 Pat 263 : 38 Cr LJ 673. Even if the person kidnapped may be below the age of majority under the Majority Act, the offence of kidnapping will not fall under this section, if the kidnapped minor girl was below the age specified in the section. AIR 1955 SC 374 : 1955 Cr LJ 1296 : 51 Cr LJ 1186 : AIR 1960 Cal 406 ; 1964 (2) Cr LJ 102 ; 1966 All WR (HC) 572 (benefit of doubt in case of doubtful proof of age).

Proof of age for school admission register. 1978 Cr LJ 1494 : *See* 1979 Cr LJ 620 (doctor's evidence). 1964 (2) Cr LJ 102 (proof of age was medical cannot override other cogent evidence).

7. Scope.—The section and the explanation are express and exhaustive in their terms, and to constitute the offence of kidnapping or abducting, the following things must be proved. A taking and enticing a minor under fourteen years of age, if a male, or under sixteen years of age, if a female, or any person of unsound mind from the custody of the following persons ; (1) the natural guardians ; (2) the legal guardians, if the natural guardians be dead ; or (3) a person lawfully entrusted with the care and custody of a minor. The last kind of guardians includes all persons other than those mentioned in (1) and (2) who, for the time being, may be lawfully entrusted with the care and custody of a minor, such as a school master or a friend at whose house the minor may be staying or such like person standing in a similar degree of relationship. But this section has no application to self constituted guardians not to persons such as waifs or strays who are taken up and maintained by charitable institutions. 4 Pat LJ 74. The offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardianship, and it is not an offence continuing as long as minor is kept out of such guardianship. 26 M 454 : 2 Weir 296. A child, ten years of age, is *prima facie* subject to guardianship, and no one is at liberty to take away such child without permission properly obtained. 3 Bom 178. The offence of kidnapping is not necessarily complete as soon as the minor is removed from the house of the guardian. When the act of kidnapping would be complete would appear to be a question of fact to be determined according to the circumstances of each case. 27 Cal 1041 : 4 CWN 645 (FB). Where a minor girl was driven from her parental roof and was found some days thence, in the company of the accused no offence of kidnapping is established. 1912 MWN 538 : 13 Cr LJ 598 : 16 Ind Cas 166. The husband of a Hindu minor girl is her lawful guardian. It amounts to kidnapping even if, without any criminal intention, the father takes away his minor daughter from the lawful guardianship of the husband. 17 Cal 298. A person who is in fact the father of a child and therefore in law is entitled to the lawful custody of the child cannot come within the scope of this section even if he takes the child from the keeping of his mother. AIR 1938 Mad 656 : 1938 MMN 385 : 47 MLW 568 : (1938) 1 MLJ 453. To bring a case within the purview of the expression "lawfully entrusted" in explanation to Section 361, it must be clearly shown that not only the mother of girl requested the alleged guardian to take the girl under his protection but that he accepted the trust. 1930 Cr LJ 649 : AIR 1930 Sind 164. According to Hindu Law, the husband's *sapindas* are the guardians of a minor widow in preference to her father and his relations. 27 PR 1915 Cr. The question whether the taking of a minor girl out of the custody of her lawful guardian was or was not complete at a given moment is a question for determination with reference to the circumstances proved in each particular case. It may no doubt be difficult in some cases of kidnapping from lawful guardianship to determine the precise moment at which the taking is complete. Speaking generally, the keeping of the guardian would be at an end when the person of the minor had been transferred from the custody of the guardian or some person on his behalf into the custody of some person not entitled to custody of the minor. 55 PLR 1916 : 25 PWR 1916 Cr : 17 Cr LJ 236 : 34 Ind Cas 652. The pledging of girl to secure a loan is not a legal contract and may not be enforced in law but if a minor is retained in the custody of a person with the consent of the lawful guardian he will not commit the offence of kidnapping under Section 361, Penal Code. 10 Pat LT 326 : 119 Ind Cas 72 : 30 Cr LJ 580 : AIR 1929 Pat 316 : 1922 Cr C 97. In the case of a girl below 16 years of age, whose parents are dead, her brother, though he is under 18, is deemed to be her lawful guardian, 1929 Cr C 563 : AIR 1929 Lah 835. Where a married girl under the age of 18 left her parent's home of her own free will and went to the accused's house and asked him to take her away to some other place as she wanted to avoid going to her father-in-law's house and the accused took her to another town, it was held that the offence committed was not of abduction but one of kidnapping from lawful guardianship as it could not be said that the girl had abandoned her guardian with the intention of not returning to him but simply with a particular purpose. 1953 All LJ 78 : AIR 1953 All 412 : 1953 Cr LJ 924. Kidnapping is an offence of guardianship and the moment the minor is taken or enticed away out of the keeping of her lawful guardian, the offence is complete and is *per se* punishable unlike abduction where a particular purpose is necessary irrespective of the fact whether there is evidence that the kidnapping was with the intention of compelling her to marry against her will. AIR 1957 Orissa 29 : ILR (1956) Cut 546 : 22 Cut LT 438 : 1957 Cr LJ 213. Where *A* kidnaps a minor girl from the lawful custody of her husband, her subsequent taking away by *B* who was no party to the original kidnapping, from the unlawful custody of *A* for illicit intercourse does not amount to kidnapping and *B is* not guilty under Section 366. AIR 1961; Bom 282 : 63 Bom LR 408 : 1961 (2) Cr LJ 578 : 1962 All Cr 14.

The accused enticed away a minor married girl under the age of 18 from the keeping of the lawful guardianship of her husband, without the consent of the guardian. The action in the case commenced on a complaint made to the police by the husband. This would be an offence under Section 363, Penal Code. The same facts would also constitute an offence under Section 498 of the Penal Code and by virtue of Section 199 of the Code of Criminal Procedure. No Court can take cognizance of it except on a complaint made by the husband of the woman. (1954) MLJ (Cr) 594 : (1964) 2 MLJ 430 : 1964 All WR (Supp) 48 : 1964 All Cr R 521.

The word "takes" in Section 361 means "cause to go" "to escort" "to get into possession". In order to prove an offence under Section 363, the prosecution must show that the accused took some active part in the girl leaving her lawful guardian's custody and taking shelter with him. 1960 Ker LJ 273 ; 29 Cut LT 602 : ILR 1963 Cut 850.

Where a girl of less than 18 years is taken away from the keeping of her father by the accused with the object of marriage or reduction, he is guilty of an offence of kidnapping punishable under Section 366, Penal Code, notwithstanding the fact that the girl accompanied him of her own accord and not a result of force or misrepresentation. 1962 (1) 841 (Punj) overruled (1963) 2 Punj 678 : 1963 Cut LJ 454 : 1964 (1) Cr LJ 220 : AIR 1964 Punj 83.

Even where the minor girl is kept by her father at the house of his relative, she still continues to be in the lawful guardianship of the former. But when the girl (who though a minor attained the age of discretion and is on the verge of attaining majority and is a senior college student) from the house of the relation where she is kept, herself telephones the accused to meet her at a certain place, and goes there, to meet him and finding him waiting with his car gets into that car of her own accord, and the accused takes her to various places and ultimately to the Sub-Registrar's office where they get into an agreement to marry registered and there is no suggestion that this was done by force or blandishment or anything like that on the part of the accused but it is clear from the evidence that the insistence of marriage came from her side, the accused by complying with her wishes can by no stretch of imagination be said to have 'taken' out of the keeping of her lawful guardianship that is the father. (1965) 1 SCWR 512 : AIR 1965 SC 942 ; *see* also 1964 BLJR 914.

The most important ingredient of this section is taking or enticing away a minor or a person of unsound mind from keeping of the lawful guardian. Before a person is said to have kidnapped a minor, there must be some proof of his having done something which led to removal of the minor from the keeping of his/her guardian. In the statement of the petitioner there is nothing to suggest that the respondent induced Raj Bala in any manner to take this step. The statement of the petitioner does not indicate how the respondent was the pre-intimate or the immediate cause of victim going out of the keeping of the petitioner. It is not shown that the respondent took some active step in persuading or inducing Raj Bala to leave her home. It is obvious that she left her home before stepping into the car of the respondent. Who induced her to leave the house has not been indicted in the statement of the petitioner. It can be, therefore, concluded that Raj Bala left her home and came to the car of the respondent in the company of her mother and brother without there being any persuation, pressure, inducement and force proceeding from the respondent. As soon as Raj Bala came out of the house in the company of her mother and brother, the act of taking her out from the guardianship of the petitioner was complete before they sat in the car of the respondent. It may be that the part played by the respondent in providing the car could be regarded as extending the facility to Raj Bala, her mother and brother, but that part cannot be regarded as taking out the minor from keeping of the lawful guardian. *Madan Lal* v. *(Dr.) Jaswant Batra*, (1994) 1 CC Cases 383 at p. 386 (P & H).

8. Word "takes or entice".—The word "taking" in this section is nothing but physical taking. 15 Cr LJ 630. The taking away must be by some over act. 27 Ind Cas 181. The word "taking" is not confined to mere physical taking. It signifies some act done which is the proximate cause of the person going out. AIR 1928 Mad 585 : 54 MLJ 456. Abduction need not be forcible. 3 WR 9 ; AIR 1949 Orissa 22 : 50 Cr LJ 650 ; 27 Cal 1041 ; AIR 1928 Pat 159 : 28 Cr LJ 820. The offence is completed as soon as the minor is actually taken away from lawful guardianship. AIR 1926 Pat 493 : 5 Pat. 536 : 7 PLT 812 : *see* also AIR 1930 Oudh 289 ; AIR 1950 Cal 406. The law is that to constitute the offence of kidnapping, the taking need not be by force, actual or constructive. AIR 1958 Ker 8 : ILR 1957 Ker 781 : (1957) 1 Mad LJ (Cr) 662 ; There is an essential distinction between the two words 'take' and 'entice'. The mental attitude of the minor is not of relevance in the case of taking. The word 'take' means the cause to go, to escort or to get into possession. The word 'entice' involves an idea of inducement by exciting hope or desire in the other. AIR 1955 Andhra 59 : ILR 1955 Andhra 290 : 1955 Cr LJ 581 ; *see* also AIR 1958 Ker 121 : 1957 Mad LJ (Cr) 516 : ILR 1957 Ker 591 : 1958 Cr LJ 637. (It must be shown that the prisoner took some active step by persuasion or otherwise to cause the girl to leave the house).

The two words "takes" and "entices" as used in Section 361, IPC are intended to be read together so that each takes to some extent its colour and content from the other. If the minor leaves her paternal home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361, IPC. *Parkash* v. *State of Haryana*, 2004 Cr LJ 595 (SC) : (2004) 1 SCC 339 : 2004 SCC (Cri) 290 : AIR 2004 SC 227 : 2004(1) SCC 339 : 2003(10) JT 58 : 2004(1) Crimes 98 (SC) : 2003(8) Supreme 555 : 2004 SCC (Cri) 290.

The word 'take' means, so more than the sense in which one would use the word if the one was taking on sister to cinema. The extent to which the girl is a consenting party is a matter for consideration under the question of sentence. AIR 1964 Punj 83 : 1963 Cr LJ 454 ; AIR 1968 Punj 439 ; (1969) 71 Punj LR 688 (the word 'take' implies want of wish and absence of desire of the person taken) ; AIR 1973 SC 2313 ('takes' does not necessarily mean 'taking by force') 1977 Cr LJ 1255 (evidence lacking about soliciting or persuading). In AIR 1965 SC 942 (overruling AIR 1949 All 710 in part) it was pointed out that there is a distinction before 'taking' and allowing a minor to accompany a person ; *see* also 1976 Cr LJ 363 (want of wish and absence of desire of the person taken) ; 1979 Ch Cr C 83.

When from evidence of girl itself it is established that she accompanied accused of her own will without any compulsion of accused, no offence of kidnapping is made out. *Gourish* v. *State of Goa*, 1997 Cri LJ 1018 (Bom).

9. Minor.—The age or mental incapacity of the person taken is a matter of fact as to which the accused may either have no opinion or may have no erroneous opinion. It was decided in *Reg.* v. *Prince*, LR 2 CC 154, that even a *bona fide* belief reasonably entertained that a girl was over sixteen, was no defence".—*Mayne's Criminal Law*, Section 469 ; *see* also AIR 1929 Pat 651; 12 Mys LJ 133 ; AIR 1929 All 82 : 1929 All 82 : 1929 ALJ 111 : 30 Cr LJ 218 Minority is determined by Section 3 of the Majority Act. 37 M 567; AIR 1962 Manipur 5 : 1962 (1) Cr LJ 49 ; AIR 1957 Punj 78 : 1957 Cr LJ 475 (value of ossification test) ; 1961 Jab LJ 76 : 1961 MPLJ 267 ; 1960 Mad WN 674 : AIR 1958 Ori 224 : 24 Cut LT 261 : 1958 Cr LJ 1211 ; AIR 1958 Ker 8 : 1957 Mad LJ (Cr) 662 : ILR 1957 Ker 781 : 1958 Cr LJ 83 (Proof of age—medical evidence—use of).

The age limit was raised term 14 to 16 in girls and from 16 to 18 in case of boys by the Amending Act 42 of 1949. So kidnapping a girl above 16 years of age from her guardian's keeping is not an offence under S. 361. AIR 1955 SC 574 : 1955 CrLJ 1296.

When evidence of mother of prosecutrix and that of her school headmaster corroborated by medical evidence show age of prosecutrix below 16 years, it is to be relied upon. *Vishnu* v. *State of Maharashtra*, 1997 Cri LJ 1724 (Bom).

10. Unsound mind.—It may be that this section ought to include person who have been made unconscious ; but an unconscious person cannot be said to be of unsound mind. AIR 1939 Lah 224 ; 40 Cr LJ 706.

11. Consent of minor.—"Consent of the minor" is of no avail. AIR 1930 Cal 437 : 51 CLJ 352 ; *see* also AIR 1930 All 19 : 31 Cr LJ 85 ; 18 Cr LJ 18 : 17 PR 1916 (Cr) ; AIR 1926 Lah 547 : 26 Cr LJ 851 : 95 Ind Cas 931 ; AIR 1926 Lah 677 : 27 Cr LJ 1018 : 96 Ind Cas 874 ; AIR 1927 Nag 279 : 28 Cr LJ 659 ; AIR 1929 All 703 : 30 Cr LJ 985 ; AIR 1959 Ker 197 : 1959 Cr LJ 716 ; AIR 1965 Raj 90 : 1965 (1) Cr LJ 483.

A minor may not be competent to give her consent to her taking but a minor is certainly competent to leave the protection of the guardian of his or her own accord. AIR 1957 Cal 589 : 1957 Cr LJ 1114 ; AIR 1968 Punj 438; 1976 Cr LJ 363 (guardians conduct).

12. Keeping out of the lawful guardian.—The minor does not cease to be in keeping of the guardian unless the guardian himself abandons the minor or the minor having attained years of discretion voluntarily and definitely abandons the protection of the guardian. AIR 1949 Orissa 22 : 50 Cr LJ 650 ; AIR 1950 Cal 406 ; AIR 1926 Cal 467 : 26 Cr LJ 977. The word "keeping" is a word of wide import and would cover a case where a minor is merely within the protection or care of the said guardian or depend upon him for his maintenance, support or substance whenever necessity arises. AIR 1955 All 78 : 1955 Cr LJ 252 ; AIR 1955 Andhra 59 : ILR (1955) Andhra 290 : 1955 Cr LJ 581.

The mere fact of a minor is away from house, say on a public street, or in a market or such other place does not mean that she is not in the keeping of the guardian. 1980 WLN (UC) 268 ; AIR 1967 All 158 : 1967 Cr LJ 311. When a minor leaves the protection of her guardian of her accord and marries the accused subsequently, there can be no conviction, 1978 Cr LJ 1494.

13. Constructive guardianship.—A girl who has been turned out by her husband and was free to go any where she liked could not be said to be in the constructive guardianship of her husband, and the accused who takes her to his house, is not guilty of kidnapping from lawful guardianship, although she is below 16 years of age, 167 Ind Cas 676 : 38 Cr LJ 401 : 1936 A Cr C 221 : 1936 AWR 1065 : AIR 1937 All 182.

14. Lawful.—The word "lawful" means that which is opposed to unlawful, *viz.* legal, proper, right, without fraud, pressure or constraint. This word does not necessarily mean that the person who contrusts a minor to the care or custody of another must stand in possession of a person owing to legal duty or obligation to the mother. It is sufficient if the entrusting is effected without illegality or the commission of any unlawful act by a person legally competent to do so 4 Pat LJ 74 : 49 Ind Cas 481. The mother of an illegitimate child is her lawful guardian. 8 Cal 971. The minor must be under the guardianship of some one, otherwise the offence is not committed. 13 Cr LJ 528. In matters of lawful guardianship, preference should be given to those who are entitled to guardianship under the Guardians and Words Act. 15 Cr LJ 640 ; Rat Un Cr C 820. In the last two cases eternal relatives were preferred to paternal relatives and the latter were convicted for taking away the minor from the guardianship of the former. According to Hindu Law, husband's relatives are the lawful guardians of the minor widow. 27 PR 1915 Cr. Where husband of a minor girl sold her, the purchaser is her lawful guardian. 7 PR 1911 Cr. A minor brother cannot be the guardian of his sister. AIR 1922 Lah 75 ; AIR 1921 Lah 316 : 3 LLJ 588 : 67 Ind Cas 831 ; but *see* AIR 1929 Lah 835. Where a minor girl leaves her husband's house without any persuation, inducement or blandishment held out to her by the accused, and then, she goes to him, he cannot be convicted of an offence under this section. 73 Ind Cas 260 ; *see* also 1 LBR 205 ; 87 Ind Cas 513 : 30 CWN 215 ; but *see* 36 Ind Cas 580 : 14 ALJ 792. When a father sent his daughter to live in a house with few of his relatives and one of their relatives married the daughter in that house without the consent of the father. *Held*, that there was no taking out of lawful guardianship. 14 Cr LJ 630. The husband of a

Hindu minor girl is her lawful guardian and her father cannot take her away without her husband's consent without committing an offence of kidnapping. 17 Cal 298. In this section, the Legislature has advisedly preferred the phrase "keeping of the lawful guardian" to the word "possession" which frequently recurs in the Code in lawful connection with the inanimate objects. The word "keeping" connotes the fact that it is compatible with independence of action and movement in the object kept. It implies neither prevention nor detention but rather maintenance, protection and control, manifested not by continual action, but as available on necessity arising. This relation between the minor and the guardian is certainly not dissolved so long as the minor can, at will, take advantage of it and place herself within the sphere of its operation. 6 Bom LR 785 : 1 Cr LJ 93. Where minor is taken away from *de facto* guardianship with consent of alleged civil guardian, Sessions Judge should enquire into question of civil guardianship before deciding the case. AIR 1931 Cal 446 : 32 Cr LJ 888 : 58 Cal 897 : 35 CWN 195. The words "lawful guardian" in this section are used in a wider sense. Every person entrusted with the care or custody of a minor is a lawful guardian. AIR 1934 Pat 170 : 1934 Cr C 367 : 15 PLT 229 : 35 Cr LJ 814. It includes the *"de facto"* guardian, 52 Cr LJ 1238 : AIR 1951 Assam 122. The husband of a muslim minor girl while taking her to his home a short visit to her mother's home or an uncles home is the rightful and lawful custodian of the minor wife within the meaning of Section 361. AIR 1952 Tri 27. The term does not include a person with whom the minor by consent of legal guardian resides. 12 Mys LJ 133. The test of lawful guardianship is that the infant or minor should be in a position to apply to his guardian for protection. AIR 1929 Sind 249 ; 17 Cr LJ 236. Mother of a Mahommedan girl of 7 of age, is her guardian and not her husband. 27 CWN 531. The expression "lawful guardian" in this section includes a *de facto* guardian, AIR 1942 Pat 212 : 44 Cr LJ 590. Where a minor leaves the immediate custody of her lawful guardian for a temporary purpose such as a visit to friends, she will deemed to be still in his keeping for the purpose of this section. *Ibid.* Mere *de facto* guardianship cannot be set up so as to convict the real civil law guardian of an offence under this section. 43 Cr LJ 918 : AIR 1943 Pat 109. Where a minor abandons the house of her guardian of her own accord and has no intention of returning to the house, she cannot be held to continue in the keeping of her lawful guardian. AIR 1941 Oudh 567 : 42 Cr LJ 728.

The words 'lawful guardian' is apparent from the language of Section 361 are of wider connotation than the words "legal guardian." AIR 1958 Bom 381 : 60 Bom LR 329 : ILR 1958 Bom 505 : 1959 Cr LJ 1296 (father forcibly removing the girl from the custody of the mother given under decree of divorce) ; *see* also AIR 1958 Bom 359 : ILR 1954 Bom 784 : 1954 Cr LJ 1032.

Under Section 6 (a) proviso of the Hindu Minority and Guardianship Act 1956 though the father is the natural guardian the mother is entitled upto 5 years. A mother cannot be guilty of kidnapping her own child upto 5 years of age. AIR 1969 Delhi 304. Under the Muhammadan Law, the mother is entitled only to the person of her minor upto a certain age according to the sex of the child. But she is not natural guardian of the minor. AIR 1918 PC 11 ; AIR 1968 Ker 21 : 1968 Cr LJ 62.

The terms "lawful guardian" does not include a person who has himself gained possession of the minor by committing an offence under this section. 1974 Punj LR 370. Distinction between the "lawful guardian" and "legal guardian". AIR 1962 Pat 21 :

1962 BLJR 41. Offences by temporary guardian under this section is committed when the removal of the boy below the age of 14 is made out of the keeping of the lawful guardian. 1964 Bihar LJ 914 (AIR 1929 Pat 316 cited).

15. Consent.—In order to constitute an offence under this section there must be taking of the minor out of the guardian without the guardian's consent. A consent given on a misrepresentation of fact is one given under a misconception of fact within the meaning of Section 90 of the Penal Code, and the consent of a guardian so obtained is not useful as consent under this section. 17 PR 1916 Cr. The consent of the girl does not affect the offence. 2 WR 61 : 2 WR 5 ; 7 WR 36 ; *Reg.* v. *Mankletow.* Dears CC 159. Where a girl originally goes to an institution with the consent of her mother who is her guardian, if the mother subsequently changes her mind, the detention of the girl by the institution does not constitute an offence of kidnapping. AIR 1939 Sind 152 : 40 Cr LJ 698.

The consent required is a free consent given by the guardian without fear or misconception of facts, not wrested out of him by intimidation or coercion. *Vide* 28 All 664. Consent of the prosecutrix is not relevant except in reduction of sentence. AIR 1968 Punj 439 ; 1976 Cr LJ 369.

16. Charge.—A charge of kidnapping from lawful guardianship should contain the name of the guardian. 1 Wyman's Rev. Civ. and Crim. Reporter 16. In a charge, the Judge should use the words of the section and must not substitute phraseology of his own. 13 CWN 754.

17. When the offence is completed.—The offence under this section is completed the moment a minor as described in this section is taken out of the custody of a lawful guardian and is not a continuing one. So there cannot be abetment of this offence by conduct which commences only after the minor has once been completely taken out of the keeping of the guardian. 38 All 664 : 14 ALJ 765 ; *see* also 6 PR 1894 Cr. The offence is complete when the minor is actually taken away from lawful guardianship and it is not an offence continuing as long as a minor is kept out of such guardianship. 26 M 454. The intimacy that had developed between the accused and the girl had played a considerable part in the whole affair of elopement and the minor girl could not have left the home but for the instigation or co-operation or accompaniment of the accused. AIR 1961 MP 104 : 1961 (1) Cr LJ 513.

18. Explanation.—The explanation to this section is not intended to limit the protection which the section gives to parents and minors. It is intended to extend that protection by including in the term "lawful guardian", any person lawfully entrusted with the care and custody of a minor. 24 M 284 ; 1 Weir 359 : 2 Weir 458 : 10 MLJ 405. The lawful entrustment contemplated by the explanation to this section, may be proved not only by oral evidence, but also by surrounding circumstances and the conduct of the parties concerned. The section cannot be constructed as contemplating a formal declaration of trust in order to lawfully entrust a person with the care and custody of a minor. A person should be regarded in the eye of law as having been lawfully entrusted with the care and custody of a minor, if he has acquired control over the minor lawfully and in such circumstances as would imply trust, even though he may not have been formally entrusted with the care and custody of the minor by a third person. 15 Pat 817 : 169 Ind Cas 48 : 38 Cr LJ 673 : 18 Pat LT 535 : AIR 1937 Pat 263. A guardian may be lawful without being a legal guardian. The expression "lawful guardian" must be liberally construed. The entrustment may be by a legal guardian ; it may be written, oral, express or implied. ILR (1942) Nag 34 : AIR 1941 Nag 66 : 41 Cr LJ 356. The entrustment may be inferred from a well defined and consistent course of conduct governing the relations of the lawful guardian alleged in the indictment and of the minor. AIR 1962 Pat 121 : 1962 (1) Cr LJ 449. Wife turned out by husband is not in his care or custody. AIR 1933 All 182 : 38 Cr LJ 401. But a lawful guardian cannot be convicted by setting up *de facto* guardianship and extending the meaning of lawful guardian. AIR 1943 Pat 104 : 43 Cr LJ 918 ; 35 CWN 195 : 32 Cr LJ 888 : AIR 1931 Cal 446. The conception of a dual guardianship is by itself not repugnant to law and there may be cases where there are more than one guardian. The guardianship of a father or mother does not cease while the minor child is in the possession of the another person who has been lawfully entrusted with the care and custody of such minor by the father or mother. There is nothing in law to prevent the father or mother of a minor, the care and custody of such minor to more than one person at a time. 15 Pat 817 : 169 Ind Cas 48 : 38 Cr LJ 673 : 19 Pat LT 535 : AIR 1937 Pat 263. The fact that a father allows his child to be in the custody of a servant for a limited purpose and for a limited time, cannot determine the father's rights as guardian or his legal possession for the purpose of the criminal law. Such a temporary guardianship does not exclude the higher legal guardianship of the father. In such cases, the Court must consider all the facts and *see* whether they are consistent or not with the continuance of the father's legal possession of the minor. If they are not inconsistent the minor must be held to be in the father's possession or keeping even though the actual possession should be temporarily with a friend or other person. *Ibid.* Where a minor girl comes to the house of her father with the consent of her husband, her father is her *de facto* guardian. 11 Cr LJ 9 : 4 Ind Cas 543 : 13 CWN 754 ; *see* also 8 SLR 182 : 16 Cr LJ 117 : 27 Ind Cas 181. The word "include" is not intended to limit the protection which the section gives to parents and minors, but rather to extend that protection by including in the term lawful guardian or any person, lawfully entrusted with the care or custody of the minor. AIR 1922 Lah 380 : 68 Ind Cas 620. Where a Hindu minor is living with a person who is not her nearest male relative, the latter commits an offence under this section if he takes the minor away from the guardianship of such relative without his consent. The technical plea of legal guardianship can be raised only by a guardian appointed by a Civil Court. 42 All 146 : 18 ALJ 64. The mere fact that the minor leaves the protection of her guardian does not put her to of the guardianship keeping. The physical control of the minor is not always necessary to constitute "keeping" or custody. 12 Mys LJ 133. Without the explanation the guardianship is limited to lawful guardianship. By the explanation the term 'guardian' has been extended to any person lawfully entrusted with the care and custody of another. The term 'entrust' implies the giving, handing over or confiding of something by one person to another. It involves the idea of active power and motive by the person reposing the confidence towards the person in whom the confidence is reposed. The term "lawfully entrust or entrusted" means a declaration of trust and the handing over or the giving of confiding of a minor to the care and custody of another by a person competent to do so unaffected by any illegality or impropriety coupled with the assent, express or implied of the person in whom the trust is vested or imposed. Neither the declaration of the trust itself nor its acceptance need be necessarily in writing : it is sufficient if the declaration is verbally made and given or if it arises from a course of conduct consistent only with the existence of such antecedent declaration and accepted verbally or by necessary implication arising from the conduct of the party so entrusted with duty imposed. 4 Pat LJ 74 : 1919 Pat 33. Intention to give child in marriage in contravention of Act 19 of 1929 is "unlawful purpose". 143 Ind Cas 873 : 11 Rang 81 : 34 Cr LJ 696 : AIR 1933 Rang 98 (FB).

19. Exception.—The exception of this section simply is that the section does not extend to the act of any person who in good faith believes himself or herself to be entitled to the lawful custody of the child. There is no question whatever of any authority to remove the girl from the control of her lawful guardian. AIR 1938 Cal 475. A woman should not be convicted of kidnapping her own minor children from the lawful guardianship of their father, when she believes, in good faith herself entitled to the lawful custody of the children. 1 Weir 384 ; 2 Weir 665. The word "unlawful" is not synonymous with "illegal" "immoral". It means what is not justifiable by law. A father of an illegitimate child who removes it from its mother in about 10 days of its birth for the purpose of hushing up the scandal and for its welfare, does so not in good faith, but *mala fide* and unlawfully. He is not protected by exception to this section. 62 Cal 629 : 39 CWN 396. Where the father deceitfully enticed his own child from the custody of his mother, he cannot be convicted under this section. AIR 1938 Mad 656 : 39 Cr LJ 93. In such a case it is for the prosecution to show that the act was committed for an immoral or unlawful purpose. *Ibid.* A minor girl leaves her husband' house without any persuasion, inducement, blandishment held out to her by a man so that she would get fairly away from home and then goes to him, he can not be deemed to have infringed the law, even if he does not restore to her lawful guardian. AIR 1965 SC 942 (overruling AIR 1958 Ker 121).

20. Cases.—The mother of Mohammedan minor girl of fifteen is her lawful guardian even if she attains puberty. 60 PR 1905 Cr. The prosecution must prove that the accused knew that the kidnapped person was under lawful guardianship. 27 PR 1887 Cr. Paternal relatives of a minor Hindu girl are not justified in removing her from lawful guardianship by fraud or force for the purpose of getting her married. Rat Un Cr C 320. Where the two accused took a minor girl from her husband in Bikhanir detained her there for a month, then brought her to Karachi by train, where they detained her for three days, the offence was completed at Bikhanir. 7 SLR 17 : 20 Ind Cas 599 : 14 Cr LJ 439. Where a girl under sixteen years of age left the guardianship of her husband and father-in-law on her own free will and not for the first time, and after that stayed with accused quite voluntarily and without any force having been exercised or deception practised upon her, *held*, it did not amount to taking or enticing the girl out of the keeping of her lawful guardian, nor did it amount to compelling her by force or inducing her by deceitful means to go from any place, and it was not an offence within the meaning of Sections 351, 362 and 366, Penal Code. 12 ALJ 265 : 23 Ind Cas 473 : 15 Cr LJ 265 ; *see* also UBR 1912, 2nd Qr 136 : 14 Cr LJ 109 : 18 Ind Cas 669. The consent of kidnapped person is immaterial, and it is not necessary for a conviction under Section 361, that the taking or enticing should be shown to have been by means of force or fraud. 2 WR Cr 5 ; 2 WR Cr 61 ; 3 WR Cr 9 ; 3 WR Cr 15 ; 7 WR Cr 36. For conviction of kidnapping under Sections 361 and 363 of the Penal Code, that the accused took or enticed from lawful guardianship the person kidnapped must be established. 10 WR Cr 53 ; 16 WR Cr 42. To entice away a child playing on a public road is to kidnap it from lawful guardianship. 7 WR Cr 98. It is not incumbent on the prosecution in a case of kidnapping under Section 361, Penal Code, to prove that the accused knew that the minor had a lawful guardian. It is for the accused to prove ignorance of the fact of the existence of a lawful guardian, when he raises that plea, though it does not follow that such ignorance will be a complete answer to the charge of an offence under Sections 361 and 363. 27 PR 1887 Cr. Motive has nothing to do with the offence of kidnapping though it might have much to say to the punishment. 6 ALJ 682 : 3 Ind Cas 480 : 31 All 448 : 10 Cr LJ 295. The right of a paternal relation of a minor girl to select a husband and perform her marriage is not according to the Hindu Law, absolute as against the guardian. Rat Un Cr C 820. When the legal guardians for marriage of a Hindu girl gets her married, he will not be committing an offence under Section 362, even if he takes money from the other side. AIR 1960 All 479 : 1960 Cr LJ 1054. The burden of proof the intention of the accused to kidnap from the lawful guardian is on the prosecution. 1960 Bom LR 744 ; 1977 Cr LJ 1235 ; 1972 Mad LW (Cr) 75.

When victim having attained age of discretion wilfully left her father's house and voluntarily accompanied accused, it cannot be said that accused did over act for inducement and was guilty. *Baldeo* v. *State* of *U.P.*, 1993 Cri LJ 1915 (Alld).

When medical evidence show that hymen of girl was intact and there being no outword sign of injuries or violence supporting sexual intercourse, no rape was committed. *Vishnu* v. *State of Maharashtra*, 1997 Cri LJ 1724 (Bom).

Girl willingly accompanying accused without any compulsion of accused, does not constitute offence of kidnapping. *Gaurish* v. *State of Goa*, 1997 Cri LJ 1018 (Bom).

When prosecutrix was to appear at M.A. Examination—Incident of kidnapping occurred meanwhile—Prosecutrix going with accused of her own free will. FIR, not mentioning that she was minor. FIR mentioning that she was of unsound mind and thus she could not take right decision which was not tenable hence was held that when prosecutrix of her own free will without any pursuation from accused abandoned guardianship of her parents and joined accused, proceedings in the case is liable to be quashed. *Balabhadra Prasad Das* v. *State of Orissa*, 1995 Cr LJ 1288 (Ori).

21. Abetment of kidnapping.—A Hindu wife removing her infant daughter and marrying her without her husband's consent is guilty of abetment of kidnapping. 8 Cal 969 : 11 CLR 6. The only evidence against the accused person, charged with abetment of kidnapping was first, that he was at the house of certain prostitutes who kidnapped a girl, secondly that he was the first man, who had connection with the girl, thirdly that he carried her about from place to place, and fourthly, that he endeavoured to conceal himself and that he himself absconded. *Held*, that there was no evidence to show that the accused abetted the offence of kidnapping. 2 CWN 81. There can be no abetment of kidnapping by conduct commencing only after the minor has been completely taken out of the keeping of the guardian when the guardian keeping of the minor is at an end. 6 PR 1894 Cr.

22. Sentence.—Kidnapping of victim girl below 18 years of age from her lawful guardianship—Intention to marry compulsorily against her will not proved—Occurrence was 5 years old—Both accused and victim girl leading happy marital life. offence under Section 361 and not under Section 366 made out. Sentence of two years imprisonment reduced to period already undergone. *Biswanath Mallick* v. *State of Orissa*, 1995 Cr LJ 1416 (Ori).

23. Procuration of minor girl.—Provisions of Ss. 359 and 361 clearly shows that the legislature did not confine to constitute the offence only if a minor girl is taken away from the place where she used to reside but the emphasis is upon taking away the girl from the "lawful guardianship". Sections 359 and 361, IPC do not spell-out any territorial jurisdiction for committing the offence. Thus the rigour of the law travels with the ward/subject and any person involving himself or herself in the offence of kidnapping or procuring a minor girl at any point of time would also come within the purview of Sections 359 and 361, IPC. Therefore, even if the victim girl was initially enticed by the co-accused, giving company to the main accused in the half-way for taking the girl to different places would be sufficient to affirm conviction of appellant-accused under S. 366A as well. *Taru Das v. State of Tripura*, 2008 CriLJ 3143 (Gau).

* * * * *

Sec. 362. Abduction.—Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

Synopsis

1. Scope 2195
2. Abduction 2196
3. Proof of abduction by deceitful means 2197

1. Scope.—"This section does not define an offence. It is merely a definition of the word "abduction" which occurs in some of the penal provisions which follow—abduction differs from kidnapping, because there may be abduction without a removal of the person from the protection of the law, or even from lawful guardianship. It may be observed on the things which constitute abduction according to this definition, that to compel by force a person to go from any place is not an offence specifically under this Code, although it may necessarily involve the commission of an offence, an assault at least, and probably, wrongful restraint. To induce a person by deceitful means to go from any place is ordinarily not an offence, but only a subject for a civil action. Neither of these things are specially punished as offence here ; they merely constitute the definition of abduction. An abduction is made an offence only when it is committed with certain aggravating circumstances".—*Morgan and Macpherson* ; *see* also 8 PLR 1924 : 24 Cr LJ 921 ; 22 Ind Cas 730 ; 15 WR 4. The rule of practice, amounting almost to a rule of law, that in cases involving sexual intercourse, the corroboration of the woman's story must be obtained does not apply in case of abduction, because the offence of abduction is complete if the accused takes the woman away by deceitful means intending to seduce her to sexual intercourse. AIR 1942 Bom 71 : 43 Cr LJ 529 : ILR 1942 Bom 384. In the case of a grown up woman, it would be an offence to carry her away by force against her own will even with the object of restoring her to her husband. AIR 1942 Lah 89 : 43 Cr LJ 529 : ILR 1942 Lah 470. "To induce" means "to lead into" it connotes a leading of the woman in some direction in which she would not otherwise have gone. There must be a change of mind caused by an external pressure of some kind. AIR 1934 Sind 164 : 36 Cr LJ 231. This section merely defines what "abduction" is. It does not define an offence. Abduction becomes an offence only when it is accompanied by one of the three intentions described in Sections 364, 365 and 369, Penal Code. AIR 1950 Assam 37. 'Abduction' requires two essentials (1) forcible compulsion or inducement by deceitful means and (2) the object of such compulsion or inducement must be the going of a person from any place. 1953 Cr LJ 1790 : AIR 1953 Punj 258. Apart from the elements of force to fraud that may be involved in abduction and which elements may attract punishment under other section of the Code, abduction per se of an adult person is not punishable under the Code. AIR 1959 Mad 274 : ILR 1959 Mad 320 : 1959 All Cr R 187 : 1959 Cr LJ 852. In case of an offer to find bridegroom for major girl and the girl accompanying the accused, no offence under Section 366 is committed as there was no compulsion. 1952 MRLPJ (Notes) 7.

Under Section 362, the force of deceitful means should be employed towards the person sought to be abducted and not towards any other person. 1956 All LJ 849 : 1956 All WR (HC) 526.

If the offence of abduction falls within the categories dealt with by Sections 364 to 369 except as, Sections 366B and 368 by reason of other additional elements apart from force or fraud it will be an offence punishable under these section. 1971 Cr LJ 1222. There can be no abduction when no inducement is made or force is used in taking away a person. AIR 1971 SC 2664 : 1971 Cr LJ 1458.

2. Abduction.—When a man by a promise of marriage induces a woman to leave her house, but does not marry her or get her married he is guilty of deceiving her as mentioned in this section. 4 ALJ 482. In order to constitute an offence under this section the woman must be compelled by force or induced by deceitful means to leave her husband's home. 11 PR 188 Cr.

Section 362 IPC, only defines abduction and is not substantive offence. *Gopa Ram* v. *State of Rajasthan*, 1996 Cri LJ 2987 (Raj).

The offence of abduction is a continuing offence and a girl is being abducted not only when she is first taken from one place to another. 12 ALJ 91 ; 7 SLR 128 ; 14 Ind Cas 599. When the accused uses deceitful means in abduction a woman from one place to another, he is guilty of an offence under this section. But if he repeats the same deceitful means in order to abduct her again from the latter place to a third place, he commits a second offence under this section. 24 Ind Cas 599 ; 40 All 507. A person who compelled a girl by force to go away from the place where her mother-in-law was, evidently with the intention to have sexual intercourse with her, is liable to be punished for committing an offence under Section 366 read with this section. 9 MLT 406 : 10 Ind Cas 290. Bare abduction, without the intention pointed out in the different sections dealing with the subject, is not *per se* an offence. 6 CWN 208.

Where an accused person deceitfully married a girl with the intention of prostituting her, *held*, that the fact of his marriage dishonestly contracted with an illicit view did not prevent his act of inducing the girl to leave her home from amounting to abduction under Section 362, or entitled the accused to be acquitted of an offence under Section 366, Penal Code. 7 PR 1881 Cr. A conviction for abduction was quashed no force or deceit having been practised on the person abducted. 2 WR 7 Cr. Where an accused person dishonestly induced a girl to marry him and leave her home with the view of causing her to prostitute herself. *Held*, that the fact of such marriage did not exculpate him from being guilty of abduction under Section 362, Penal Code, or of an offence under Section 366, 7 PR 1881 Cr. Neither under the Penal Code nor under the Frontier Regulation is it an offence for a married woman to abet her own abduction. 40 PR 1866 Cr. ; 6 PR 1871 Cr; 14 PR 1875 Cr; 11 PR 1883 Cr. Where the kidnapped girl goes with the accused on his false representation, an offence under this section has been committed. 73 Ind Cas 510 : 24 Cr LJ 622 : AIR 1923 Lah 158. Abduction in itself constitutes no offence and only becomes an offence when certain criminal intents are proved. 75 Ind Cas 297 : 24 Cr LJ 921. Abduction itself is not an offence but becomes so when taken in connection with other factors which form the subject matter with other sections of Chapter XVI of the IPC, 29 PLR 444 : 109 Ind Cas 127 : 10 Lah LJ 325 : 29 PLR 479. The offence of kidnapping from lawful guardianship is not a continuing offence. As soon as the minor is actually removed from the custody of his or her guardian, the offence is committed. The offence is not a continuing one as long as the minor is kept out of guardianship. AIR 1931 All 55 ; AIR 1951 Raj 33 : 52 Cr LJ 217.

There is no question of any kidnapping from the lawful custody if the real gravamen of the offence is that the accused induced the prosecutrix by threatening her with a pistol to go with him to the room in his fields. AIR 1972 SC 2661 : 1973 Cr LJ 179.

3. Proof of abduction by deceitful means.—In order to prove abduction by deceitful means, it is not enough for the prosecution merely to establish that there was a misrepresentation of some kind but they have also to prove that there was misrepresentation by which the person abducted was himself deceived. 41 CWN 287.

The expression "deceitful means" is wide enough to include the induction of a girl to leave her guardian's house on a pretext. AIR 1951 Raj 33 : 52 Cr LJ 217 : 1950 RLW 340. An offence of abduction can be said to have been committed only if the prosecution is able to prove against the alleged offender that he has by force compelled or by deceitful means induced another person to go from any place. 1959 Raj LW 269. Deceit is proved when a woman leaving her husband's place willingly but subsequently discover intention on part of accused of selling her for concubinage. 6 Sau LR 329.

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Sec. 363. Punishment for kidnapping.—Whoever kidnaps any person from *India* or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

STATE AMENDMENT

Uttar Pradesh.—The offence under Section 363, IPC is non-bailable. [*Vide* U.P. Act 1 of 1984].

Synopsis

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1. Amendment.—The words "British India" have been successively substituted in India by the word "India" by Adaptation of Laws Orders, 1948 and 1950 and Act 3 of 1951, Section 3 and Sch.

2. Scope or object.—This section and Section 366 are intended not only to protect the rights of parents and lawful guardians of minor, but also to protect the minors as well. So the willingness of the minor or of the temporary guardian does not protect the accused. 12 ALJ 133. It is well settled that the taking away of a minor from the lawful custody is not the same thing as keeping the minor out of such custody ; the act of taxing away is completed as soon as the minor is taken out of his or her guardian. 48 Cr LJ 799 : 231 IC 457. This section must be strictly construed. 42 PLR 25. An offence under Section 363 of the Penal Code is made out if (i) the person kidnapped was a minor ; (ii) the minor was in keeping of lawful guardian (iii) the accused took or induced such person to leave out of such lawful keeping and such taking was done with the consent of the lawful guardian. 1952 MWN 231 : (1952) 1 MLJ 536. To sustain a conviction under Section 363, the prosecution has to prove that the accused had some active part in the minor leaving the guardian's house. The offence under Section 363 is not a continuing one, and it really consists in the initial act of taking her from the keeping of her lawful guardian. 1959 Ker LR 656 : 1959 Ker LT 684. In a case under Sections 363 and 366 Penal Code, the prosecution story was that *I*, a minor girl of Ajmer, on suggestion by the accused P and *N* to go with them to Bombay, left her father's house and met P near Plaza Cinema. P took her towards clock tower when he got a Tonga to take her up to water through where *P* and *N* met *I* and then all the three in the same tonga went to Kishengarh. *Held*, in revision by the High Court against conviction of *N* under Section 366, that the offence of kidnapping was not complete till I left for Kishengarh but he had been rightly found under Section 366. 1956 AMLJ 14.

Section 366 is an aggravated offence under Section 363. 1954 Mad WN 810 ; 1954 All WRHC 296 : 1955 Cr LJ 168. (Where a person is guilty under Section 366A, he cannot be convicted at the same time of the minor offence under Section 363 or Section 366).

A mere reading of the FIR shows that the petitioner had taken shabana after getting the consent of her lawful guardian to a function at the house of Poonam. Instead of taking her to the house of Poonam, she took her to the Bus-stand from where she went to Delhi. Before leaving, she had given instructions to Balraj to take Shabana back to her parents house. In this situation the petitioner had no criminal intention while taking away Shabana from her house. She was taken with the consent of her guardian and was sent back from the bus-stand the moment Shabana refused to accompany her to Delhi. If Balraj tried to prevail upon Shabana to go with him, which act in fact was never committed, the petitioner cannot be made liable. No offence is thus disclosed against the petitioner. In this situation, the continuation of any prosecution on the basis of the FIR registered at Police Station Sadar, Sonepat, shall be an abuse of process of law. *Neelam* v. *State of Haryana*, (1994) 1 SLJ 719 at pp. 719, 720 ; 1994 (3) CC Cases 34 (P & H).

Absence of any *direct evidence* of kidnapping. The appellants were arrested along with the victim girl. The said circumstance has no help to the case of prosecution. In the absence of any direct evidence of kidnapping, it cannot be ruled out that the girl might have gone to Kuju on her own or with some other persons. It may also be possible that on the same day appellants might have gone to Kuju and after seeing the victim girl at Kuju Chowk, they might have started talking to her and by that time police might arrive there and arrested them. Thus, from the aforesaid circumstance, it cannot be inferred that the present crime has been committed by the appellants and none else.

It is well settled that statement under Section 164 CrPC is not a substantive piece of evidence. It can be used only to corroborate or contradict the statement of witness. It is equally well settled that the statement under Section 161 of the CrPC of a witness can be used only for contradicting him. Under the said circumstance, the aforesaid two statements of Sarita Kumari under Sections 161 and 164 CrPC cannot become the basis for conviction. Held, the Court below had committed serious illegality by convicting the appellants on the basis of aforesaid statements. *Rajesh Kumar & Anr. vs. State of Jharkhand*, 2010 (3) CriLJ 3512 (Jhar).

Prosecutrix was rescued by witness when accused persons forcefully took her towards village. Statement of prosecutrix inspiring confidence and corroborated by evidence of eye-witnesses. Prosecutrix on date of incident was less than 18 years of age. Plea of alibi as projected in defence is neither put to any of prosecution witnesses nor it can be proved by preponderance of probability. Held, conviction of accused persons is proper. *Chander Singh & Ors vs State of Himachal Pradesh*, 2010 (4) CriLJ 4031 (HP).

Accused persons took prosecutrix on point of knife from one place to another. No evidence showing that either of accused persons extended any premise or allurement to prosecutrix.

As regards charge under Sections 363 and 366 of IPC, in order to prove kidnapping the prosecution was required to prove that the appellants had taken or enticed the prosecutrix out of the keeping of her lawful guardian. The object behind Section 361 of IPC, which defines kidnapping, is to protect the minor children from being seduced for improper purposes and to protect the rights and privileges of guardians having lawful charge or custody of their minor wards. What is necessary is either taking or enticement, of the minor. Taking would include causing to go or getting into possession whereas enticement involves an idea of inducement, by igniting hopes or desire in the other. One does not entice other, unless the latter attempts to do a thing which he or she would not otherwise have done. In order to bring home conviction for kidnapping, there must be proof of the accused having done something which led to the girl going out of the keeping of her guardian. The words 'takes' and 'entices' as used in Section 361 of IPC need to be read together so as to take colour and content from each other.

In the present case, there is no evidence of either of the appellants having extended any promise or allurement to the prosecutrix. This is not the case of the prosecution that either of the appellants had promised to marry the prosecutrix or held out any other promise to her. The case of the prosecution is that the appellants had threatened the prosecutrix by putting knives on her person and being afraid of them she accompanied them to Merrut. That part of the deposition of the prosecutrix where she claimed that she had been threatened and two knives had been put on her person when she was taken from Delhi to Merrut cannot be believed and is obviously false. The truth appears to be that since the prosecutrix was previously known to the appellants, and had become friendly to one of them, she of her own abandoned the guardianship of her parents and eloped with the appellants. Though the prosecutrix has been found to be less than 16 years old, it cannot be said that she was not capable of knowing what she was doing. She was not of such an age so as to be unable to decide what was good and what was bad for her. Had the prosecutrix been about 10 months older, even the offence of rape would not have been made out against the appellants in the facts and circumstances of the case. In my view the facts and circumstances brought on record clearly show that the prosecutrix willingly accompanied the appellants and stayed with them till they were caught by the police. The prosecutrix knew and had the capacity to know the full import what she was doing. It is, therefore, difficult to say that the offence of kidnapping has been made out against the appellants in the facts and circumstances of this case.

Held, it cannot be said that accused persons took prosecutrix with them so as to force or seduce her to illicit intercourse. Offence of kidnapping has not been made out against them. *Mohd. Imran Khan & etc. vs. State*, 2010 (2) CrLJ 1756 (Delhi).

The accused was convicted under the sections for having subjected the prosecutrix to forcible sexual intercourse. It was observed that prosecution had failed to prove that accused played any active part in taking the prosecutrix out of the keeping of her lawful guardian. *Held*, that prosecutrix had voluntarily gone to accused's house to contact matrimonial alliance with him without the accused playing any overt or covert role therein. At the relevant time the prosecutrix had attained age of discretion. The appeal was, therefore, accepted and sentence set aside. 1987 Cri LJ 1266 (Him Pra).

Major girl leaving her parents of her own will does not commit any offence under Section 363 or 366. *Oroos Fatima* alias *Nisha and another* v. *Senior Superintendent of Police, Aligarh and another*, 1993 Cri LJ 1 (Alld).

When infant girl raped and thereafter body thrown into a well, offence is made out under Section 366 and not under Section 363. *Siddik Singh Pritam Singh* v. *State of Maharashtra*, 1993 Cri LJ 2919 (Bom).

For the purpose of Section 363, the intention of the offender, his motive the means employed by him and the consent of the girl are all irrelevant. AIR 1961 Jab LJ 870 ; AIR 1961 MP 104 : 1960 Jab LJ 1071. The appellant was not convicted when he was a close relation of the kidnaped girl and had absolutely no intention or motive to take her away. 1980 Cr LJ 121. The offence of kidnapping under Section 363 consists solely of taking a minor from the keeping of her lawful guardian, and no intention needs to be established. AIR 1964 Punj 83 : 1963 Punj 678 : 1963 Cr LJ 454 ; 1961 Jab LJ 870 (the intention of the offender, the motive and the means adopted by him and the consent of the girl are all irrelevant). The age of the minor is less than 16 years if male and less than 18 years if female, the minor was taken or enticed away from the keeping of his or her lawful guardian without the consent of the guardian. 1975 WLN (UC) 112 ; 1972 Mad LW (Cr) 169 : 1972 Mad W (Cr) 75. The section will not apply where neither taking away nor enticement established. (1971) 2 SC Cr R 16 : 1971 Cr LJ (N) 6 ; 1971 Cr LJ 1365. Some kind of inducement was held out by the accused or that he took an active part in the formation of the intention of the minor to leave the house of the guardian—are the ingredients of the offence. AIR 1965 SC 942 : (1965) 2 Cr LJ 31 ; 1971 SCC (Cr) 29. *See* also 1983 All Cr LR 629.

The accused was charged with kidnapping of prosecutrix, a minor girl, by means of intimidation that she would be killed/or with the intention that she may be compelled to marry him against her will. One day when her father and brother were not in the house, the prosecutrix took Rs. 1100/- and left with the accused. The Investigating officer recovered the girl but could not recover money. No satisfactory proof of the age of the prosecutrix was furnished. *Held,* that accused was not responsible for the prosecutrix leaving her house and could not be said to have committed offence under Section 363/366. 1987 Cri LJ 910 (Del).

Case under Section 363 is warrant case. *Usha K. Pillai* v. *Raj Kumar Srinivas*, 1993 Cri LJ 2669 (SC) : AIR 1993 (SC) 2090 : 1993(3) JT 254 : 1993(2) Scale 734 : 1993(2) Crimes 336.

The accused took away such minor out of such keeping without consent of lawful guardian. Such taking away with knowledge of the guardian with his tacit consent offence of kidnapping. *Mohd. Murshid* v. *State of Bihar*, (1995) 1 East Cr C 97 (Pat) (RB).

It has already been held that it was notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. Hence taking such error into consideration it cannot be said that age as ascertained by medical examination would conclusively establish petitioner No. 3 to be of below 18 years. S.K. *Delal* alias *S.K. Raja* v. *State of Orissa*, (1994) 1 OLR 20 (Ori).

Trial was of the accused for rape and murder of a minor girl. The accused cannot be held guilty by showing that he committed the similar offences on other occasion. *Jag Mohan* alias *Birju* v. *State*, (1995) 1 Crimes 188 (Del).

3. Lawful guardianship.—A *de facto* guardian of minor, whose guardianship is not against the wishes of the *de gure* guardian, is a lawful guardian. 12 Cr LJ 239 : 10 Ind Cas 281. According to Mahommedan Law the occurrence of puberty determines minority and the mother's right to custody. But for the purposes of this section regard must be had only to the definition of minority in Section 3 of the Majority Act. 37 M 567. In the absence of mother, mother's mother and not father is lawful guardian of minor girl. AIR 1959 Madh Pra 99 : 1959 Jab LJ 218 : 1959 Cr LJ 327. The guardianship of a husband is not terminated by a minor wife's running away from his house. 16 Ind Cas 764 : 13 Cr LJ 736. This section is applicable to married as well as to unmarried minor girls. 12 PR 1879 Cr. A mother can be convicted under this section where she takes the child out of the father. 9 Ind Cas 511 ; 18 CWN 484. Removal of a ward by a teacher to distant place is an offence under this section. 23 ALJ 10. When a person is kidnapped with the object of holding him to ransom, an offence under Section 363 or 365 has been committed. 91 Ind Cas 240. The consent of the minor does not excuse the accused. 27 Cr LJ 1018. *Kumhars* are not bound by strict Hindu Law, and as such a father cannot be convicted under this section for taking her minor daughter from her husband's house. 24 PWR 1914 Cr : 161 PLR 1914 : 15 Cr LJ 639 : 25 Ind Cas 831. According to Hindu Law the husband's relations, if any, exist within the degree of a *sapinda*, are the guardians of a minor widow in preference to her father and his relations. 27 PR 1915 Cr. The testimony of the kidnapped person, if satisfactory, legally suffices for a conviction for kidnapping. 7 WR Cr 104. To constitute the offence of kidnapping, it must be shown that the person was abducted from lawful guardianship which is the guardianship of a person who is lawfully entrusted with the care or custody of a minor. 2 NWP 286. The offence of kidnapping under Section 363 is not a continuing offence. 19 All 109 : AWN 1896, 191 ; 64 Ind Cas 842 : 23 Cr LJ 58 : 24 OC 329. A minor girl left her parent's house with the intention of asking the accused to take her away and of by her. *Held*, the question was whether the female minor, when she left her guardians house, had given up the intention of returning home ; that in this case, the girl, when she left her parents house, had no such intention of not returning as to remove her from their guardianship, and that the accused was therefore guilty of the offence of kidnapping from lawful guardianship. UBR 1909 3rd Qr Penal Code 27 : 4 Ind Cas 901 : 11 Cr LJ 81. When the mother from whose custody a Mahommedan minor girl was removed by the accused was proved to have married in a stranger family and consequently lost her right of guardianship, *held*, that the conviction under Section 363, IPC, could not be sustained. 1930 Cr C 1057 : 51 Cr LJ 476 : 128 Ind Cas 181 : 32 Cr LJ 90 : AIR 1930 Cal 665. Where an act of restraint or confinement in an attempt to kidnap has been exercised in furtherance of the attempt and goes to form part of that offence, and it is not done with any intention or object which can be separated from the general intention to kidnap, it will constitute an integral part of that offence and should not form the subject of a separate conviction and sentence. 6 NWP 293. Until a Mahommedan girl attains her puberty, her mother is entitled under the Mahommedan Law to the guardianship of the girl in preference to her husband. So a mother cannot be convicted under this section for removing such a girl from the custody of her mother-in-law. 32 Cal 444 : 2 Cr LJ 328 ; *see* also 21 PLR 1906 : 3 Cr LJ 296 : 60 PR 19. If the accused removed the girl from the custody of the husband while taking the minor wife to his home from a short visit to her mother's house or an uncle's home and it was not proved that the removal was at the instance of the mother who could terminate the guardianship of the husband, no offence could be said to be committed, AIR 1952 Tri 27.

Father is natural guardian of minor child and if not prohibited by Court's order debarring him to have custody of child can take away the child from custody of his wife while she is living in her parent's house. No offence under Section 363 is made out even if he does so by forcibly entering into the house of father-in-law. The High Court has in such a case set aside the cognizance under Section 363 but taking of cognizance under Section 452 was maintained. *Ashok Kumar Seth* v. *State*, 2003 Cr LJ 642 (Orissa) : 2002(94) Cut LT 447 : 2003(23) OCR 425.

"If a girl goes on a visit with or without the knowledge of the guardian, she is still in the legal keeping of her parent, and, further, it is not necessary that there should be any intention to make an unlawful use of the minor to constitute the offence of kidnapping". 1 SLR 104 Cr : 8 Cr LJ 361 ; *see* also 1 LBR 205 : UBR 1907 3rd Qr Penal Code 11 : 14 Bur LR 262 : 7 Cr LJ 210. A husband or those who aided him cannot be convicted of kidnapping for taking away his own wife, WR 1864 Cr 12. Where a person carried away, without the consent of her lawful guardian a girl to whom he had been betrothed by her father, after the father had changed his mind and broken off the marriage, he is guilty of kidnapping from lawful guardianship. 4 WR Cr 7. When a girl below 18 years but above 16 years was kidnapped from husband, he can not be convicted under Section 363, 146 Ind Cas 248 : 57 Bom 537 : 35 Bom LR 186 : AIR 1933 Bom 417 (FB).

Where persons are kidnapped with the object of holding them to ransom, the kidnapper is guilty under Section 363 or Section 365 but not under Section 364, IPC. 91 Ind Cas 240 : 27 Cr LJ 64. The offence of kidnapping from lawful guardianship is complete when the minor is actually taken from the lawful guardianship It is not an offence continuing so long as he is kept out of such guardianship. 5 Pat 536 : 27 Cr LJ 792 : 95 Ind Cas 392 : 7 Pat LT 812 : AIR 1926 Pat 460. Although consent of the person kidnapped is no defence to a charge under Section 363, where the accused and the girl were neighbours and for this reason became fond of each other and when her marriage was about to take place the accused decided to take her away and she agreed, *held*, that it is not a bad case of kidnapping though technically it amounts to such and that the accused should not be punished severely. 96 Ind Cas 874 : 27 Cr LJ 1018 : AIR 1926 Lah 667. One P who was formerly a Christian changed her religion and became a convert to Hinduism. She left the house in which she was living during the absence of her husband who had gone to another place. When the latter came back he demanded his children but they were not handed over to him. *Held*, that on these facts there is no question of an offence under Section 363. 102 Ind Cas 209 : 28 Cr LJ 513 : AIR 1927 Lah 496. Whether the offence of kidnapping is complete when the person has been taken out of the custody of the lawful guardian is a question of a fact to be determined according to the circumstances of each case. Where he enticed the girl to come out of *gachi* to the road and then to the motor car where *R* was sitting and *R* drove away with her in order to kidnap her. *Held*, that *R* was rightly convicted under Section 363, IPC. 109 Ind Cas 436 : 28 Cr LJ 820 : 6 Pat R 471. The test of lawful guardianship is that the infant or minor should be in a position to apply to his guardian for protection. The law does not require that the minor should have been actually taken from the actual custody of the guardian. AIR 1929 Sind 249 : 1929 Cr C 548.

To constitute kidnapping, the intention to prevent the kidnapped person from returning to his guardian is not necessary. 69 Ind Cas 444 : 23 Cr LJ 716. In the absence of the mother, the mother's mother is the guardian of the person of a Mahommedan minor girl who has attained puberty. 37 Cr LJ 329 : 27 CWN 531 : 73 Ind Cas 936 : 24 Cr LJ 712 : AIR 1923 Cal 672. If a minor abandons her guardian with no intention of returning, she cannot be held to continue in the guardian's keeping. 87

Ind Cas 513 : 26 Cr LJ 977. Removal of a boy by a temporary guardian without the consent of a permanent guardian is an offence under this section. 23 ALJ 10 : 86 Ind Cas 428 : 26 Cr LJ 796 : AIR 1925 All 295. The offence of kidnapping from lawful guardianship is not a continuing offence. 131 Ind Cas 246 : 1930 ALJ 1485 : 1931 Cr C 127 : 53 All 140 : 32 Cr LJ 690 : AIR 1931 All 55.

To constitute a conviction under Section 363 there must be taking, AIR 1958 Ker 121 : 1958 Cr LJ 637 : 1957 Mad LJ (Cr) 516. The consent of the minor is no excuse for, even then it would amount to taking. 1960 Ker LJ 205 : AIR 1960 Ker 481 : 1960 Ker LT 273 ; 1960 Mad WN 674.

Unless there is specific allegation of the respondent having taken any step in taking the minor out of the possession of her father.—In the instant case, the very fact that Raj Bala was accompanied by her mother and brother indicates that she left the house voluntarily with their blessings. While saying so it has to add here that it is correct that the consent of the minor is immaterial and 'taking' would be complete if a minor is taken out of the possession of the father without his consent. But in the peculiar circumstances of this case, where there is no specific allegation of the respondent having taken any step in taking her out from the possession of her father. It is not inclined to hold that the ingredients of Section 361, IPC, have been satisfied. *Madan Lal* v. *Dr. Jaswant Singh*, (1994) 53 DLT 326 at p. 329 ; (1994) 1 CCR 392 (Del).

4. From India.—Where the accused induced certain woman to leave British India for Ceylon, on the misrepresentation that they were to be married to his son, and after arriving at Ceylon made them work as coolies on the estate. *Held*, that the woman must be held to have been taken without their consent, and the accused were guilty of an offence under this section. 6 Ind Cas 503 : 1910 MWN 262 : 8 MLT 91 : 11 Cr LJ 368. Where the attempt is made for kidnapping from British India, and the attempt fails, the abetment of such an offence is punishable under Sections 363 and 116 and not under Sections 363 and 109. 1 M 173 : 1 Weir 353.

Under the Hindu law the father and after his death, mother is the natural guardian, (1970) 37 Cut LT 187.

5. Age of the girl.—In a prosecution under Section 363, age of the girl is a material point because unless it is shown that she was below 18 years of age at the relevant time there could be no case of kidnapping within the meaning of Section 333. AIR 1957 Him. Pra. 42 : 1957 Cr LJ 847 ; AIR 1931 Lah 401 ; AIR 1939 All 708 ; 1962 MPLJ 137 (Notes). The prosecution must prove that on the date of the incident the girl was under eighteen years of age. AIR 1956 Nag 74 : ILR 1956 Nag 282 : 1956 Cr LJ 263. Where the prosecution failed to prove beyond all reasonable doubt the age of the prosecutrix was below 18 the accused was acquitted under the section. 1977 Raj Cr C 362.

After hearing the learned Counsel for the parties and giving my thoughtful consideration to their respective arguments and also perusing the record. Court has found that document is not based upon material to prove date of birth of both the girls because admittedly, the dates of birth were not registered/recorded by the father of the girls with the Chowkidar of the village in a register of Births and Deaths or in the office of C.M.O. of the area. It is also not recorded from the original admission register, rather date of birth has been obtained from the certificate of 8th Class. Moreover, the learned

Counsel for the State could not point out any other error in the judgment of the trial Court, which has formed an opinion in favour of the accused/respondents on the basis of evidence. It is well settled by the Supreme Court that if two views are possible in a case of acquittal, then the view which has been taken in favour of the accused/ respondents should be maintained. *State of Haryana vs. Ramesh Kumar*, 2010 (2) CrLJ 1812 (P & H).

The appellant belonged to the same Caste and Gotra of the prosecutrix and was a frequent visitor to the house of the prosecutrix. There was a love affair between them and the Court also observed that she did not ever resist her being repeatedly deflowered by the appellant Sunil. In this background, close and careful determination of the age of the prosecutrix is imperative. Doctor, who had clinically examined the prosecutrix, found that her secondary sex characters were well developed.

Doctor who examined the prosecutrix referred her for verification to the Dental Surgeon and the Radiologist. The failure of getting the prosecutrix examined from the Dental Surgeon or the Radiologist despite the fact that she was referred to them by doctor is a serious flaw in the prosecution version. The prosecution also failed to produce any Admission Form of the school which would have been primary evidence regarding the age of the prosecutrix.

The School Leaving Certificate produced by the prosecution was also procured. six days after the incident and three days after the arrest of the appellant. As per that certificate also, she joined the school in the middle of the session and left the school in the middle of the session. The attendance in the school of 100 days is also not reliable.

The prosecutrix was admitted in the school by her brother. The said Ashok Kumar was not examined. The alleged School Leaving Certificate on the basis of which the age was entered in the school was not produced.

The father of the prosecutrix has also not been able to give correct date of birth of the prosecutrix. In his statement he clearly stated that he is giving an approximate date without any basis or record.

On consideration of the totality of the facts and circumstances of this case, it would unsafe to convict the appellant when there are so many infirmities, holes and lacunas in the prosecution version. The appellant is clearly entitled to benefit of doubt and consequently the appeal filed by the appellant deserves to be allowed. The appellant is directed to be released forthwith, if not required in any case. The appeal is accordingly disposed of. *Sunil vs. State of Haryana*, 2009 (4) Crimes 321 (SC) : 2009 (14) JT 644 : 2009 (14) Scale 370 : 2009 (8) Supreme 20 : 2009 (9) SLT 92 : 2010 (1) JCC 140.

Doctor's estimate about the age does not amount to proof. 1978 Cr LJ (NOC) 270 : AIR 1976 PC 243 : 44 IA 236. An ossification test may provide a surer basis for determining the age of an individual. ILR (1970) 2 Delhi 198 ; 1964 (2) Cr LJ 105 : 1 Chand LR 276 (radiologists's evidence) Date of birth from birth entry. 1975 Chand LR (Cr) 588 ; 1979 Bom LR 661 (Birth register of Gram Panchayat office). 1981 Raj Cr C 281 (certificate of educational institutions) ; 1983 All Cr LR 750 : 1982 Chand Cr C 78 (Birth Register of Municipal Committee *vis-a-vis* examination report of radiologist).

Where school certificate showed 17 years and 34 days but prosecutrix claimed her age as 18 years.—Prosecutrix was held as major and no case under 363 was made out. *Hira Lal* v. *State of Haryana*, (1994) 2 Recent Cr R 435 (P & H).

Minority of the girl not conclusively proved and also her vagina admitting two fingers and was easily taxed—Normal uterus was also found the girl appeared to be used to sexual intercourse. *Bhajan Lal* v. *State of U.P.*, 1995 JIC 41 (Alld).

Where there was cutting in the medical report and girl was of habitual intercourse—Hence Public hair developed. Accused claimed her as wife. No offence under Sections 366 and 363 made out. *Budh Ram* v. *State of U.P.*, 1994 JIC 115 (All).

Where case under Sections 363 and 365 was registered by police and petitioner alleged to have been enticed by respondent—Respondent's plea that petitioner was major and had married with him. Copy of Nikahnama files but School Leaving Certificate showed her age as 13 years and 4 months on date of alleged incident—Medical evidence giving her age as 16 years. It was held that relying on age as recorded in school leaving certificate petitioner being minor and her marriage is null and void. Petitioner was released to custody of her parents. *Kuman Razda* v. *Noor Mohd.*, (1994) 1 Crimes 227 (All) : 1994 ACC 129 : (1994) 1 CCR 430 (All).

School certificate showing the age of the girl to be 13 years—Radiologist reporting prosecutrix age to be 17 years—Issuance of the certificate during investigation—Which was found to be not reliable—Prosecutrix was held to be a major. *Annakodi* v. *State*, (1995) 1 Crimes 2 (Mad).

The prosecutrix of 5 was taken to the toilets undressed and bent down upon her but did not attempt to rape her. *Held*, offences under Sections 363/366 were made out but not one under Section 376 IPC. (1986) 2 Crimes 334 (Del).

Accused was convicted under the sections for have subjected the prosecutrix to forcible sexual intercourse. As per evidence of the mother of the prosecutrix, age of prosecutrix was calculated to be above 18 years and as per medical officer age appeared to be 16 years on the basis of the general development of the body. It was thought that determination of age on the basis of ossification test was considered in law to be proper evidence and was being relied upon by courts in India when proved in a proper manner. 1987 Cri LJ 1266 (Him Pra).

Whether the prosecutrix was below 18 years, at trial—FIR also not proved—These being fatal to prosecution case—As regards age of prosecutrix Medical Expert gave opinion that there can be error of three years in age and that her age could be 18 years—Thus prosecution is bound by this opinion and also it does not stand 'proved beyond' reasonable doubt that her age was below 18 years on the date of incident. Appeal failed. *State of Rajasthan* v. *Nand Lal*, (1995) 1 RCD 137 (Raj).

The girl of 18 years was taken by the accused to another place and was raped. Ossification tests report proved that the prosecutrix was more than 18 years of age but school certificate showed that she was below 16 years of age. No evidence was available to show as to on what basis and at whose instance the date of birth was written in the school register. The conviction of accused for rape *etc.* was set aside. *Makhan* v. *State*, 2003 Cr LJ 2777 (MP) : 2003(9) All Ind Cas 202 : 2003(4) Crimes 396 : 2003(3) MPHT 284 : 2003(3) MPHT 284 : 2003(3) Rec Cri R 674.

Where the mark-sheet showing the age of the prosecutrix below 18 years was never filed along with the challan nor it was exhibited or stressed by the prosecution the reliance placed by the trial Court on untendered, non-exhibited and unproved mark-sheet for holding that the age of the prosecutrix was below 18 years was erroneous and could not be sustained in the eyes of law. The opinion of the Radiologist that the age of the prosecutrix was 14 to 16 years and there could be a variance of two years. This benefit was given to the accused. *Sita Ram* v. *State*, 2004 Cr LJ 4320 (Raj) : 2004(4) Raj LW 2588 : 2004(4) WLC 99.

6. Cases.—Magistrate should not give themselves jurisdiction by trying under Section 363, cases which really fall under Section 366, IPC. The form of a kidnapping which is punishable by Section 366 is a seriously aggravated form which only Session Courts and District Magistrate in the exercise of their special powers, have jurisdiction to try UBR (1897-1901) Vol. I, 328. To establish kidnapping, there must be evidence that the minor was taken out of the keeping of the lawful guardianship without her consent. 14 Cr LJ 149 : 19 Ind Cas 140 (FB) : 6 Bur LT 21. Where a Hindu sold his wife a girl of 16 years of age to S, a barger, with whom she was living, and, where the girl, while living with S, was persuaded by the accused to leave the house of S and go away with another man. *Held*, that S was the lawful guardian of the girl within the meaning of Section 361 and that, the accused was rightly convicted under Section 363, IPC. 7 PR 1911 Cr : 154 PLR 1911 : 10 Ind Cas 97 : 12 Cr LJ 211 : 31 PWR 1911. When the accused were charged under Section 363, Indian Penal Code, with having kidnapped a girl from the guardianship of her father and it appeared that the girl was over 16 at time when she disappeared and that there was delay in making a report to the police. *Held*, that the accused were not of an offence under Section 363 of the Penal Code. 48 Ind Cas 351 : 19 Cr LJ 1011. Where a kidnapped child is left in the house of the accused and the accused gave information of it to the guardian through another, he is not guilty. AIR 1933 Lah 392 : 1933 Cr C 636 : 140 Ind Cas 42. The moment a minor girl is taken away from the custody of a temporary guardian the offence kidnapping is complete. AIR 1931 Lah 53 : 120 Ind Cas 782 : 32 Cr LJ 615. Where a girl of 15 was kidnapped by an accused of 21 years old a sentence of four years rigorous imprisonment was reduced to two years. 135 Ind Cas 677 : 1933 Cr C 247 : 73 Cr LJ 190 : 33 PLR 485 : AIR 1932 Lah 203.

Where evidence available on record established an offence of simple kidnapping of a girl from lawful guardianship of parents and not for any immoral purpose therefore accused liable to convicted under Section 363, IPC only and not under Section 366A, IPC. *Nandjee Yadav* v. *State of Bihar*, 2005 (3) East Cr C 29 (Pat).

The consent of the minor to the act of the accused in taking or enticing the minor out of the keeping of the lawful guardian is no defence. (1974) 1 Cr LJ 485 ; 1982 (U.P.) Cr LR 36 (minor cannot give consent) similarly the infatusion of the minor towards accused cannot held him to escape the liability under the section. 1976 J & K LR 706 : 1977 Cr LJ 185.

Prosecutrix of easy virtue bearing on the prosecution. 1981 WLN (UC) 243. Person taking part in process with the criminal knowledge of kidnapping is also guilty. 1983 Cr LJ (NOC) 81.

7. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate of the first class.

8. Charge.—"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :

"That on or about the.........day of ....at.......you kidnapped *AB* (a minor male then under 14 years of age, or a female under 16 years of age) from *India* (or from lawful guardianship of *PQ*, his or her.....) and thereby committed an offence punishable under Section 363 of the IPC and within my cognizance.

"And I hereby direct that you be tried on the said charge."

9. Sentence.—It is not necessary under this section that the sentence of fine must be imposed along with imprisonment. What is essential under this section, is that an offence under this section should not be punished with fine. AIR 1949 All 587 : 50 Cr LJ 884. The offence should be viewed with sternness and the sentence should be enhanced in the case from two months' SI to one year's rigorous imprisonment, 1964 Raj LW 606 : 1965 (1) Cr LJ 483 : AIR 1965 Raj 90.

Convicted for offence under Section 363, IPC, and sentenced to RI for 3 years—Revision petition was filed. There was nothing to show in evidence of PW 2 victim that she was enticed away by appellant from lawful guardianship of her father. Hence conviction unsustainable. *Udaibhan Singh* v. *State* of *M.P.*, (1995) 2 CCR 726 (MP).

Minor girl enticed away and was repeatedly raped. Mother of prosecutrix was with her in beginning but left her after a day—Mother not reported matter for a month—Prosecutrix recovered—Conviction was not disputed but sentence which was prayed for reduction—Doctor gave no definite report—Doctor not produced. They have also married each other and accused was already in jail for more than 4 years, sentence was reduced to period already undergone. *Saddique Mohd.* v. *State*, (1995) 1 RCD 90 (Raj).

The prosecution failed to prove the age of girl below 18 years. Further she went with accused on her own accord and was not taken away forcibly or fraudulently. As per medical report she appears to be a girl of loose character. Hence conviction and sentence is set aside and accused acquitted. *Bhajan Lal* v. *State of U.P.*, 1995 (32) ACC 156 (All).

Long pendency of matter. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic a view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system. *Ankush Maruti Shinde vs. State of Maharashtra*, AIR 2009 SC 2609 : 2009 (6) SCC 667 : 2009 (6) JT 358 : 2009 (7) SCR 182 : 2009 (6) Scale 388 : 2009 (3) Supreme 760 : 2009 (4) SLT 470;; See also *Bikram Dorjee vs. State of West Bengal*, AIR 2009 SC 2539 : 2009 (2) Crimes 354 (SC) : 2009 (7) JT 325 : 2009 (6) Scale 325 : 2009 (6) SCR 884 : 2009 (3) Supreme 772.

Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic a view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system. *State of Madhya Pradesh vs. Basodi*, AIR 2009 SC 3081 : 2009 CrLJ 4284 : 2009 (2) Crimes 273 (SC) : 2009 (12) SCC 318 : 2009 (6) JT 92 : 2009 (6) SCR 1166 : 2009 (6) Scale 353 : 2009 (3) Supreme 501;; See also *State of Madhya Pradesh vs. Sheikh Shahid*, AIR 2009 SC 2951 : 2009 (12) SCC 715 : 2009 (8) JT 277 : 2009 (5) SCR 1038 : 2009 (5) Scale 679 : 2009 (3) SLT 744.

10. Custody of minor.—Offence was of enticing away petitioner minor girl by respondents—Her school leaving certificate showing her age as 16 years on date of incident which was accepted to be true—Hence her alleged held marriage is null and void—Husband having no right to keep her in custody—Hence direction issued to give her in custody of her father as *de facto* guardian. *Kumari Razda* v. *Noor Mohd.*, 1994 ACC 129 ; (1994) 1 CCR 430 ; 1994 (1) Crimes 227.

When appellant is specifically charged for kidnapping minor girl for immoral purpose, he cannot be convicted for abducting a woman for said purpose on proving that victim is not a minor. *Abhaya Jena* v. *State*, 1997 (1) Crimes 531 (Ori).

11. Conviction.—Where accused was convicted under Sections 363, 366 and 376, IPC, which was challenged in revision petition.—The age of prosecutrix was found to be 15 years by ossification test. There can be error of 3 years in either way as per Doctor's opinion. The evidence of prosecutrix showed that appellant never forced her for sexual intercourse. Hence conviction under Section 376, IPC, was not sustainable. Further the prosecutrix was taken away from her house in the night by another accused and the appellant met her at Railway Station. Hence conviction for other offence is also not sustainable. *Sribatcha Khamari* v. *State of Orissa*, (1994) 2 Crimes 476 (Ori).

Where prosecutrix was 17 years old girl. Prosecutrix and accused having intimacy prior to incident. She deposed to have been sexually assaulted by accused without her consent—On night of incident she was sleeping alongwith parents and sister of accused and accused took her to his village assuring to marry her after incident accused himself took her back to her village. It was held that committing sexual intercourse without her consent was not probable. Conviction was held non- sustainable. *Samrao* v. *State of Maharashtra*, (1994) 2 Crimes 125 (Bom).

Where the case was of kidnapping of four years old boy for ransom. Boy seen in company of accused persons at several places—Eye-witnesses being natural and trustworthy—They identified accused persons in identification parade and latter demanding ransom sent to father of boy which proves that boy was kidnapped from lawful guardianship of his parents—Admission of guilt by one accused—Contents of latter showing that boy was killed—Hence conviction was upheld. *Radha Ballabh* v. *State of U.P.*, 1995 SCC (Cr) 797 (SC) : 1995(4) JT 206 : 1995(3) Scale 205 : 1995(2) Crimes 473.

Where there was controversy regarding age of prosecutrix—Prosecutrix stating her age to be 15-1/2 years—As per medical evidence her age being between 14 to 16 years--Material (Birth certificate) suggesting that the age of girl on the date of occurrence was 15 years. Hence conviction and sentence was not interfered with. *Mohammad Kasam* v. *State of Punjab*, (1995) 3 Crimes 5 (P & H).

When minor girl left her home not in cool mind but no disadvantage taken by accused—Conviction was not fully justified and was set aside. *Vinod Kumar Lekhraj Sharma* v. *State of Maharashtra*, 1994 Cr LR (Mah) 130 ; 1994 B Cr C 42 (Bom).

Allegation was of taking forcibly and committing rape—One of the accused lady having friendly relations and there was other male—Male accused committed rape while female took her away—Male accused convicted and female released. *Sushil Mandal* v. *State of M.P.*, (1994) 2 Crimes 739 (MP).

The question was as to whether the sentence awarded to the appellant by the trial court while convicting him for offense under Section 363, IPC, in the facts and circumstances of the case, is appropriate and if not, what sentence should be awarded so as to meet the ends of justice. Considering the facts and circumstances of the (sic), acquittal of the appellant under Sections 366, IPC and 376, IPC and the fact that appellant has already undergone sentence for more than 1 year and 9 months, held that the ends of justice would be met if the appellant is sentenced to the term already undergone by him. *Vishnu Kumar v. The State of Rajasthan* 2002 Cri LJ 3346 Raj. H.C. : 2002(2) Raj LR 337 : 2002(3) WLC 618.

Where there is positive evidence to show that the accused took away the minor victim never to return thereafter or by heard of, the offence of kidnapping within the meaning of Section 363, IPC is all proved and therefore, conviction of the accused thereunder does not require interference. *Ghanshyam Punjiyar* v. *State*, 2004(2) Crimes 428 at p. 431 (Pat) : 2004 CR LJ 2642 : 2004(19) all Ind Cas 445 : 2004(4) Cur Cri R 4 : 2004(2) MPHT 153.

The accused persons were apprehended near the spot where the ransom amount was supposed to be paid. The accused person's presence at the place where they were arrested is a strong circumstance against the accused appellants. There was no apparent plausible reason for their presence alongside the railway track, loitering around a place which is quite far away from the place where they were residing *viz.*, Hosadurga. Their conduct in running away when they saw the police party is also indicative of their guilty mind and is an important piece of evidence showing their conduct. No plausible explanation was given by the accused appellants for their presence at the spot where they were arrested, which was nearby the place indicated in the demand for payment of the ransom amount. Evidence of the eye-witness who had seen the boy playing with the accused before his death could not be discarded on account of estimated time of death given by the doctor when the dead body was decomposed and examined after two days. There was no infirmity in the statement of the eye-witness to disbelieve him. Conviction of accused was held proper. *A.N. Venkatesh* v. *State of Karnataka*, 2005 Cr LJ 3732 (SC) : AIR 2005 (SC) 3809 : 2005(3) AndhLT (Cri) SC 264 : 2005(3) Crimes 231 : 2005(5) Kant LJ 321 : 2005(7) SCC 714 : 2005(6) Scale 348 : 2005(5) Supreme 746.

12. Evidence.—The girl was below 18 years—Prosecutrix was a consenting party and admissibility of entry in birth and death register. It was finally held that these are public documents and admissible in evidence. *Bijendra Singh* v. *State of Haryana*. (1994) 1 Recent Cr R 469 (P&H).

When accused was convicted under Sections 363 and 376 sentenced to 3 years RI and 7 years RI. Both the sentence to run concurrently petition challenging of the same was filed. The victim stated to have been raped several times and her testimony was supported by PWs and the doctor. The prosecution version was fully corroborated by the medical evidence also. Hence no leniency or indulgence could be granted to the accused for such an offence. Appeal dismissed. *Ram Nath Mandal* v. *Union of India*, (1994) 3 CC Cases 209 (Del).

No incriminating evidence. As against co-accused, there is no admissible incriminating evidence against them. Their inculpatory disclosure statements are totally inadmissible in evidence as nothing has been recovered or discovered by the police pursuant thereto and cannot even be read as evidence against them under Section 8 or Section 10 of the Evidence Act.

Held, said accused would be entitled to acquittal. *Ashok Kumar alias Govind vs. State*, 2010 (2) CrLJ 2329 (Delhi).

The medical evidence is not proving rape. Story narrated by victim child aged 11-12 years was not reliable. The Sessions Judge has acted on basis of imagination and has thrown to winds all the recognised principles of criminal law that the prosecution has to prove its case beyond a shadow of reasonable doubt. Mere suspicion does not take the place of evidence. Accused deserves acquittal. *Omi* v. *State of U.P.*, 1994 All LJ 93 : 1994 Cr LJ 155 (All).

Minor girl was induced and taken away to different places and raped throughout the period till recovered. There was corroboration of same by medical evidence as well as her evidence. Hence decision of trial court upheld *Shyam Sunder* v. *State of M.P.*, 1995 Cr LR 222 (MP).

Where there is clear evidence that the prosecutrix left her parents house out of her own sweet-will leaving behind a letter showing the reason for her leaving the house; travelled alone to Railway Station where the accused who was previously known to prosecutrix and he had visiting terms with her family; she was found habitual to sexual intercourse and also pregnant at the time of her medical examination, her mother's evidence shows that she was a major girl; no reliable documentary evidence has been led to show her below 18 years of age; she never complained against the accused despite so may occasions available to her, the only conclusion can be drawn that she was major and a consenting party and none of the offence is made out. *Sita Ram* v. *State*, 2004 Cr LJ 4320 (4325) (Raj) : 2004(4) Raj LW 2588 : 2004(4) WLC 99.

Where the report of the Radiologist shows that the victim girl was above 12 years but below 15 years and the delay in registration of case through written complaint by the mother of the girl to Superintendent of Police on refusal to register a case by the local police stands explained, the girl was recovered from the village of the accused at his instance, the accused was convicted under Section 363 and 366, IPC but his conviction under Section 378, IPC was not sustained. 2004(2) Crimes 611 (MP).

The eye-witness, her grandmother, on noticing the absence of her grand daughter aged 5-1/2 years went in search, heard the cries of the child and she rushed to the house of the accused from where the sound of cries was coming and she found that the child victim was naked and the accused was lying on top of her. Her evidence was found credible, the evidence of the eye-witness could not be discarded merely because nobody else heard the cries of the victim or came forward hearing it and as such conviction of the accused was held sustainable. *Parkash* v. *State of Haryana*, 2004 Cr LJ 595 (SC) : 2004(1) SCC 339 : 2004 SCC (Cri) 290 : AIR 2004 SC 227.

The prosecutrix left her parents' house out of her own sweet will, left behind the letter showing the reason for her leaving the house and went away with the accused. She was found habituated to sexual intercourse and also pregnant at the time of her medical examination. The facts and circumstances clearly showed that she was a willing and consenting party for the sexual intercourse and from the evidence of her mother it appeared that she was 18 years of age, the accused was held entitled to acquittal. *Sita Ram* v. *State*, (2004) 3 Crimes 463 at p. 470 (Raj) : 2004 Cr LJ 4320 (Raj) : 2005(1) Rer LJ 77 : 2004(3) Raj Cri C 1352 : 2005(1) Raj LR 228.

Where the evidence of the minor victim girl as to how the accused persons kidnapped her from the school and confined her in the forest was corroborated by the evidence of her three class-mates who have given proper identification of the accused by their description and the accused were known to the class-mates of the victim girl, merely because some of the PWs were involved in criminal cases their evidence could not be subject to total rejection, and as such the High Court was justified in setting aside the acquittal recorded by the trial Court and therefore, the conviction and sentence imposed on the accused could not be interfered with. *Shashidhar Purandhar Hegde* v. *State of Karnataka*, 2004 Cr LJ 4677 at pp. 4681, 4682 (SC) : (2004) 4 Crimes 202 (SC) : (2004) 12 SCC 492 : AIR 2004 SC 5075.

Where the evidence of the witnesses was corroborated by the medical evidence showing the victim girl as 15 years of age on the date of the occurrence and the evidence showed that the accused-teacher having dictated love letter to her, blackmailed her to accompany him and took her to another place by seducing her for illicit sexual intercourse against her will, it was held that the accused was rightly convicted under Sections 363 and 366. *Iftekhar Ali* alias *Lalla Master* v. *State*, 2004 AIR Jhar 686 : 2004 Cr LJ (NOC) 173 (Jhar) : AIR Jhar HCR 686.

In a case of Kidnapping, rape and murder, the dead body of the deceased, a minor girl, was recovered from the pond in early morning. The accused was immediately arrested and the clothes worn by him were sent for chemical examination. He fail to gave any explanation for presence of blood and semen stains on his clothes. The accused was found moving around during night with a child on his shoulder by a witness. It was held that the previous conduct of accused, though not strictly admissible in evidence would prove that he was prove to do such crimes and that the accused was liable to be convicted for offences under Sections 363, 376 and 302. *Surendra Pal Shivbalak Pal* v. *State of Gujarat*, AIR 2004 SC 4882 : 2004 Cr LJ 4642 : AIR 2004 SCW 5581 : AIR Jhar HCR 3026 : 2004 Cri LR (SC&MP) SC 907 : 2004(4) Crimes 110 : 2004(4) Supreme 107.

Where there is no evidence that the prosecutrix, below 18 years of age was enticed or taken away from the lawful guardianship rather she went away with the accused with her own will and had enjoyed movie and sweets, conviction of the accused cannot be sustained. *Narinder* v. *State*, (2004) 1 Crimes 140.

13. Consenting party.—In *Varadarajan* v. *State of Madras*, AIR 1965 SC 942 : 1965 (2) Cri LJ 33, a college girl who was a minor telephoned the accused and met him and thereafter went to the sub-Registrars office for registering marriage agreement. The supreme court held that the fact of her accompanying the accused was quite consistent with her own desire to be the wife of the accused on which the desire of accompanying him wherever he went was of cause implicit. The supreme Court found that she has willingly accompanied him and he was not guilty of taking away the girl out of the keeping of her father.

In *State of Kerala* v. *Rajayyan*, (1995) 2 Ker LJ 537 : 1996 Cri LJ 145, a minor girl of her own volition left her home and joined the accused to get the marriage registered. It was held that the ingredients of section 361 and 366. A were not at all attracted.

In *Suresh Babu* v. *State of Kerala*, 2001 Cri LJ 1483 (Ker) : 2001(1) CCR 233 (236) : 2001(2) Crimes 313 : 2001(1) Femi-Jurisce 302 (Ker). The prosecutrix aged about 16 years entered into an agreement of marriage and lived together as husband and wife and the accused had sexual intercourse with the prosecutrix on several occassions. It was held that the accused could not be said to have kidnapped or enticed her.

Prosecutrix 18 years old. No protest against the accused by prosecutrix—Remained together in crowded places, buses and on train, no offence under Section 363, 366 and 376, IPC, made out. Prosecutrix is consenting party. *Mohammad Imteaz* alias *Sannu* v. *State of Haryana*, (1994) 2 Recent CR 456 (P & H).

Appellant took away informant's daughter on allurement of solemnizing marriage and committed rape on her. Ocular evidence by witnesses and medical evidence fully supported version of victim girl. Victim and appellant were in love does not inspire confidence. Held conviction of appellant is proper. *Maheshwar Singh Munda vs State of Jharkhand*, 2010 (4) CriLJ 4011 (Jhar).

This Apex Court find that the High Court was justified in its conclusions about the prosecutrix having accompanied the accused on her own and being a consenting party to the sexual acts. As rightly contended by learned counsel for the State, if the age of the prosecutrix was below 16 years, the consent would be of no consequence. But the High Court's findings as regards the age of the prosecutrix cannot be said to be without any basis. The High Court has analysed the oral evidence and the documentary evidence to come to a conclusion that the date of birth of the prosecutrix as claimed by the prosecution has not been established. Held, there was inconsistency in evidence of prosecutrix. She appeared to have accompanied accused of her own accord and she was a consenting party to sexual acts. That being so, we find no merit in this appeal which is accordingly dismissed. *State of H. P. v. Suresh Kumar @ Chhotu*, AIR 2009 SC 1109

Where prosecutrix was going with accused in a train and lived with him—There was filed complaint from her—Age of prosecutrix was also not established—Evidence of her parents about age not dependable. No offence was made out as she was consenting party. *Mahesh* v. *State of M.P.*, 1994 MPLJ 71 (N) (MP).

Offence of rape of—Minor girl and there was consent defence but evidence showing it untenable. *Ashok Nivruti Desai* v. *State of Maharashtra*, (1995) 1 Bom CR 288 : 1995 Cr LT 826 ; (1995) 1 Mah LR 312 (Bom).

14. Motive.—Prosecution for offence under Section 363 IPC—Evidence clearly indicating the guilt of the accused.—Hence conviction not vitiated on account of absence of the motive. *Pulabai* v. *State of Maharshtra*, (1995) 1 CCR 333 (Bom).

15. Acquittal.—Accused convicted under Section 366, IPC—Which was challenged in appeal. It was held that the victim was below 18 years of age when accused has been acquitted of charge under Section 376, IPC, he cannot be convicted for mere offence of kidnapping under Section 363, IPC. Hence conviction altered to that under Section 363, IPC. *Anandhan* v. *State*, 1995 Cr LJ 832 (Mad).

Where a person is specifically charged for offence of kidnapping a minor girl for illicit purpose, he cannot be convicted for abducting a woman for said purpose as on evidence, victim was found not minor. *Abhaya Jena* v. *State*, 1997 (1) Crimes 531 (Ori).

No incriminating evidence. As against co-accused, there is no admissible incriminating evidence against them. Their inculpatory disclosure statements are totally inadmissible in evidence as nothing has been recovered or discovered by the police pursuant thereto and cannot even be read as evidence against them under Section 8 or Section 10 of the Evidence Act. Held, said accused would be entitled to acquittal. *Ashok Kumar alias Govind vs. State*, 2010 (2) CrLJ 2329 (Delhi).

Two eye-witnesses examined by the prosecution who happen to be the brother and the friend of the deceased did not support the prosecution version and resiled from their statement made during investigation. Therefore, the residual question is the acceptability of two dying declarations. The trial Court did not place any reliance on the dying declarations.

The discrepancy pointed by the trial Court is that in Exh. PD there is mention about one incident of rape on her on 28.07.1989 in a hotel at Sector 22 Chandigarh by Honey and two other accused. She does not state in the dying declaration in Ex PJ that she was raped on July 17th and stated that accused Honey had simply taken her to Rose Garden. In Exh. PJ she does not mention the date of the first incident as July 17th but states that her friend Rajni was also with her and they were taken to some unknown hotel while Honey raped her and accused Longoal raped Rajni. She also did not mention the second incident to have taken place on 28th July and stated that it was 2/3 days ago and not yesterday, when the boys took them to a hotel in Sector 22 and raped them. There are several inconsistencies and contrcdiations in the Exh. PD1 and PJ1.

Above being the position, when two Courts on analysis of the evidence found the respondents not guilty, there is no scope for interference in this appeal. The reasons indicated by the trial Court and affirmed by the High Court discarding the two dying declarations do not suffer from any infirmity. The appeal fails and is dismissed. *State of Punjab vs. Chatinder Pal Singh*, AIR 2009 SC 974 : 2008 (16) SCR 23 : 2008 (15) Scale 359.

Where though offences of kidnapping and rape were committed in the year 1987 but the date of committing rape had been mentioned in the charge 11/12.1.1986 thereby prejudicing the defence and it was found from the entire evidence that the victim girl was not a truthful witness, the trial Court was held to have committed an illegality in placing reliance on the testimony of the victim girl and other witnesses in convicting the accused. *Dharam Pal* v. *State*, 2004(3) Crimes 220 at pp. 222, 223 (All) : 2004 Cr LJ 3879 : AIR 2005 (SC) 4122 : 2004(6) SCC 513.

In a case of kidnapping and sexual assault on a child victim age 5-1/2 years the plea of false implication on account of family disputes between the accused and father of the victim is not tenable, as it is highly improbable that from making false implication a child of 5-1/2 years would be used as a pawn unmindful of the disrepute she would have to suffer in public with a stigma for the rest of her life. *Parkash* v. *State of Haryana*, 2004 Cr LJ 595 (SC) : (2004) 1 SCC 339 : 2004 SCC (Cri) 290 : AIR 2004 SC 227 : 2003 (10) JT 58 : 2004(1) Crimes 98 (SC).

16. Abetment.—Appellant compelling and coercing the prosecutrix to accompany the co-accused—Threats were advanced and offered cycle to co-accused to leave village hence playing of active role in abetting crime established.—Appeal was held dismissed and conviction and sentence was upheld.' *Mohamrmd Kasam* v. *State of Punjab*, (1995) 3 Crimes 5 (P & H).

17. Kidnapping and abduction.—The Investigating Officer has not investigated the case properly and not even a single person of various places where she was allegedly taken has been produced in support of the prosecution story. The evidence which has come on record leads to only one conclusion that Kumari Jesi (P.W.2) was not taken against her will nor was subjected to rape as alleged by her. The fact that in her first statement Ex. D1 her version has been that she left her house all alone and went to Ahmedabad without any persuasion from the accused is very significant. It supports the defence arguments that subsequently, at the instance of her father, she was made to change the whole story. Consequently, the accused cannot be found guilty under Sections 363, 366 and 376, I.P.C. *Kasan v. State of Rajasthan* 2002 Cri LJ 1460 (Raj.) : 2002(3) All Cri LR 794 : 2002(2) Rec Cri R 648.

Attempt to kidnapping.—Accused was caught red handed while trying to forcefully take away victim child from school premises i.e. lawful authority. There is nothing on record to show that the accused person had any intention to murder or to dispose of the victim child in a manner so as to put him in a danger of being murdered. The I.O. himself, stated that during the investigation he could not ascertain the purpose of kidnapping the boy. It has not been established that the attempt to kidnap was done with a view to murder or to dispose of the victim child in a manner so as to put him in danger of being murdered. It appears that the offence committed by the accused was an offence covered by the Section 361, IPC i.e. kidnapping from lawful guardian. Therefore, the conviction and punishment should have been made under Section 363, IPC for committing the offence under Section 361, IPC.

Therefore, in the absence of any ingredient regarding intention to murder, or to put the victim child in danger of being murdered, the conviction and sentence recorded under Section 364, IPC was not proper. However, as discussed above, from the evidence on record, it has been established that the appellant tried to take away the victim child, who was a minor at the relevant time from the lawful guardian. Therefore, by the alleged act, the appellant aforesaid tried to kidnap the said minor boy from his lawful guardian. Hence, it was a case of kidnapping simpliciter and as such the accused appellant committed the offence under Section 361, IPC, which is punishable under Section 363, IPC. The gravity and punishment of the offence under Section 363, IPC being lesser than the punishment prescribed by Section 364. *Laxmi Chakraborty and etc vs State of Tripura*, 2010 Cri LJ 1360 (Gauhati).

18. Proof of kidnapping.—Since in the present case, the prosecutrix PW2 Pinky was only 16 years of age, therefore, the offence of kidnapping punishable under Section

366, IPC is well proved against the accused appellants Sofar the participation of the accused appellants Hariram and Ramsharan is concerned, from the statement of the prosecutrix PW2 Pinky, it is also very much clear that they were found on its Raihway station chura and they went along with the accused appellant Rajan and prosecutrix from Churu to Delhi and they also accompanied them from one place to another at Delhi and therefore it cannot be said that no offense was committed by them. *Rajan and Others v. State of Rajasthan* 2002 Cri LJ 3152 Raj. : 2002(2) Raj Cri C 1035 : 2002(3) Raj LR 788 : 2002(3) WLC 607.

After hearing the learned Counsel for the parties and giving my thoughtful consideration to their respective arguments and also perusing the record. Court has found that document is not based upon material to prove date of birth of both the girls because admittedly, the dates of birth were not registered/recorded by the father of the girls with the Chowkidar of the village in a register of Births and Deaths or in the office of C.M.O. of the area. It is also not recorded from the original admission register, rather date of birth has been obtained from the certificate of 8th Class. Moreover, the learned Counsel for the State could not point out any other error in the judgment of the trial Court, which has formed an opinion in favour of the accused/respondents on the basis of evidence. It is well settled by the Supreme Court that if two views are possible in a case of acquittal, then the view which has been taken in favour of the accused/respondents should be maintained. *State of Haryana vs. Ramesh Kumar*, 2010 (2) CrLJ 1812 (P & H).

Accused persons took prosecutrix on point of knife from one place to another. No evidence showing that either of accused persons extended any premise or allurement to prosecutrix.

As regards charge under Sections 363 and 366 of IPC, in order to prove kidnapping the prosecution was required to prove that the appellants had taken or enticed the prosecutrix out of the keeping of her lawful guardian. The object behind Section 361 of IPC, which defines kidnapping, is to protect the minor children from being seduced for improper purposes and to protect the rights and privileges of guardians having lawful charge or custody of their minor wards. What is necessary is either taking or enticement, of the minor. Taking would include causing to go or getting into possession whereas enticement involves an idea of inducement, by igniting hopes or desire in the other. One does not entice other, unless the latter attempts to do a thing which he or she would not otherwise have done. In order to bring home conviction for kidnapping, there must be proof of the accused having done something which led to the girl going out of the keeping of her guardian. The words 'takes' and 'entices' as used in Section 361 of IPC need to be read together so as to take colour and content from each other.

In the present case, there is no evidence of either of the appellants having extended any promise or allurement to the prosecutrix. This is not the case of the prosecution that either of the appellants had promised to marry the prosecutrix or held out any other promise to her. The case of the prosecution is that the appellants had threatened the prosecutrix by putting knives on her person and being afraid of them she accompanied them to Merrut. That part of the deposition of the prosecutrix where she claimed that she had been threatened and two knives had been put on her person when she was taken from Delhi to Merrut cannot be believed and is obviously false. The truth appears to be that since the prosecutrix was previously known to the appellants, and had become friendly to one of them, she of her own abandoned the guardianship of her parents and eloped with the appellants. Though the prosecutrix has been found to be less than 16 years old, it cannot be said that she was not capable of knowing what she was doing. She was not of such an age so as to be unable to decide what was good and what was bad for her. Had the prosecutrix been about 10 months older, even the offence of rape would not have been made out against the appellants in the facts and circumstances of the case. In my view the facts and circumstances brought on record clearly show that the prosecutrix willingly accompanied the appellants and stayed with them till they were caught by the police. The prosecutrix knew and had the capacity to know the full import what she was doing. It is, therefore, difficult to say that the offence of kidnapping has been made out against the appellants in the facts and circumstances of this case.

Held, it cannot be said that accused persons took prosecutrix with them so as to force or seduce her to illicit intercourse. Offence of kidnapping has not been made out against them. *Mohd. Imran Khan & etc. vs. State*, 2010 (2) CrLJ 1756 (Delhi).

19. Kidnapping and Rape.—There are circumstances which strengthen the above conclusion. There is no dispute that the prosecutrix was a student at the material. time Raguvir Singh, inspector (PW-15), the investigating officer in the case, at one stage of his cross examination, denied the fact that he had gone to the concerned school to get the age certificate of the prosecutrix. However, on further cross examination, he had admitted that he had gone to get such certificate but there was difference in the entries regarding the age of the prosecutrix in the school record and the panchayat record. Thus, the school certificate does not appear to have been obtained and produced in evidence. In the absence of any explanation to show that for any reason the school certificate was not material and relevant to prove the age of the prosecutrix, an inference adverse to the prosecution has to be drawn to the effect that had such certificate been produced, that would have demolished the prosecution version regarding age of the prosecutrix. In the given circumstances of the of the case, similar inference deserves to be drawn to the effect that had such certificate been produced, that would have demolished the prosecution version regarding age of the prosecutrix. In the given circumstances of the case, similar inference deserves to the drawn for failure of the prosecution to get clinical/dental/radiological opinion about the age of the prosecutrix. *Suresh Kumar v. State of H.P.* 2002 Cri LJ 498 (H.P.) : 2002(2) All Cri LR 800.

20. Kidnapping for ransom.—Accused kidnapped victim girl for ransom, as and when he picked up the ransom amount which was kept at a spot as per his directions in the ransom note, he was arrested. He made a disclosure statement and pursuant thereto led the police to the house of co-accused wherefrom Sonam was recovered.

Victim girl did not disclose as to where she was kept was immaterial as she was about 4 1/2 years old when incident took place.

The first is of Mahesh Kumar being apprehended at the spot when he came to collect the ransom money and after he picked up the ransom note he was apprehended at the spot. The prosecution has also successfully proved that after Mahesh Kumar made the disclosure statement he led the Investigating Officer to the house of Ram Ashish from where the young girl was recovered.

Save and except the evidence of the kidnapped child being recovered from the house of Ram Ashish we find no evidence where from his intention or knowledge can be gathered. *Mahesh Kumar vs. State*, 2010 (3) Cri LJ 3208 (Del).

Accused kidnapped victim girl for ransom. Accused wrote ransom note to father of victim girl only stating that if ransom is not paid, his daughter would be sold.

It is obviously not a case where any threat was extended either to the victim or to her father of causing death or causing injury to the kidnapped child. We note that victim girl has not stated that she was maltreated by either accused.

Thus, the offence made out against Mahesh Kumar does not attract Section 364-A IPC. He has committed the offence punishable under Section 363, IPC as also the offence punishable under Section 367, IPC. *Mahesh Kumar vs. State*, 2010 (3) Cri LJ 3208 (Del).

The victim and his brother identified accused, but he is not sure as to whether the accused was seen at the forest or in the car, but this witness says convincingly that accused was involved very much in the occurrence. Though the accused persons had never been put on test identification parade, but in the facts and circumstances of the case, it will not have any adverse effect on the prosecution case.

Coming to the fact of this case, we do find that, was kidnapped along with his brother, whereas victim could be recovered in the afternoon and hence, he must have got several occasions to see the face of accused persons and those scenes must have been imprinted so deep not to be wiped out for number of years to come. Under these circumstances, testimonies of the witnesses, on the point of identification are quite acceptable.

That apart, accusation against the appellants further gets established, as one of the co-accused, confessed his guilt in writing which never seems to have been retracted, in his statement made under Section 313 Cr. P.C., has accepted that he had confessed his guilt in writing, wherein it has been stated that after hatching a plan with the other accused persons, they had kidnapped for ransom. *Ekram Khan & Ors. vs State of Jharkhand*, 2010 Cri LJ 1536 (Jharkhand).

21. Non-disclosure of name of informer.—Recovery of children on secret information given by police informer. Non-disclosure of name of informer by police.

The name of the secret informer who informed the SHO that a man would be disembarking has not been disclosed by any police officer, requiring this Court to disbelieve the testimony of the police officers and the father of the children, has hardly impressed us. The reason is obvious. Inasmuch as criminals have their own network, the police has a network of secret informers and if their names are disclosed, the network of informers created by the police would be breached and the informants life or limb may be endangered. *Ashok Kumar alias Govind vs. State*, 2010 (2) CrLJ 2329 (Delhi).

22. Circumstantial evidence—Last seen evidence.—In last seen theory, an element of identification is an important and strong factor. If either of the party i.e., culprit or the victim was not identified by a witness of lastly seen saying that they were in the company of each other, the circumstance of last seen fails because in that case it would not be established by the prosecution that who accompanied whom. If in a case based on last seen together, the identity of the culprit or the victim is doubtful or is not established beyond reasonable doubt, the circumstance shall not be held to be proved and the conviction based on such circumstance cannot be sustained. In the present case, the prosecution has failed to prove that it was the deceased who was accompanying the accused on his bicycle on the fateful day. Therefore, the guilt of accused was not proved beyond all reasonable doubt and he was entitled to get benefit of doubt. *Sheo Kumar v. State of Chhattisgar*, 2009 CriLJ 3165 (Chha).

* * * * *

Sec. 363-A. Kidnapping or maiming a minor for purpose of begging.—(1) Whoever kidnaps any minor or, not being the lawful guardian of a minor, obtains the custody of the minor, or in order that such minor may be employed or used for purposes of begging shall be punishable with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

(2) Whoever maims any minor in order that such minor may be employed or used for the purposes of begging shall be punishable with imprisonment for life and shall not be liable to fine.

(3) Where any person, not being the lawful guardian of a minor, employs or uses minor for the purposes of begging it shall be presumed, unless the contrary is proved, that he kidnapped or otherwise obtained the custody of that minor in order that the minor might be employed or used for the purposes of begging.

(4) In this section :—

(a) "begging" means—

(i) soliciting or receiving aims in a public place, whether under the pretence to singing, dancing, fortune telling, performing tricks or selling articles or otherwise.

(ii) entering on way private premises for the purpose of soliciting or receiving alms.

(iii) exposing or exhibiting, with the object of obtaining or extorting alms, any sore, wound, injury, deformity or disease, whether of himself or of any other person or an animal.

(iv) using a minor as an exhibit for the purpose of soliciting or receiving alms.

(b) "minor" means :—

(i) in the case of a male, a person under sixteen year of age ; and

(ii) in the case of female, a person under eighteen years of age.

Synopsis

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1. Notes.—The section was inserted by Act 52 of 1959, Section 2 *(with effect from* 15.1.1960).

2. Procedure.—Cognizable—Warrant—Not Bailable—Not compoundable—Triable by any Magistrate of the first class.

If the kidnapping or obtaining the custody is in order that such minor may be employed or used for the purpose of begging and exclusively by a Court of Session, in case of maiming a minor in order the minor may be employed or used for the purpose of begging, the Court of Session, Presidency Magistrate or Magistrate of the first class.

3. Kidnapping.—Kidnapping from lawful guardian - It was found that the victim girl Savitri went to the accused Varadarajan on her own accord and both of them after visiting various places, ultimately went to the office of the Sub-Registrar and get an agreement of marriage registered. From the facts and circumstances of that particular case, the learned Judge of the Apex Court viewed that the girl was never taken away from the lawful custody of her guardian and, therefore, the provisions of Section 363, I.P.C. are not attracted. *Palipireddi Satayanarayana alias Sathi Babu v. State of A.P.*, 2002 Cri LJ 2319 (AP) : 2002(2) ALD (CRL) 327 : 2002(2) Andh LT (Cri) AP 170 : 2002(3) Crimes 691.

4. Kidnapping and Murder.—Evidence of last seen with the accused five days prior to death, however no evidence that he was taken forcibly or by adopting deceitful means. The medical evidence shows that the ante-mortem injuries on the persons of the deceased were not sufficient to cause his death and it was suspected that he died due to poisoning. The viscera preserved by the doctor was not sent to chemical Examiner and therefore, there is no evidence regarding cause of death. There no offense is made out. *Gulab Singh v. The State*, 2002 Cri LJ 1575 (Allah.) : 2002 all LJ 267 : 2002(44) All Cri C 212 : 2001(3) All Cri R 2818.

5. Proof required.—(1) The kidnapped or maimed minor under 16 years if a male and under 18 years, if a female, (2) such person was if the kidnapping of a lawful guardian, (3) the accused kidnapped the here you and not being a lawful guardian obtained custody of the minor, and (4) the accused employed or used the minor for the purpose of begging.

6. Charge.—"I *(name and office of the Magistrate. Session Judge etc.)* hereby charge you (*name of the accused*), as follows :—

"That on or about the.....day of ....at.......you kidnapped *AB* (a minor male then under 14 years of age or a minor female then 16 years of age or obtained the custody of the said minor).......for employing or using him for the purposes of begging by maiming the minor and thereby committed an offence punishable under Section 363A of the Penal Code and within my cognizance" (or the cognizance of the Court of Session).

"And I hereby direct that you be tried by the said Court on the said charge."

* * * * *

Sec. 364. Kidnapping or abducting in order to murder.—Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with *imprisonment for life* or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations

(a) *A* kidnaps *Z* from India, intending or knowing it to be likely that *Z* may be sacrificed to an idol. *A* has committed the offence defined in this section.

(b) *A* forcibly carries *B* away from his home in order that *B* may be murdered. *A* has committed the offence defined in this section.

Synopsis

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1. Amendment.—The words "imprisonment for life" were substituted for the words "transportation for life" by Act 26 of 1955, Section 117 and Sch. with effect from 1.1.1956. The word "India" in the illustration has been successively substituted by the A.O. 1948 and A.O. 1950 and Act 3 of 1951, Section 3 and Sch. for the words "British India".

In the instant case the accused was alleged to have kidnapped mother of the informant. The FIR was recorded after much delay and the informant claimed that to have reported the matter about the incident on the next day of the occurrence and he also put his signatures on the statements recorded by the police but the document was not brought on record. No independent witness was examined. Moreover there appeared much contradiction in the evidence of prosecution witnesses as regards the manner of occurrence. Conviction was held not proper. *Deori Bankere v. the State of Bihar*, 2001 Cri LJ 3579 (Jharkhand).

2. Notes.—For a conviction under this section it is necessary to show that there was a pre-conceived plan for committing the murder. AIR 1938 Cal 51 : 66 Cr LJ 235 : 42 CWN 129. Where a person was abducted by the accused in order that he might be held to ransom, and where it did not follow as a matter of course that he was in danger of being murdered. *Held*, that a conviction under this section cannot stand. 6 LBR 160 : 91 Ind Cas 240 : 27 Cr LJ 64. In a prosecution under this section, where there was no incriminating evidence whatsoever against the accused beyond the fact that he and the deceased left together and were last seen together, and that the one returned without the other. *Held*, that although circumstances lead to a high degree of suspicion against the accused, they cannot be said to be inconsistent with any reasonable theory other than that the accused lured him away for the purpose of having him murdered, or being exposed to the danger of being murdered and hence no conviction could be safely had. 9 Lah LJ 396 : 103 Ind Cas 836 : 28 Cr LJ 758 : AIR 1927 Lah 658. In case of abduction of person in broad day light sentence of transportation for life was held not to be too severe. 143 Ind Cas 55 : 10 OWN 7 : 34 Cr LJ 498 : AIR 1933 Oudh 148 ; *see* also AIR 1933 Lah 1035. Legal evidence is necessary for a conviction under this section. AIR 1939 Mad 593 : 40 Cr LJ 849. In a case under this section the prosecution must prove that there was a misrepresentation and that the particular misrepresentation was the result of a plan to murder and that it was one by which the abducted person was himself deceived and was induced to go. 50 Cr LJ 1008 : AIR 1949 Dacca 21 ; 41 CWN 287. In a case under this section, depending on circumstantial evidence, the question of motive is of great importance. Absence of motive is a circumstance in favour of the accused. It must be proved that the accused had the intention at the time of abduction, that the person abducted should be murdered or should be so disposed of as to be put in danger of being murdered. AIR 1940 Cal 541 : 42 Cr LJ 285 : *see* also AIR 1939 Mad 593 : 40 Cr LJ 593 ; AIR 1936 Oudh 44 : 37 Cr LJ 12. Only self-exculpatory statements do not warrant conviction. 1935 MWN 951. Where the case for the prosecution is that the person abducted has been murdered by the abductor, there is no scope for a charge under this section. AIR 1940 Cal 561 : 42 Cr LJ 285.

When the accused was one of the persons who were responsible for kidnapping or abducting the deceased, so that he may be murdered or may be so disposed of as to be put in danger of being murdered and the deceased was found lying murdered on the next day, the conviction of the accused was altered from one under Section 302 to Section 364, Penal Code and was sentenced to imprisonment for life. 64 Punj LR 1017.

In order to sustain a charge under Section 364, it is incumbent upon the prosecution to prove that the abductors had the intention at the time of abduction that the person abducted should be murdered or would be disposed of as to be put in danger of being murdered. ILR 40 Pat 809.

Where the *modus operandi* as disclosed in the letters from the accused demanding ransom from the father of the boy whom they have kidnapped is by putting him in fright of the boy being murdered and there is throughout the likelihood of the boy being murdered in case the ransom money was not paid for one ransom or other, the accused are guilty of the aggravated forms of kidnapping and extortion under Sections 364 and 368. AIR 1957 SC 381 : 1957 Cr LJ 559.

Where on the same circumstantial evidence it is found that the offences under Sections 364 and 386 were actually committed in pursuance of the conspiracy or in pursuance of the common intention, one accused would be equally guilty with the other of the two substantive offences and would be liable to the same sentence. In order to bring home a charge under Section 364 in a trial by jury, the jury must be satisfied that at the time when the accused took away the deceased they had the intention to cause his death AIR 1956 Cal 600 : 1956 Cr LJ 1313. Accused charged under Sections 302 and 364 but acquitted under Section 302 can be convicted under Section 364. AIR 1954 Hyd 88 : ILR 1953 Hyd 756 : 1954 Cr LJ 641. In 1963 SCD 638 : 1963 (2) Cr LJ 170 : AIR 1963 SC 1074, the Supreme Court held that there was no scope for argument that verdict should be interferred with or conviction under Section 302 based on it, altered on hypothetical considerations is not founded on any facts on record.

Where the accused died before he was kidnapped the charge under Section 364, IPC, must necessarily fail. AIR 1975 SC 123. Abduction by itself is no offence. It is an offence when coupled with one of the intentions contemplated by the Penal Code. 1977 UP Cr C 62. Where there is no evidence to show that *A* was abducted for being murdered or he was ever put in danger of being murdered and the witness are not reliable the conviction is untenable, 1979 Bihar Cr C 41. Proof of age the prosecutrix below 18 when not proved beyond doubt, accused is to be acquitted. 1977 Raj Cr C 362. Where there is no indication that the alleged misrepresentation was the result of the plan to murder ; the appellant can not be held guilty under Section 364. 1975 Cr LJ 950. So far as kidnapping for the purpose mentioned in the section in concerned, it is an aggravated form of offence under Section 363. AIR 1957 SC 381 : 1957 Cr LJ 559 ; *see* also AIR 1975 SC 1252. The intention must exist at the time of abduction. AIR 1963 SC 1014 : 1963 (2) Cr LJ 170 ; AIR 1979 SC 1410 : 1979 Cr LJ 1089 ; AIR 1979 SC 1280 : 1979 Cr LJ 871.

Charge under Section 148 related to murder taking place other than the place of abduction subsequent to the alleged abduction of the deceased. Common object would not be availed for sustaining the conviction for abduction. AIR 1954 SC 911 : 1984 Cr LJ 814.

Since charge-sheet under Section 364, IPC has been furnished by police in that crime the Session Judge while trying the case may summon anyone as witnesses under Section 311, Cr PC. Hence petition rejected. *Ramji Lal* v. *Dila*, 1995 JIC 979 (Alld).

In absence of enmity of deceased with accused there is no evidence to connect the accused with the murder the accused cannot be convicted for taking away the deceased for his medical treatment before his murder. Conviction is therefore set aside. *Lakhan Rabidas* v. *State of Bihar*, (1995) 2 East Cr C 127 (Pat).

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session exclusively.

Where one of the offences complained of was under Section 364 triable by Court of Sessions, the Magistrate's action summoning the accused was quashed. 1982 Cr LJ 1170 : 1982 All Cr R 101.

4. Charge.—I *(name and office of Session Judge, etc.)* hereby charge you (*name of the accused*) as follows :—

That on or about the . . . . day of . . . . at . . . . you kidnapped, (or abducted) *AB in* order that the said *AB* might be murdered (or might be so disposed of as to be put in danger of being murdered), and thereby committed an offence punishable under Section 364 of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

5. Evidence and proof.—Where there was non-examination of important witness and non-production of important evidence had inherent weakness of the prosecution story.—Order of conviction and sentence cannot be sustained. *Mahabir* v. *State of U.P.* (1995) 2 Crimes 575 (All) (DB).

Accused was caught red handed while trying to forcefully take away victim child from school premises i.e. lawful authority. There is nothing on record to show that the accused person had any intention to murder or to dispose of the victim child in a manner so as to put him in a danger of being murdered. The I.O. himself, stated that during the investigation he could not ascertain the purpose of kidnapping the boy. It has not been established that the attempt to kidnap was done with a view to murder or to dispose of the victim child in a manner so as to put him in danger of being murdered. It appears that the offence committed by the accused was an offence covered by the Section 361, IPC i.e. kidnapping from lawful guardian. Therefore, the conviction and punishment should have been made under Section 363, IPC for committing the offence under Section 361, IPC.

Therefore, in the absence of any ingredient regarding intention to murder, or to put the victim child in danger of being murdered, the conviction and sentence recorded under Section 364, IPC was not proper. However, as discussed above, from the evidence on record, it has been established that the appellant tried to take away the victim child, who was a minor at the relevant time from the lawful guardian. Therefore, by the alleged act, the appellant aforesaid tried to kidnap the said minor boy from his lawful guardian. Hence, it was a case of kidnapping simpliciter and as such the accused appellant committed the offence under Section 361, IPC, which is punishable under Section 363, IPC. The gravity and punishment of the offence under Section 363, IPC being lesser than the punishment prescribed by Section 364. *Laxmi Chakraborty and etc vs State of Tripura*, 2010 Cri LJ 1360 (Gauhati).

The case was based on circumstantial evidence. The "last seen" evidence is a link but it is a weak type of evidence unless corroborated by other evidence. The prosecution has failed to say how the deceased sustained fatal injuries. Hence conviction set aside. *Dhanna* s/o *Lalu Kalbelia* v. *State of Rajasthan*, 1995 Cr LR 698 (Raj).

Accused, alleged to be last seen with deceased girl and this was extra-judicial confession. Alleged cause of death by throttling—These allegations not proved from oral and medical evidence. Accused was held entitled to be acquitted. *Arumugham* v. *State*, 1994 Cri LJ 520 (Mad).

Kidnapped child was a prosecution witness and he admits tutoring in cross-examination—Evidence of witnesses declared hostile—Medical evidence not corroborating child's evidence—Evidence of child not reliable and kidnapping held doubtful—On such evidence conviction of accused not sustainable. *Pankaj Naik* v. *State of Orissa*, 1994 Cri LJ 829 ; (1994) 2 East Cr C 51 (Ori).

Rape and murder of a girl aged 2 years. The evidence of PW-5 and PW-6 reveals that appellant had been seen around the complainant's house on the previous day and as he was not a resident of this area, he had been quickly singled out. These witnesses further stated the appellant had been seen in the vicinity again after the rape and murder and he had accordingly been apprehended and handed over to the police and two chains worn by deceased had been taken from his pockets. PW-13 also identified the chains in Court. It is true that in the cross-examination of these two witnesses, several improvements *vis-a-vis* their statements under Sec. 161 of Criminal Procedure Code had been pointed out by the defence Counsel, but the fact that the appellant had been present in the vicinity of the house and had been arrested, soon after the incident has been admitted even by the defence.

Another significant piece of evidence is the statement of PW-7 who testified to the fact that about 2:30 a.m. on the night of the murder he had gone out of the house to urinate and had seen the appellant outside and on being questioned, the appellant had threatened him with dire consequences with the result that he had not informed anybody till the third day after the police had come to the village to verify the facts. He too stated to the fact that two chains had been recovered from the pocket of the appellant. It is true that several improvements have been made by the three primary witnesses but there is absolutely no reason as to why they would involve the appellant in a false case as admittedly he was a stranger to the locality and they bore him no ill will.

We have also gone through the evidence of PW-12 relating to the recovery of the frock pursuant to a disclosure statement made by the appellant under Sec. 27 of the Evidence Act. Nothing could be spelt out from the cross-examination of this witness except that the recovery had not been made from a closed place, though he explained that there was very little movement of human beings in that area as no one was residing close by. This witness also identified the frock that had been recovered. It is equally significant that the strands of fibre recovered from the place of incident had been matched with the material of the frock and were found to be from the same source.

It is true that in a criminal matter the onus of proof lies almost exclusively on the prosecution. As already mentioned above, however, the appellant has not been able to give any explanation in his statement under Sec. 313 of Criminal Procedure Code as to what he had been doing in that locality. On the contrary he admitted his presence by stating that he had been caught by the neighbours on suspicion of the murder and beaten up, and had suffered several injuries in the process. The medical evidence on the contrary reveals that these injuries could also have been sustained while raping and killing the young child.

The evidence that the appellant was a paedophile with extremely violent propensities also stands proved on record in that he had been convicted and sentenced for an offence punishable under Sec. 354 in the year 1998 and later for offences punishable under Secs. 363, 376, 379, 302 and 201 of the IPC for the rape and murder of a young child and had been awarded a sentence of imprisonment for life under Sec. 302, and several other terms of imprisonment with respect to the other Secs., though, an appeal in this connection was pending as on date. It is also extremely relevant that the appellant, had, in addition, been tried for the murders of several other children but had been acquitted on the 28.07.2005 with the benefit of doubt. The present incident happened three days later. We accordingly dismiss the appeals but modify the sentence of death to one for the rest of his life in terms of the judgment in *Shraddananda's* case.

Sebastian vs. State of Kerala, 2010 (1) SCC 58 : 2009 (4) Crimes 121 (SC) : 2009 (13) JT 136 : 2009 (13) Scale 210 : 2009 (7) Supreme 8 : 2009 (8) SLT 96.

Trial Court must base its conclusion solely on evidence produced during trial and not on investigation or result thereof. *Vijender* v. *State of Delhi*, 1997 (1) Crimes 158 (SC).

Where mother of child stated in evidence that her son was murdered, there is no need to make any enquiry into moral life of mother. State of *U.P.* v. *Raghubir Singh*, 1997 (1) Crimes 53 (SC).

The allegation was that accused had kidnapped victim child of four years of age from house of parents and took him to village and pushed him into well whereby his death was caused. Extra judicial statement made to the witnesses was not genuine and voluntary and other evidence was not sufficient to connect the accused with the offence alleged. The accused was held entitled to the acquittal. *Sarala* v. *State*, 2003 Cr LJ 1195 (Mad) : 2003(1) Cur Cri R 38 : 2003(1) Mad LW (Cri) 54.

When there is enmity between informant and accused due to land dispute it is natural that he will not send his son with him and if son is taken away by accused the informant instead of filing the FIR will not go in search of the body. The accused in such cases will be entitled to get the benefit of doubt. *Islam Mian* v. *State of Bihar*, 2004 Cr LJ (NOC) 27 : AIR 2004 Jhar HCR 112.

In a case of kidnapping a boy of 8 years conviction of accused was held improper when the motive for commission of the offence was not shown and the evidence led by prosecution suffered from intermine improbabilities and discrepancies. *Kaptan* v. *State of UP*, 2004 Cr LJ 1556 (All) : 2004 All LJ 492 : 2004(48) All Cri C 94.

In another Allahabad case, the prosecution alleged that the victim, after attending Court proceedings went along with accused and did not return. There was long-standing enmity between the complainant, brother of victim and his family and the accused. There was no evidence to show that victim went along with complainant and other witnesses to attend case of the alleged date of incident. The delay of two months in lodging FIR was not explained. It was held that conviction of accused was not proper. *Kaliyan Singh* v. *State of UP*, 2004 Cr LJ 4262 (All) : 2004 All LJ 2727.

6. Acquittal.—Several accused were involved—Acquittal was of respondent accused and there was State appeal—Sole witness not implicating respondent for abduction or murder—Guilt of respondent was not fully established-Acquittal of respondent was hence affirmed. *State of M.P.* v. *Amar Singh*, 1994 Cri LJ 619 (SC) ; AIR 1994 SC 650.

Where there in no evidence direct or circumstiantial on the involvement of the accused in the kidnapping or murder of the deceased, in the circumstance of the case the conviction cannot be based solely on the extra-judicial confession made by co-accused. *Raj Kumar Pandit v. State of Bihar*, 2001 Cri LJ 3570 (Jharkhand).

In appeal against acquittal if conclusion and inference drawn by trial Judge appears to be probable, the same not to be reversed, even if other view is possible. *State of M.P.* v. *Manoj*, 1997 (1) Crimes 308 (MP).

Where there is no positive evidence to show that kidnapping of the victim minor girl was in order that she may be murdered or may be so disposed as of be put in danger of being murder, the conviction of the accused for offence under Section 364, IPC cannot be sustained. *Ghanshyam Panjiyar* v. *State*, (2004) 2 Crimes 428 at p. 432

(Pat) : 2004 Cr LJ 2642 : 2004 (19) All ind Cas 445 : 2004 (4) Cur Cri R 4 : 2004 (2) MPHT 153.

Where though offences of kidnapping and rape were committed in the year 1987 but the date of committing rape had been mentioned in the charge 11/12.1.1986 thereby prejudicing the defence and it was found from the entire evidence that the victim girl was not a truthful witness, the trial Court committed an illegality in placing reliance on the testimony of the victim girl and other witnesses in convicting the accused. *Dharam Pal* v. *State*, 2004(3) Crimes 220 (All).

The accused was alleged to have abducted wife of informant in order to murder her by entering into his house at night after breaking tin door but independent witness did not support prosecution case and became hostile and the same was done by some of witnesses also. The fact that inmates of house did not wake up by the sound produced by breaking of tin door made prosecution case doubtful. The conviction of accused was set aside as investigating officer did not find any sign or clue of commission of murder of wife of informant. *Chhota Tael* v. *State*, 2003 Cr LJ (NOC) 88 (Jhar) : AIR 2003 Jhar HCR 331 : 2002(3) East Cri C 4.

7. Conviction.—Alleged murder of mother-in-law by throttling her neck and throwing dead body in bush—Convicted under Section 302, IPC, and sentenced to life-imprisonment and under Section 364, IPC for five years Rigorous Imprisonment and under Section 201 for 2 years Rigorous Imprisonment—Appeal filed challenging of the same—The evidence of Doctor and inquest panchname establishes that death was due to throttling. The evidence of PW 3 shows that deceased was in company of accused on the date of occurrence. The Doctor also stated that injuries were sufficient to cause death in ordinary course of nature. Hence guilt of accused is proved conviction and sentence confirmed. *Jillela Madhu* v. *State of A.P.*, (1994) 2 ALT (Cri) 209 (AP).

The allegation that accused persons armed with guns and arms belt forcibly took deceased in their company and motive was that they were witnesses in a dacoity case against the accused. There was no serious infirmity in ocular testimony of witnesses about abduction of deceased persons and their eventual killing. Accusations attributed to the accused persons squarely attracted mischief of Section 364/34 and their conviction for offence charged was held proper. *Yadunandan Mandal* v. *State*, 2003 Cr LJ 2167 (Pat) : 2002(3) BLJ 290 : 2002(3) BLJR 2357 : 2002(3) East CriC 170 : 2002(3) Pat LJR 779.

Due to enmity accused persons were said to have kidnapped victim girl of six or seven years of age and committed her murder. The dead body was not recovered from the place pointed out by the accused and extra-judicial confession made by him was also not found reliable. The conviction of accused under Section 302/34 was held not proper but his conviction under Section 364 was sustained as it was proved that it was accused who had kidnapped the girl. *Sibu Jhanghu* v. *State*, 2004 Cr LJ (NOC) 35 (Jhar) : AIR 2004 Jhar HCR 104 : 2003(2) JCR JHA 366 : 2003(1) JLJR 362.

8. Abduction.—Abduction in order to murder. If a person is abducted with the intention that he may be murdered or with the knowledge that he may be put to danger of being murdered, the offence under Sec. 364, IPC would be complete even if the victim, eventually, escapes or is not murdered. Conversely, if the victim is not abducted with the intention of being murdered or with the knowledge that he is likely to be murdered, but if such a victim is eventually, murdered, penal provisions of Sec. 364, IPC would not be attracted to such a case for the gravamen of the charge under Sec. 364 is that kidnapping or abduction has to be either with the intention to murder the victim or with the knowledge that the victim is likely to be murdered.

Where the abductors were armed with weapon and there was no explanation by accused as to why the victims were abducted, it could be presumed that victims were abducted with at least, the knowledge that they were likely to be murdered and thus, the accused were guilty of offence under Sec. 364. When a fact is especially or pre-eminently within the knowledge of an accused, the onus lies on him to offer his explanation for his conduct if his intention was contrary to, or in consistent with what his conduct indicated. When the prosecution succeed in proving certain facts, the Court may presume the existence of certain other facts, which are likely to follow, in normal circumstances, from the proven facts. Such a presumption is available to a Court in the light of the provisions of Sec. 114 of the Evidence Act. *Shri Moni Neog and Ors. v. State of Assam*, 2006 CriLJ 1944 (Gau).

* * * * *

[1][**Sec. 364-A. Kidnapping for ransom,** ***etc.***—Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or [2][any foreign State or international, inter-governmental organisation or any other person] to do or abstain from doing any act to pay a ransom, shall be punishable with death or imprisonment for life, and shall also be liable to fine.

Synopsis

1. Procedure 2228
2. Ingredients. 2228
3. Scope and applicability of section 2229
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6. Non-disclosure of name of informer. 2232
7. No incriminating evidence. 2232
8. Charge 2232
9. Common Intention 2233

1. Procedure.—The offence is cognizable, non-bailable, non-compoundable and triable by the Court of Session.

2. Ingredients.—(1) The accused kidnapped or abducted any person.

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[1] *Inserted* by Act 42 of 1993, Section 2 (w.e.f. 22.5.1993).

[2] *Substituted* by Act 24 of 1995, Section 2 (w.e.f. 26.5.1995).

(2) He kept a person in detention after such kidnapping or abduction.

(3) The accused threatened to cause death or hurt to such person.

(4) Threatened to cause hurt or death to such person in order to compel the Government or any foreign State or international, inter-governmental organisation or any other person to do or abstain from doing any act.

(5) Such kidnapping or abduction was for ransom.

3. Scope and applicability of section.—To attract the provisions of section 364-A, IPC prosecution has to prove that the accused kidnapped or abducted the child, kept him under detention after such kidnapping and that the kidnapping was for ransom. Mere recovery of letter purported to have been written by the accused indicating a demand of Rs. 50,000/- by itself would not be covered under the expression to "pay a ransom". For the purpose of getting paid a ransom a demand has to be made and communicated. Unless the price of retrieval or rescue is made the question to pay a ransom would not arise. Therefore, the essential ingredient to attract the provisions of section 364-A is that there has to be a demand by the kidnapper on the complainant or any of his relations asking for the payment of ransom. "To pay" means to set in motion the demand for payment. Demand cannot be by keeping the letter in one's pocket. It has to be communicated to the person from whom the demand to pay is made. Unless that is done, prosecution cannot succeed in covering its case under section 364-A *Netra Pal* v. *State (NCT of Delhi)* 2001 Cri LJ 1669 (Delhi).

In the case of *Mohammad Rashid Ansari* v. *State, reported in* (1998) 2 cur Cri R 608 the minor boy was kidnapped. There was allegation of demanding ransom by the accused from the uncle of the kidnapped child but on facts the alleged demand was not established. The demand of ransom having not been established, the court observed that , "In the instant case exept for indicating that there must be some strong reason for the accused appellants to take the boy away in the aforesaid manner, that alone is not, in our opinion enough to make out the theory of ransom."

In the case of *Mohan* v. *State of Tamil Nadu* (1998) 5 SCC 363 : (1998 Cri LJ 3276) a boy of 10 years age was kidnapped for ransom. The kidnapper contracted the father of the deceased and demanded Rs. 5 lacs so that the boy could be released otherwise they threatened to kill him. After killing the boy they again contracted the father of the deceased to get a ransom of Rs. 5 lacs and ultimately succeeded in extracting a sum of Rs. 5 lacs from him. It was in this background that the apex court held that it was a case of kidnapping for ransom. In the above case the demand was made by the kidnappers by contracting the father of the kidnapped boy. There was communication of demand by contract.

Accused kidnapped victim girl for ransom. Accused wrote ransom note to father of victim girl only stating that if ransom is not paid, his daughter would be sold.

It is obviously not a case where any threat was extended either to the victim or to her father of causing death or causing injury to the kidnapped child. We note that victim girl has not stated that she was maltreated by either accused.

Thus, the offence made out against accused does not attract Section 364-A IPC. He has committed the offence punishable under Section 363, IPC as also the offence punishable under Section 367, IPC. *Mahesh Kumar vs. State*, 2010 (3) Cri LJ 3208 (Del).

The victim and his brother identified accused, but he is not sure as to whether the accused was seen at the forest or in the car, but this witness says convincingly that accused was involved very much in the occurrence. Though the accused persons had never been put on test identification parade, but in the facts and circumstances of the case, it will not have any adverse effect on the prosecution case.

Coming to the fact of this case, we do find that, was kidnapped along with his brother, whereas victim could be recovered in the afternoon and hence, he must have got several occasions to see the face of accused persons and those scenes must have been imprinted so deep not to be wiped out for number of years to come. Under these circumstances, testimonies of the witnesses, on the point of identification are quite acceptable.

That apart, accusation against the appellants further gets established, as one of the co-accused, confessed his guilt in writing which never seems to have been retracted, in his statement made under Section 313 Cr. P.C., has accepted that he had confessed his guilt in writing, wherein it has been stated that after hatching a plan with the other accused persons, they had kidnapped for ransom. *Ekram Khan & Ors. vs State of Jharkhand*, 2010 Cri LJ 1536 (Jharkhand).

4. Evidence and proof.—Where the PWs 3 and 4 were stated to have witnessed a part of the occurrence, *i.e.* A-1 calling the victim PW 2 and their going towards the vehicle. Though PW 4 resiled from the statement made during investigation, his evidence corroborated the evidence of PWs 2 and 3 to the extent that he had seen PW 2 going in the company of somebody towards the trap Jeep. The trial Court took into account the evidence of PWs 2 and 3 and the fact that the vehicle and the accused persons were confined by the villagers and they were arrested from the spot found the accused guilty while acquitting A-2 to A-4 as the evidence was not found sufficient to convict them under Section 364A of IPC. In appeal the High Court on analysis of factual position, affirmed the view of the trial Court. In the instant case, as the factual position found by the trial Court and the High Court went to show, the object of abduction was for ransom which was clearly conveyed to the victim PW 2 no matter who would pay the same and therefore, the concurrent findings of the courts below did not warrant interference. *Malleshi* v. *State of Karnataka*, 2004(4) Crimes 53 (SC) : 2004(8) SCC 95 : 2004 SCC (Cri) 2115 : 2004(8) JT 72.

In the instant case there was no eye-witness and the victim or kidnappee alleged to have been recovered from his own house himself, who could be the best witness, was murdered in some other incident before being produced as a witness in the case, original letters claiming ransom from the son of kidnappee has not been produced, the alleged recovery statement made by the accused as to recovery of the kidnappee has not been proved and there was no test identification of the accused persons despite their claim, the accused persons cannot be convicted for offence under Section 364A of IPC. *State* v. *Shashi Shekhar*, 2004 Cr LJ 2961 (All) : 2004 All LJ 1804 : 2004 (2) All Cri R 1088.

Where the two witnesses to the recovery of the boy from the house of the accused and father of the main accused were declared hostile of the prosecution and the mother of the boy merely stated that her son was missing on the day of occurrence, and there was no evidence that demand for ransom was made by the accused persons.

prosecution miserably failed to establish its case for offence under Section 364A of IPC against the accused persons. *Mazhar Hussain* v. *State*, 2004(2) Crimes 432 (Pat). *See also Pappu* v. *State*, 2005 Cr LJ 3380 (Delhi) : 2006 (1) East Cri C 129.

After making the demand to the kidnapped or abducted person merely because the demand could not be conveyed to some other person, as the accused is arrested in the meantime does not take away the offence out of the purview of Section 364A of IPC. *Malleshi* v. *State of Karnataka*, 2004(4) Crimes 53 (SC) : 2004(8) SCC 95 : 2004 SCC (Cri) 2115 : 2004(8) JT 72 : 2004(6) Supreme 609.

5. Sentence.—Held, there was no evidence on record to suggest that the accused was found involved previously in any heinous crime, nor there was evidence that he would be danger to the society, if the death penalty was not awarded. There was no evidence as to who actually caused the death of the deceased though the offence committed by the accused deserved severe condemnation and was the most heinous crime, but on cumulative facts and circumstances of the case, it could not be held that the case fell in the category of rarest of the rare cases, and instead of death penalty, award of life imprisonment to the accused for offence under Section 364A, IPC would be justified. *Mannu* v. *State of UP*, 2005 Cr LJ 3469 (All) : 2005 All LJ 2280 : 2005(52) All Cri C 831 : 2005(2) All Cri R 2185.

Rarest of rare. The accused persons were not criminals. They were friends. The deceased was said to have been selected because his father was rich. The motive, if any, was to collect some money. They were not professional killers. They have no criminal history. All were unemployed and were searching for jobs.

Further if age of the accused was a relevant factor for the High Court for not imposing death penalty on accused Nos. 2 and 3, the same standard should have been applied to the case of the appellant also who was only two years older and still a young man in age. Accused Nos. 2 and 3 were as much a part of the crime as the appellant. Though it is true, that it was he who allegedly proposed the idea of kidnapping, but at the same time it must not be forgotten that the said plan was only executed when all the persons involved gave their consent thereto.

It must be noted that the discretion given to the Court in such cases assumes onerous importance and its exercise becomes extremely difficult because of the irrevocable character of death penalty. One of the principles which we think is clear is that the case is such where two views ordinarily could be taken, imposition of death sentence would not be appropriate, but where there is no other option and it is shown that reformation is not possible, death sentence may be imposed.

Sec. 354(3) of the Code of Criminal Procedure requires that when the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons thereof.

We do not think that the reasons assigned by the Courts below disclose any special reason to uphold the death penalty. The discretion granted to the Courts must be exercised very cautiously especially because of the irrevocable character to death penalty. Requirements of law to assign special reasons should not be construed to be an empty formality.

We have previously noted that the judicial principles for imposition of death penalty are far from being uniform. Without going into the merits and demerits of such discretion and subjectivity, we must nevertheless reiterate the basic principle, stated repeatedly by this Court, that life imprisonment is the rule and death penalty an exception. Each case must, therefore, be analyzed and the appropriateness of punishment determined on a case-by-case basis with death sentence not to be awarded save in the *'rarest of rare'* case where reform is not possible. Keeping in mind at least this principle we do not think that any of the factors in the present case discussed above warrants the award of the death penalty. There are no special reasons to record the death penalty and the mitigating factors in the present case, discussed previously, are, in our opinion, sufficient to place it out of the *"rarest of rare"* category.

For the reasons aforementioned, we are of the opinion that this is not a case where death penalty should be imposed. The appellant, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous imprisonment for life. *Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra,* 2009 (6) SCC 498 : 2009 (7) JT 248 : 2009 (9) SCR 90 : 2009 (7) Scale 341 : 2009 (4) Supreme 235 : 2009 (5) SLT 166.

Sentence Reduction. So far as Sec. 364A of IPC is concerned, the only option is given to the Court is to award punishment of death or punishment for imprisonment of life. There is no other option and the lower Court has awarded imprisonment for life. This Court cannot under the provisions of Sec. 364A of IPC reduce that sentence. There is no option, no power given to the Court in that regard. Therefore, the submission of accused of lesser punishment cannot be accepted. *Shridhar Yeshwant Bhosale v. State of Maharashtra,* 2007 CriLJ 1380 (Bom).

6. Non-disclosure of name of informer.—Recovery of children on secret information given by police informer. Non-disclosure of name of informer by police.

The name of the secret informer who informed the SHO that a man would be disembarking has not been disclosed by any police officer, requiring this Court to disbelieve the testimony of the police officers and the father of the children, has hardly impressed us. The reason is obvious. Inasmuch as criminals have their own network, the police has a network of secret informers and if their names are disclosed, the network of informers created by the police would be breached and the informants life or limb may be endangered. *Ashok Kumar alias Govind vs. State,* 2010 (2) CrLJ 2329 (Delhi).

7. No incriminating evidence.—As against co-accused, there is no admissible incriminating evidence against them. Their inculpatory disclosure statements are totally inadmissible in evidence as nothing has been recovered or discovered by the police pursuant thereto and cannot even be read as evidence against them under Section 8 or Section 10 of the Evidence Act. Held, said accused would be entitled to acquittal. *Ashok Kumar alias Govind vs. State,* 2010 (2) CrLJ 2329 (Delhi).

8. Charge.—I, (*name and office of the Sessions Judge*) hereby charge you (*name of the accused*) as follows :

That on or about......at...........you kidnapped (or abducted) and kept a person..........in detention after such kidnapping (or abduction) and threatened to cause death or hurt to such person (or caused hurt or dealt on such person) in order to compel the Government (or any foreign State or international, inter-governmental, organisation or any other person) to do or abstain from doing any act to pay a ransom, and you have thereby committed an offence punishable under Section 364-A, IPC and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charge.

9. Common Intention.—It is not the demand of ransom alone, but it is when the conduct of the person who demands ransom that gives rise to a reasonable apprehension that the person for whose release the demand has been made that on failure such person may be put to death or caused hurt, that the provision under Sec. 364-A is attracted. In the present case, there is not even a whisper in the testimony of father of boy that accused No.1 ever intimidated that if the demand of Rs. 30,000/- was not met, harm would be caused to the kidnapped child, and that he was acting with consent of co-accused. Therefore, offending act of accused No.1 does not constitute an offence punishable u/S. 364-A of the IPC. In these circumstances, appellants No. 2 and No.3 also cannot be convicted u/S. 364-A of the IPC. *Durgashankar alias Durgalal and Ors. v. State of M.P.*, 2006 CriLJ 2494 (DB) (MP).

* * * * *

Sec. 365. Kidnapping or abducting with intent secretly and wrongfully to confine person.—Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Scope 2233
2. Sentence 2235
3. Procedure 2235
4. Charge 2235

1. Scope.—To support a conviction under this section, it must be clearly proved that at the time of the abduction, it was the intention of the accused to secretly and wrongfully confine the person. 18 CLJ 578 : Ind Cas 187 ; *see* also 92 Ind Cas 213 : 1925 Lah 614 : 27 Cr LJ 229 ; 7 LLJ 529 : 26 PLR 733 : AIR 1925 Lah 614 ; 73 Ind Cas 510 : 24 Cr LJ 622. Where an accused is charged with rape and abduction, the abduction being an aggravating circumstance two separate sentence should not be passed. 89 Ind Cas 912 : 26 Cr LJ 1440 : AIR 1926 Lah 114. "The will of the woman may ultimately be gained over but this will not affect the offence, when the kidnapping or abduction is with the knowledge or intention which the section mentions."—*Morgan and Macpherson.*

Where a person was abducted by the accused in order that he might be held to ransom and where it did not follow as a matter of course that he was in danger of being murdered. *Held*, conviction under Section 364 cannot stand, but a conviction under Section 365, IPC, was justifiable as though the main object was to extort money. 6 LBR 160 : 19 Ind Cas 167 : 14 Cr LJ 167 : 6 Bur LT 77. The accused abducted *B* in order to put pressure upon her friends to restore a young girl whom they had abducted. She was restored a few days after *B* was abducted and then *B* was also let go. It was not found that any harm was done to *B. Held*, that under such circumstances heavy sentence of imprisonment on the accused were not necessary. 89 PLR 1916 : 17 Cr LJ 472 : 36 Ind Cas 152. Where the appellant intended and actually did confine a girl wrongfully while he negotiated with her relations for the payment of a sum of Rs. 690/- which was practically her ransom. *Held*, this act therefore fell under Section 365 IPC. 73 Ind Cas 510 : 24 Cr LJ 622 : AIR 1923 Lah 158. This section makes punishable the offence of abduction with intent to cause the person abducted to be secretly and wrongfully confined. 7 Lah LJ 520 : 26 PLR 733 : AIR 1925 Lah 614.

For a conviction under this section an intention to secretly confine abducted person is necessary. 92 Ind Cas 313 : 27 Cr LJ 229 : AIR 1925 Lah 614. An offence under Section 365 consists of kidnapping or abducting any person with intent to cause that person to be secretly and wrongfully confined, 109 Ind Cas 677 : 29 Cr LJ 597 : 10 AI Cr R 277. There can certainly be no offence of kidnapping if a person of age is conveyed from one part of British India to another. 137 Ind Cas 290 : 33 Cr LJ 514 : 9 OWN 243.

Accused persons took deceased forcibly along with his jeep and thereafter dead body of deceased was found in well, contradictions in statements of witnesses to prove that accused persons kidnapped deceased forcibly. No evidence to prove motive, either personal enmity or theft for killing deceased, recovery of purse, driving licence and number plates at instance of accused persons not significant. Held, accused entitled to benefit of doubt. *Bablu @ Om Prakash vs. State of Rajasthan*, 2010 (2) CrLJ 1728 (Raj).

Essence of offence under Section 365 is kidnapping. Therefore where the accused cannot be convicted under Section 363, she cannot be convicted under Section 365. 1957 Cr LJ 688.

An offence under this section is clearly made out when there is a finding that the woman in question has been forcibly dragged out of her house and was kept locked up in a room in the home belonging to the accused. AIR 1954 All 51 : 1954 Cr LJ 46 : 1953 All LJ 421. Where the case of the prosecution is that the person abducted has been murdered there is no scope for the charge under Section 364. ILR (1953) Hyd 322 : 1953 Cr LJ 1517 : AIR 1953 Hyd 249. A mere abduction as such and by itself is not an offence. 1971 Cr LJ 1221 ; *see* also 1980 All LJ 101.

Intention how proved.—Where a girl was forcibly removed from her father's house by the accused person at the instance of her husband and was taken to the house of her husband's brother-in-law so that her father should not be able to find her, the Court is entitled to come to the conclusion that she was to be secretly confined in that house, and the conviction of the accused under Section 365, IPC, is justifiable. Their intention at the time of abduction can be deduced only from what the accused subsequently did. 163 Ind Cas 301 : 37 Cr LJ 827 : 1936 A Cr C 118 : 1936 Cr C 424 : 1936 ALJ 340 : AIR 1936 All 360. No circumstance to warrant inference that the accused had one of the objects mentioned in Section 366 in view, inference that the accused abducted woman for the purpose of confining her wrongfully and secretly can be drawn. 1953 Raj LW 100 : ILR (1952) 2 Raj 548.

The intention of the abduction has to be judged from the facts and circumstances of the case including the accused did at the time of abduction. AIR 1968 All 170. Person taking part in process with criminal knowledge of kidnapping is guilty to the same extent as the first man who initiates the process of kidnapping. 1983 Cr LJ (NOC 81). The failure by the abducted person to identify the kidnapper is of no great importance if there is sufficient independent evidence to establish identity of the accused who kidnapped the person. AIR 1967 All 528 : 1967 Cr LJ 146. For evidence and proof *see* AIR 1968 All 170 : 1968 Cr LJ 584 ; 1978 Cr LJ (NOC) 115 : 1977 All Cr R 277.

2. Sentence.—Mitigating factors. AIR 1970 SC 658 : 1979 Cr LJ 741.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Magistrate of the first class.

4. Charge.—"I (*name and office of Magistrate, etc.*), hereby charge you (*name of accused*), as follows :

"That on or about the......day.........at.........you kidnapped (or abducted) one *AB* with intent to cause the said *AB* to be secretly and wrongfully confined, and thereby committed an offence punishable under Section 365 of the Indian Penal Code and within my cognizance" (or the cognizance of the Court of Session or High Court).

And I hereby direct that you be tried by the said Court on the said charge.

* * * * *

Sec. 366. Kidnapping, abducting or inducing woman to compel her marriage, *etc.*—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; "and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid".

Synopsis

1. Amendment 2236
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1. Amendment.—The words within quotations at the end of the section have been inserted by the Indian Penal Code (Amendment) Act, 1923 (20 of 1923), Section 2.

2. Scope.—In order to sustain a conviction under Section 366, IPC, it must be a woman or girl in question was either by force compelled, or by deceitful means induced, to leave the house of the guardian or the person who had the care of her on behalf of her husband. Where the woman however goes willingly and voluntarily with the accused and not as the result of force or deceit, there is no offence under the section and the accused cannot be convicted. 168 Ind Cas 833 : 1937 ALJ 547 : 38 Cr LJ 621 : 1937 ALR 417 : 1937 AWR 203 : 1937 A Cr C 39 : AIR 1937 All 353. Even a forcible abduction does not amount to an offence under this section, unless there are other ingredients, namely, the intention either that the girl should be seduced or forced to illicit intercourse or that she should be compelled to marry against her will. In cases of forcible abduction, there can seldom be direct evidence as to actual intention of the abductor and that intention must be inferred from the circumstances of each case under Section 114, Evidence Act. Human nature being what it is whenever one finds a young man abducting a girl of marriageable age, the first natural presumption must be that he has abducted her with the intention of having sexual intercourse with her forcibly, or with her consent after abduction, or after marrying her. If he has any intention other than that which is suggested by the natural consequence of the case, the burden lies upon him under Section 106 of the Evidence Act, to prove his intention.

AIR 1938 Lah 474. In a case under Section 366 to ask the jury to give a verdict upon both heads of abduction and kidnapping, is a complete misunderstanding of the law. There cannot be any such verdict under this section a verdict based upon such a direction, cannot be upheld. 45 CWN 27. Section 366 applies whether the offence is kidnapping or abduction and the only additional ingredient required is that such kidnapping or abduction is with the object of marriage or seduction. (1963) 2 Punj 678 : 1963 Cur LJ 454 : 1964 (1) Cr LJ 220 : AIR 1961 Punj 83. For essential ingredients of the offence under the section *see* AIR 1964 Punj 357 : 1964 (2) Cr LJ 207 (intention and knowledge as specified in section).

The gist of the offence of the accused person should be kidnapping or abducting a woman for the purposes mentioned in the section. (1962) 1 Cr LJ 841. Section 366 is an aggravated form of offence under Section 361. (1968) Jab LJ 143. Want of consent does not come under a special exception or proviso. The burden must be on the accused to prove consent. *Ibid* ; (1969) 71 Punj LR 688 ; AIR 1979 SC 1494 : 1979 Cr LJ 1126. (It was further necessary to find that the accused not only abducted the woman but abducted for purposes mentioned in Section 366) ; AIR 1967 Mad 409 ; AIR 1937 Cal 589 ; 1979 Cr LJ 967. For an offence under the section persuasion must be from the accused. 1960 MPLJ (Notes 14). Where according to the evidence it is clear that the girl was taken away by the appellant with the consent of the mother no offence can be made out. 1967 Cr LJ 867. There must be kidnapping or abduction. 1966 SCD 903 ; 1974 Chand LR (Cr) 553 ; 1969 Cr LJ 1310 ; 1968 Cr LJ 1390 ; AIR 1961 Bom 282 ; AIR 1960 All 479.

Accused persons took prosecutrix on point of knife from one place to another. No evidence showing that either of accused persons extended any premise or allurement to prosecutrix.

As regards charge under Sections 363 and 366 of IPC, in order to prove kidnapping the prosecution was required to prove that the appellants had taken or enticed the prosecutrix out of the keeping of her lawful guardian. The object behind Section 361 of IPC, which defines kidnapping, is to protect the minor children from being seduced for improper purposes and to protect the rights and privileges of guardians having lawful charge or custody of their minor wards. What is necessary is either taking or enticement, of the minor. Taking would include causing to go or getting into possession whereas enticement involves an idea of inducement, by igniting hopes or desire in the other. One does not entice other, unless the latter attempts to do a thing which he or she would not otherwise have done. In order to bring home conviction for kidnapping, there must be proof of the accused having done something which led to the girl going out of the keeping of her guardian. The words 'takes' and 'entices' as used in Section 361 of IPC need to be read together so as to take colour and content from each other.

In the present case, there is no evidence of either of the appellants having extended any promise or allurement to the prosecutrix. This is not the case of the prosecution that either of the appellants had promised to marry the prosecutrix or held out any other promise to her. The case of the prosecution is that the appellants had threatened the prosecutrix by putting knives on her person and being afraid of them she accompanied them to Merrut. That part of the deposition of the prosecutrix where she claimed that she had been threatened and two knives had been put on her person when she was taken from Delhi to Merrut cannot be believed and is obviously false. The truth appears to be that since the prosecutrix was previously known to the appellants, and had become friendly to one of them, she of her own abandoned the guardianship of her parents and eloped with the appellants. Though the prosecutrix has been found to be less than 16 years old, it cannot be said that she was not capable of knowing what she was doing. She was not of such an age so as to be unable to decide what was good and what was bad for her. Had the prosecutrix been about 10 months older, even the offence of rape would not have been made out against the appellants in the facts and circumstances of the case. In my view the facts and circumstances brought on record clearly show that the prosecutrix willingly accompanied the appellants and stayed with them till they were caught by the police. The prosecutrix knew and had the capacity to know the full import what she was doing. It is, therefore, difficult to say that the offence of kidnapping has been made out against the appellants in the facts and circumstances of this case.

Held, it cannot be said that accused persons took prosecutrix with them so as to force or seduce her to illicit intercourse. Offence of kidnapping has not been made out against them. *Mohd. Imran Khan & etc. vs. State*, 2010 (2) CrLJ 1756 (Delhi).

Prosecutrix was rescued by witness when accused persons forcefully took her towards village. Statement of prosecutrix inspiring confidence and corroborated by evidence of eye-witnesses. Prosecutrix on date of incident was less than 18 years of age. Plea of alibi as projected in defence is neither put to any of prosecution witnesses nor it can be proved by preponderance of probability. Held, conviction of accused persons is proper. *Chander Singh & Ors vs State of Himachal Pradesh*, 2010 (4) CriLJ 4031 (HP).

If the accused played some role at any stage by which he either solicited or persuaded the minor to abandon the legal guardianship it would be sufficient to hold such person guilty of kidnapping. The contention of the accused that he and the minor were in love for number of years and on the date of incident she voluntarily and willingly went with him with a desire to marry, is of no merit. In the instant case, the accused who was a regular visitor to the house of the complainant, took undue advantage of his friendship and persuaded the minor to abandon the guardianship of her brother with a promise of marriage which facts was sufficient to convict the accused under Section 366, IPC. *Moniram Hazarika* v. *State of Assam*, 2004(5) SCC 120 : 2004 SCC (Cri) 1545 : 2004 Cr LJ 2553 (SC) : 2004(2) Crimes 254 (SC) : AIR 2004 (SC) 2472 : 2004(3) Supreme 294.

In the instant case, the evidence on record showed that the accused had not used any force in taking the minor victim girl out of her house and that girl herself had taken money out of her house as the accused had no money of his own. Her statement showed that her father was going to betroth her to another boy against her wish. There was no evidence to show that it was the accused who took or induced her out of lawful custody of her father, the conviction of the accused under Section 363/366, IPC cannot be said to be proper. *Mahendra Murtiyan Madras* v. *State*, 2004 Cr LJ 539 (Guj) : 2004(2) All Cri LR 325 : 2004 Cri LR (SC Mah Guj) Guj 242 : 2004(2) Rec Cri R 913.

In a MP case, the prosecutrix did not raise any alarm when the accused took her alongwith her wearing apparels. She lived with the relatives of the accused without informing or complaining to the inhabitants of the house nor did she make any attempt to run away. It appeared that she left the lawful guardianship willfully and went alongwith the accused of her own accord and there was no promise or persuasion, inducement or allurement from the accused and even if her age was accepted to be below 18 years, she was at the age of discretion. It was held that the accused is not guilty of kidnapping or abduction. *Lakhanlal* v. *State*, 2004 Cr LJ 3962 (MP) : 2004(2) Ker LJ 732 : 2004(4) MPLT 423.

The victim gave three different statements about place of incident and none of them was corroborated by witnesses examined by the prosecution. There was failure on the part of prosecution to prove that victim was taken away by force or by way of deceitful means. The conduct of victim in not raising any hue and cry showed that she accompanied accused at her own and no offence under Section 366 (abduction) was made out. As far as charge of rape was concerned prosecution could not prove beyond doubt that accused had sex with victim and Section 376 become inapplicable in this regard. The trial Court judgment was set aside and accused was acquitted. *Mohan* v. *State*, 2003 Cr LJ 1991 (Raj) : 2003(1) WLC 260 (Raj).

3. Kidnaps.—A woman, marrying her minor daughter to another in the absence of her husband kidnaps the minor from the lawful guardianship of her husband. 8 PR 1878 Cr. Where two girls ran away from their houses and remained for nearly one or two days in the house of a woman who belonged to the caste *of Naiks in Kumaon*, and no report was made to the *Pradhan, held*, that the offence under this section was complete. 34 All 340 : 9 ALJ 307. A person kidnapping two girls should be awarded separate sentences, the offence of kidnapping being separate. 1 OC 4. No offence is committed when a girl is abducted from the custody of her maternal uncle with the consent of her mother. 16 Cr LJ 237 : 27 Ind Cas 909. In order to sustain a conviction under this section it must be proved that the girl was taken out of the custody of her lawful guardian. 16 WR 42. There are two ingredients of an offence under this section. First there must be kidnapping or abduction as defined in Section 361 or 362 and secondly the kidnapping or abduction must be done with the intent or knowledge or with the object that certain things will happen as specified in this section. 3 Lah LJ 574. In kidnapping, consent of the person enticed to immaterial. In abduction consent of the person removed, if freely and voluntarily given condemns it. 53 Punj LR 339 : 1953 Cr LJ 1790 : AIR 1953 Punj 258. Assuming that the girl went of her own accord to the accused, even then the offence of kidnapping is established if the girl is below sixteen. Cr, Appeal no. 15 (J), of 1952, dated 25.8.1952.

A minor may not be competent to give her consent to her taking, but a minor is certainly competent to leave the protection of his or her guardian or of his own accord. AIR 1957 Cat 589 : 1957 Cr LJ 1114. The gist of the offence under Section 366 is that the accused person should kidnap or abduct a woman for the purposes mentioned in Section 366 by compulsion. 63 Punj LR 625 : 1961 All Cr R 317 : 1962 (1) Cr LJ 841. It is incumbent before persons who deal with or choose to entice young girl or who try to seduce them to be sure of their age. A person dealing with a girl of border line age always does at his own peril and suffers the consequence if the girl turns out to be below the prescribed age limit, 62 Punj LR 123. An accused cannot be convicted under this section where the girl left the protection of her guardian on her own accord and lived with the accused. 13 ALJ 848 : 16 Cr LJ 663. A person kidnapping a girl of fifteen years of age out of British India with her consent, for the purpose of seducing her to illicit intercourse is not guilty of an offence under Section 366, IPC. 42 Bom 391 : 20 Bom LR 372 : 45 Ind Cas 506 : 19 Cr LJ 602. It is not necessary for a conviction under

Section 366, IPC, that the accused should know definitely who the guardian of the minor girl is whom he finds wandering about. 9 OALR 1102. In case marriage "will" means will of girl and not of guardian. AIR 1932 Cal 442 : 32 Cr LJ 512 : 36 CWN 49.

Where the accused is charged for both kidnapping and abduction, separate charges are necessary. 144 Ind Cas 93 : 34 Cr LJ 682 : AIR 1933 Cal 563. Joint trial of accused charged with abduction alone and accused charged with both abduction and kidnapping is irregular. 144 Ind Cas 93 : 34 Cr LJ 682 : 1933 Cr LJ 940 : AIR 1933 Cal 563. In charges of kidnapping and wrongful confinement, that was joint trial in the first place and separate trials were held subsequently. AIR 1932 Lah 203. Prosecution must prove age of girl. AIR 1931 Lah 401 : 32 Cr LJ 1041 ; *see* also AIR 1934 Sind 119 : 28 SLR 285 : 1934 Cr C 960. Where the Magistrate finds in a case under Section 383, IPC, that there was *prima facie* sufficient evidence that the girl was enticed away ; the Magistrate should examine and decide whether an offence under Section 366 or some other cognate offence against a female over 16 was committed and should not remain content with finding that the girl was not proved to be under Section 16. AIR 1924 Lah 718. To sustain a conviction under this section there must be a finding as to the use of force or deceitful means. 88 Ind Cas 463 : 26 Cr LJ 1151 : AIR 1925 Oudh 454.

Where it was not unlikely that the girl herself eloped with some of the accused and on missing her, her parents got up the story to recover her and to bring her paramour into trouble. *Held*, that a conviction under Section 366 was improper. 6 Lah LJ 622 : AIR 1925 Lah 274. The mother of a Mahommedan minor girl handed her to the accused for marriage and the accused married her. The guardian for marriage of the girl did not consent to the marriage. *Held*, that the accused was punishable under Section 366, IPC. 84 Ind Cas 434 : 26 Cr LJ 290 : AIR 1925 Cal 578. Where an abduction is not completed, the accused may be convicted of an offence of an abetment of abduction. 86 Ind Cas 1007 : 26 PLR 119 : 26 Cr LJ 943 : AIR 1925 Lah 512. In the case of an offence under Section 366, IPC, the intention is a matter of inference from the circumstance of the case and the subsequent conduct of the accused after the abduction has taken place. 110 Ind Cas 99 : 10 AI Cr R 429. In the absence of any element of forcing or seducing for the purpose of illicit intercourse, no offence under Section 366, Penal Code, can be regarded as possible. 27 LW 683 : 109 Ind Cas 907 : 29 Cr LJ 635 : AIR 1928 Mad 585 : 54 MLJ 456.

The words "seduced to illicit intercourse" do not refer to first act of seduction or surrender of chastity but they refer also to subsequent cohabitation as well. The object of the section is to punish not the seduction by itself but the kidnapping of the kidnapped. 1929 Cr C 379 : AIR 1929 Pat 651 ; *see* also AIR 1935 Bom 189 ; AIR 1930 Cal 209 : 50 LLJ 593 : 1930 Cr C 209 : 125 Ind Cas 656 ; AIR 1933 Cal 718 ; but *see* AIR 1932 All 409 : 1932 ALJ 488 : 54 All 756 : 33 Cr LJ 669 : 138 Ind Cas 609. Act of seduction must be subsequent to kidnapping. AIR 1932 All 409. Proof of kidnapping or abduction from lawful guardianships is necessary. 34 Cr LJ 100 : AIR 1932 All 580 : 1932 ALJ 776 : 141 Ind Cas 127 ; *see* also AIR 1933 Oudh 62 : 34 Cr LJ 377 : 1933 Cr C 102 : 9 OWN 1049 : 142 Ind Cas 813. Where a grown up girl of 18 submits herself to be carried away and 'raped' the presumption is of consent. AIR 1931 Lah 401 : 1931 Cr C 641 : 32 PLR 98 : 133 Ind Cas 560. For a conviction under this section it is not necessary that the accused should know definitely who the guardian of the minor girl is. 12 Mys LJ 133.

In a charge under this section consent of the minor girl of his temporary guardian is of no avail. *Ibid.* Allowing a child to be in the custody of a servant or friend for a limited purpose or time does not determine the guardian's right to legal possession. Hence an offence under this section is committed when the minor is kidnapped with the consent of the servant or friend. 68 Ind Cas 620. Paternal relative of a minor commit a technical offence under this section when they kidnap a minor girl from the custody of mother with the object of marrying her. 5 Lah LJ 377. To constitute an offence under this section the accused need not know who is the guardian of the minor. 81 Ind Cas 529 : 25 Cr LJ 1913. A person cannot be convicted without a fresh charge for abduction where the original charge was for kidnapping. 31 CWN 171. Under this section, object of the abduction must be an enforcement of compulsion or seduction to illicit intercourse. The section is inapplicable to a case where the intention of the accused is to bring such influence to bear on the woman or her family that a certain case which is pending against him will be withdrawn or seriously prejudiced. 155 Ind Cas 662 : 36 Cr LJ 826 : 1935 ALJ 670 : 1935 Cr C 664 : AIR 1935 All 665. In case of absence of force or deceit, there is no offence under Section 366. AIR 1953 Punj 258. When a minor girl is kidnapped and later on it is found that the accused had illicit intercourse with her, the accused is liable to be punished u./Sec. 366. AIR 1957 Assam 39 : 1957 Cr LJ 353.

Attempt to rape—Outraging modesty of women. Action of lifting victim, putting her on bed, removing her underwear and lifting her frock did outrage the modesty of victim. There was no attempt to rape as there was no attempt to penetrate. Held, offence under S. 354 made out. *Tika Ram Chettri vs State of Sikkim,* 2010 (4) CriLJ 4025 (Sikkim).

Where there was quashing of criminal proceedings. Such proceeding to be quashed to prevent abuse of process of court and in end of justice under inherent powers of High Court and victim girl not coming out to give evidence implicating accused persons in offence alleged against them. In such case it was held that inherent powers can be exercised to quash proceedings. *Kamadev Naik* v. *State of Orissa,* (1994) 3 Crimes 248 (Ori).

Women being lured away in the name of job to prostitution—Act offence under Section 366, IPC as well as under Section 5(c) of Suppression of Immoral Traffic in Women & Girls Act, 1956. Plea of prosecution being improper under Section 366, IPC hence, held not tenable. *Ramu* v. *State rep by inspector of Police.* 1995 Cr LJ 2525 (Mad).

Where wife alleged that her husband was forcibly taken by police. ' Husband not complaining that he was illegally arrested or abducted. It was finally held that proceedings for offence against police not maintainable. *Ramakanta Panda* v. *Smt. Satyabhama Panda,* 1995 Cr LJ 2409 (Ori).

Where the girl was consenting party and she stayed two days with accused and leaded sexual intercourse for determination of her age—Ossification test was held showing 14 to 16 years. Margin of three years given—No case made out under Sections 363 and 376, IPC. *Balasaheb* v. *State of Maharashtra,* 1994 Cri LJ 3044 (Bom).

When evidence of prosecutrix aged between 15-1/2 to 16-1/2 years revealed that she left her house of her own and without any inducement from appellant she was a consenting party and conviction not sustainable. *Madan Lal* v. *State of Punjab.* 1997 (1) Crimes 561 (P & H).

Where from the evidence on record it was established that the victim-girl was having love affair with the accused and she had gone with him with her sweet will and that she admitted that while she was going on the motor-cycle with the accused she did not raise alarm though the place wherefrom she was alleged to have been abducted was not a lonely place, no case under Section 366, IPC was made out, she being aged above 18 years. *Manoj Kumar Hunda* v. *State*, 2004 Cr LJ 3431 (Jhar) : AIR 2004 Jhar HCR 1923 : 2004(2) Cur Cri R 273 : 2004(1) JCJR 226.

4. Ingredients.—In the case of kidnapping and rape evidence in regard to the age of victim adduced by her illiterate relations coupled with the opinion of doctor the victim was rightly held to be below the age of 16 years on the date of occurrence. 1987 Cri LJ 224 (Del).

In the case of kidnapping and rape it was observed that victim was not consenting party to accompany the accused as well as to the sexual intercourse. Had she accompanied the accused of her own, it could not be expected that she should suddenly turn round against the victim as soon as she was recovered. 1987 Cri LJ 224 (Del).

Accused committed rape with the prosecutrix one after another. Accused were convicted under Sections 366 and 376. It was observed that in spite of statements of girl, her father and the medical report the police was not satisfied as to the truth of allegations against accused. Police even did not produce examination report of chemical examiner. *Held*, that in the circumstances no importance to be given to the fact that police was not satisfied about the genuineness of the prosecution case. 1987 Cri LJ 971 (SC).

5. Seduce.—"Seduce" in this section, means enticing or tempting. It is used in the general sense and not in the limited sense of committing the first act of illicit intercourse. Section 336, would therefore apply to person who has had several intercourses with the kidnapped girl even before the alleged kidnapping takes place, and such person can be charged under this section. It is the illicit nature of the intercourse for which the kidnapping or abduction takes place that constitutes the aggravation of the offence and not the priority in point of time of such intercourse. 59 Bom 652 : 158 Ind Cas 1048 : 36 Cr LJ 1509 : 37 Bom LR 176 : 1935 Cr C 490 : AIR 1935 Bom 189 ; *see* also 19 NLJ 49 : AIR 1935 Nag 34. Etymologically the word "seduction" is derived from the two Latin words '*se*' which means away and '*duced*' which means to lead away or draw away. The term 'seduction' therefore implies that this woman is led away or is induced to stray away from the path of rectitude. But when the deviation on the part of the girl is the result of the promptings of her own inclination, and she herself permits or encourages improper sexual relations as opportunity comes her way without the aid of any artifice or vile on the part of the man, it is no seduction. AIR 1958 Punj 323 : ILR 1957 Punj 2003 : 1958 Cr LJ 1097. It is 'seduction' when a man is induced to consent to unlawful sexual intercourse by enticement and persuasion overcoming her reluctance and scruples. *Ibid* ; *see* also AIR 1955 Andh 59 : 1955 Cr C 581 : ILR 1955 Andh 260. The words seduced to illicit intercourse "do not refer to the first act of seduced only when she lured into surrendering her chasties. *Ibid*. The expression "seduced to illicit intercourse" means "induced to surrender or abandon a condition of purity from unlawful sexual intercourse" 38 CWN 71 ; *see* also AIR 1934 Sind 164 : 1934 Cr C 1266 ; AIR 1934 Lah 227 : 1934 Cr C 458 ; AIR 1955 Cal 100 : 1955 Cr LJ 347. (the direction to the Jury that if the accused found not guilty under Section 366, may be found guilty under Section 363, was a misdirection). Illicit intercourse does not cease to be one merely because it is repeated. If the intention is kidnap the girl in order to seduce her to illicit intercourse the fact of previous intimacy with her is wholly immaterial. 27 ALJ 114 : 113 Ind Cas 765 : 30 Cr LJ 218 : AIR 1929 All 32; but *see* AIR 1934 Pat 170 : 15 PLT 229 : 35 Cr LJ 814. There is no warrant for holding that the forcing or seducing to illicit intercourse contemplated by Section 366, IPC, has reference only to the first act of unchasity ; an accused forcing or seducing a woman to illicit intercourse cannot claim immunity from conviction on the mere ground that the woman had already sexual intercourse with persons other than her husband. Where it is shown that certain persons other than her husband had sexual intercourse with a woman, but ultimately she is left stranded at a place by certain persons and then the accused come and take her to their place with a view to profit from her sex and her youth by conveying her to some man other than her original seducer the latter persons who take her are guilty under Section 366, 168 Ind Cas 833 : 1937 ALJ 547 : 38 Cr LJ 621 : 1937 A Cr C 39 : AIR 1937 All 353. A person can be convicted of seducing a girl under Section 366, in spite of the fact that he had previous illicit connection with the girl. Seduction does not mean the first act of illicit intercourse. AIR 1952 Sau 19 : 4 Sau LR 151.

6. Seduction.—Seduction implies surrender of her body by a woman who is reluctant or unwilling to submit herself to importunity, whether such surrender is for the first time or preceded by intercourse for money on earlier occasions. AIR 1962 SC 1908. It would then be impossible that a person who instigates another to assist a woman following the profession of a prostitute abets her to do an act with intent that she may or with knowledge that she will be seduced to illicit intercourse. *Ibid.* If seduction was complete before abduction, renewed illicit intercourse cannot be held to be seduction to illicit intercourse, AIR 1955 Cal 100. If kidnapping is done with the object of seducing her to illicit intercourse it will be an offence under the section. 1968 SCD 438. For the meaning of the word 'seduction'. *See* AIR 1979 SC 1276 : 1979 Cr LJ 867 (no seduction when she herself permits or encourages improper sexual relation as opportunity comes her way without the aid of any artifice or vile on the part of the man). Submission of her body under the influence of fear or terror is no consent. 1977 Cr LJ 556 ; 1968 Cr LJ 690.

7. Illicit Intercourse.—A charge under this section of abducting a woman with the intention of forcing or seducing her to illicit intercourse, can be sustained only by evidence to show the intent or to raise the presumption that illicit intercourse was likely from the abduction. 23 PR 1868.

The words "illicit intercourse" mean the sexual intercourse between a man and woman who are not husband and wife. The woman need not be a married one. 4 ALJ 482. Under the Buddhist law a man cannot marry a girl under sixteen years of age without her guardian's consent and hence an intercourse between the man and such girl is "illicit intercourse" LBR (1872-1892), 202. When it is proved that the accused took two minor girls from lawful guardianship with the object of seducing them to illicit intercourse, he is guilty of an offence under this section and the consent of the girl is of no avail. 49 Cal 906. This section applies to the case of a married woman. 45 Cal 641 : 24 CWN 695. The husband forcibly carrying his wife from her father's home and to live with him as his wife can not be convicted under Section 366, AIR 1960 MP 24 : 1959 Jab LJ 570 : 1960 Cr LJ 83.

If a girl below the age of 18 voluntarily abandons the lawful guardianship of her parents or husband and goes, to the accused, the accused does not commit the offence under Section 366. 1973 Mad LJ 685.

Prosecutrix aged 5 years only eye-witness her evidence not convincing and injury as alleged was possible if she had fallen on sharp pointed iron bar, her evidence rejected and accused acquitted. *State of Maharashtra* v. *Suresh Bhimaji Thorat*, 1997 Cri LJ 1192 (Bom).

8. Intent of knowledge.—For a conviction under this section a special intent or knowledge is necessary. 53 PLR 1916 ; 25 Cr LJ 867 : 99 Ind Cas 121 ; 27 Cr LJ 456 ; 25 Ind Cas 297 ; AIR 1933 Rang 98 (FB) : 34 Cr LJ 699 ; AIR 1934 Pesh 99 ; AIR 1934 Lah 237 : 35 Cr LJ 1386 ; 67 Ind Cas 731 ; 72 Ind Cas 538 ; 81 Ind Cas 529 ; 102 Ind Cas 552. Intention can be inferred from conduct of the accused and circumstances of case. AIR 1930 Lah 52 : 31 Cr LJ 529 ; *see* also AIR 1930 Lah 163 ; 29 Cr LJ 643 ; AIR 1933 Oudh 45 : 39 Cr LJ 220 ; AIR 1933 Rang 98 (FB) ; AIR 1951 Assam 95 : 52 Cr LJ 698. Where a marriage between the kidnapped girl and the accused is not possible under any law, it must be presumed that he must have contemplated illicit intercourse and it cannot be suggested that he might have contemplated a lawful marriage. AIR 1938 Cal 551 : 42 CWN 896. Where it is clear from, the evidence that the accused's intention in forcibly carrying a girl of 17 was not only to persuade the unwilling girl to change her mind and to accept him as her groom, but also to marry her, her refusal notwithstanding, and that he kept her confined from 10.30 A.M. to 5 P.M. while the girl was standing and crying and refused to stay and marry him, there can be no other conclusion than that his intention was to compel her to marry him or, if opportunity permitted, to marry her forcibly. Even repeated requests to one who knew her limitations, namely that she was completely within the grip of the requester (accused) when she was imprisoned and was given no food and drink would certainly amount to forcing her to consent ; and even if consent were to be given in such circumstances, that would never amount to consent in law. That is nothing less than "force" in law and it must therefore, be held that the requisite intention was present and that an offence under Section 366, IPC has been committed. ILR 1950 Cut 185 : AIR 1951 Ori 142. A kidnapped minor girl's consent to her marriage with the accused is no consent at all even for the purpose of Section 366. AIR 1951 Mad 900 : 52 Cr LJ 1115 : 6 DLR (Mad) 286 : 5 A J Cr C D 847 : (1951) 1 MLJ 570. In case of minor girl of marriageable age being abducted, intention of sexual intercourse can be presumed. 1962 MPLJ (Notes) 45 ; *see* also 1961 Jab LJ 870 : 1961 MPC 649 ; AIR 1954 Madh B 97 : Madh BLR 1954 (Cr) 28.

The intention to abduct is to be gathered from the conduct. 1973 Orissa JD 175 ; *see* also 1978 Cr LJ 1494 (the ingredients of the offence under Section 386 are proved along with the intention to marry against her will, a charge under Section 368 IPC, is established) ; The essential ingredient of an offence under this section is at the time of committing the offence the accused intended or knew that it was likely that the abducted or kidnapped woman might or would be compelled to marry a person against her will or that she might or would be forced or seduced to illicit intercourse. 1980 Mad LJ 56 : 1980 WLN (UC) 268 ; ILR (1968) 18 Raj 635 ; 1961 Jab LJ 870 ; AIR 1964 Punj 357 : 1964 (2) Cr LJ 207.

The accused and his father tried to drag a girl to a taxi. The accused died while his appeal was pending. Two independent witnesses had nowhere said that the father of the deceased accused had got down from the taxi or was present at sites or abetted in any manner to kidnap her—*Held*, the case is not proved beyond reasonable doubt the accused was given the benefit of doubt. (1986) 2 Crimes 138.

9. Husband and minor wife.—No offence under this section is committed, if the husband takes away his minor wife from the custody of her father, even where the girl has been put in the custody of her father by Civil Court. AIR 1943 Pat 109 : 43 Cr LJ 918 : 203 IC 163 ; but *see* AIR 1943 Pat 212 : 44 Cr LJ 590.

10. Age of the girl.—Age of the girl should be proved by medical witness. He should be asked to prove the age of the girl with utmost precision. AIR 1946 Cal 143 : 47 Cr LJ 325. In a criminal trial the accused must get the benefit of doubt and there can be no conviction under Section 366, Penal Code, unless it can be clearly and unequivocally stated that the age of the girl was below 16 years. AIR 1950 Cal 406. Positive evidence furnished by the Birth Register or the members of the family with regard to age will have preference over the opinion evidence of the doctor. (1964) 6 Orissa JD 1 : ILR 1963 Cut 997 : 1964 (2) Cr LJ 102 ; but *see* 1964 Cur LJ 204 (Punj) ; AIR 1957 Cal 589 : 1957 Cr LJ 1114 (test of ossification) : 1959 Raj LW 269 (test of osiffication).

The estimation of age from the teeth by noting the number and position of teeth erupted along with X-Ray examination, with some amount of certainty is possible upto 17 to 20 years and beyond that it is merely a guess-work. Third molars teeth which are six in number erupt between the age group of 17 to 25 years.

Where four "third molars" teeth have not so far erupted in case of kidnapped girl on the date of her examination and the fusion of the epiphysis of her iliac crest has not yet started, the age of the kidnapped girl is under 18 years on the date of occurrence. Her removal on false pretext by the accused from lawful guardianship of the informant amounts to her kidnapping. *Md. Mahfooj Ansari, v. The State of Bihar (now Jharkhand)*, 2005 CriLJ 1771 (Jhar).

If the Court on the evidence hesitates to hold the girl was below 16 (prior to the amendment of Section 361 fixing the outside age limit at 18) on that date the accused cannot be convicted under Section 366 although the Court holds there is alternative evidence that the girl was below 18 years. AIR 1955 SC 574 : 1956 SCC 32 : 1955 Cr LJ 1296.

After hearing the learned Counsel for the parties and giving my thoughtful consideration to their respective arguments and also perusing the record. Court has found that document is not based upon material to prove date of birth of both the girls because admittedly, the dates of birth were not registered/recorded by the father of the girls with the Chowkidar of the village in a register of Births and Deaths or in the office of C.M.O. of the area. It is also not recorded from the original admission register, rather date of birth has been obtained from the certificate of 8th Class. Moreover, the learned Counsel for the State could not point out any other error in the judgment of the trial Court, which has formed an opinion in favour of the accused/respondents on the basis of evidence. It is well settled by the Supreme Court that if two views are possible in a case of acquittal, then the view which has been taken in favour of the accused/respondents should be maintained. *State of Haryana vs. Ramesh Kumar*, 2010 (2) CrLJ 1812 (P & H).

The question of the age of the prosecution in cases under Sections 366 and 370 is always of importance. AIR 1970 SC 574 for evidentiary value of age given in school certificate. AIR 1970 Punj 450 : 1970 Cr LJ 1 ; AIR 1970 Guj 175 : 1970 Cr LJ 1348.

According to medical opinion age may be 18 or 19—It was held that difference may be of one year and prosecutrix was a major—No offence under Sections 363 and 366, IPC made out. *Natthal* v. *State of U.P.*, 1995 Cr R 15 (All).

The authority of the apex Court in case of *Jaya mala* v. *Home Secretary Government of J & K* AIR 1982 SC 1297 (1982 Cri LJ 1777) may be referred to here. In it the age of the detenu was in question. According to the opinion of the expert, the age of the detenu was around 17 years. The Apex Court observed:-

"However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side".

In *Shanmugham* v. *State* 1984 Cri LJ 1081 a Division Bench of Madras High Court has observed;

"The fusion of bones occures for different persons at different times and the variation is due to the multiplicity of causes, such as the health conditions of the family in which the person was born, the climatic conditions in which he is living, the dietary habits he is accustomed to, the type of life he is leading *etc.* Consequently, the determination of age on the basis fo radiological examination can only be an approximate factor and it cannot be taken as a decisive and incontrovertible feature. Courts have taken judicial notice of this fact and have always held that the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person, but the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error."

Then there was an authority of the Bombay High Court in *Balasaheb* v. *State of Maharashtra*, 1994 Cri LJ 3044 in which the opinion given in Modi's medical Jurisprudence and Toxicology, 22nd Edition was taken judicial notice of that the eror in case of age based on ossification test may be three years. Modi in his 22nd Edition at page 53 quoted from Dr. H.S Mehta's Medical Law and Ethics in India, 1963 who was of the view that of fairly close estimate within a margin of two years may be made, mainly on the progress of the epiphysial union (ossification test).

In Jhala Raju's Medical Jurisprudence, Sixth Edition it was said at page 197.

"Appearance of centres of ossification and fusion of epiphyses are more reliable factors, although opinion based on these factors is also liable to an error of about 2 yeas *i.e.* one year on either side."

There can be considerable variation regarding the ages at which ossification in the epiphyses appear and at which the epiphyses fuse with the respective diaphyses, Brush observes thus; "From puberty until the consolidation of the skeleton (at 22 to 23 or at the most 25 years) a fairly close estimate within a range of 2 or 3 years may still be made, mainly on the progress of the union of the epiphyses."

Opinion of age based on ossification is liable to an error of 2 years either way. If the opinion is to be exact it should be expressed in the form of upper and lower limits. Thus, if a doctor gives an opinion based on ossification that in his opinion the age of Q is 15 years, that opinion is liable to an error of 2 years up or down. The exact age will be between 13 and 17. *See Shakeel* v. *State of U.P.* 2000 Cri LJ 153 (All).

Though the doctor opined that the age of the prosecutrix was between 15 to 16 years, in his report he clearly mentioned that the age of the victim was below 18 years and admitted that in determination of age on the basis of ossification test variation of 2 years or more was possible, and according to radiologist report the age of the victim girl was above 18 years, it could not be held, that the victim girl was under the age of 18 years on the date of incident. *Lakhanlal* v. *State*, 2004 Cr LJ 3962 (MP) : 2004(2) Ker LJ 732 : 2004(4) MPLJ 423.

11. Charge of rape.—A charge of rape against the accused cannot be proved by the uncorroborated evidence of the prosecutrix. 17 PWR 1916 Cr ; 54 PLR 1916 ; 73 Ind Cas 513 : AIR 1928 Lah 238 ; AIR 1924 Lah 669 : 75 Ind Cas 986 ; but *see* AIR 1923 Lah 332 ; AIR 1923 Lah 91 ; AIR 1938 Lah 474.

12. Proof of Outraging Modesty.—The accused appellant Shoukat has been convicted for the offense under Section 366 and 354 IPC. Had there been a simple case of conviction for the offence under Section 354 IPC, the request of the learned counsel for the accused appellant for sentencing him for the period already undergone by him would have been considered, but the case against the accused appellant Shoukat for the offense under Section 366 IPC is well proved as he by deceitful means took the prosecutrix PW 1 Rampyari, who was Nurse (ANM) in the Primary Health Centre, Basni, from her house and then, he outraged her modesty. *Shoukat and Another v. State of Rajasthan*, 2002 Cri LJ 364 (Raj.).

13. Proof of Abduction.—Where the girl was between 18 and 19 years of age and stated that she left the house of her own - Moreover she raised no objection while going from place to place.

There is no doubt that Lalita accompanied Ranjeet Lohra from Ranchi to Calcutta and she never made any objection or raised any cry which would apparently go to show that she had left her house with her own consent and she was also major at the relevant time. Thus it was found that the offence under Section 366 of the Indian Penal Code is not made out in the instant case. There is also no evidence to show that Lalita had even been induced to compel her marriage, rather she flatly denied about performing the marriage in Kalimandir at Calcutta. Thus considering the above facts and circumstances, it is evident that the prosecution has totally failed to establish the charge under Section 366 of the Indian Penal Code against the appellant and, therefore, he is acquitted thereunder. *Ranjeet Lohra v. The State of Bihar*, 2002 Cri LJ 329 (Jhar) : 2002(1) ALD (CRL) 383 : 2002(4) All Cri Lr 651 : 2002(1) Andh LT (Cri) AP 352 : 2002(2) Crimes 442.

14. Abduction and Rape.—When element of consent is there, the findings of the learned Addl. Sessions Judge that prosecutrix P.W. 13 Mst. Naru was forcibly abducted or kidnapped by the accused appellants Mohan and Udailal cannot be sustained, especially when the prosecutrix P.W. 13 Mst. Naru was above the age of 18 years on the date of occurrence. The fact that these two accused-appellants used to visit her house also goes to show that she was familiar with them and that is why, she went with them in night to Jogamaya Mata temple in the jeep. The fact that she did not complain to anybody on the way up to Jogamaya Mata temple, also goes to show that she was a consenting party. From the evidence on record, it does not appear that prosecutrix P.W.13 Mst. Naru was in any manner forced or compelled to go with the accused appellants and on the contrary, it appears that she was a consenting party and all the activities right from the very beginning were going on with her consent. *Mohan and Another v. State of Rajasthan.* 2002 Cri LJ 3438 Raj. H.C.

15. Not a continuing offence.—The offence of kidnapping is not a continuing offence. When it is once complete, abetment cannot be proved against persons who have taken a subsequent part in the proceedings. 75 Ind Cas 297 ; 64 Ind Cas 842 : 23 Cr LJ 58 : 24 OC 329 ; AIR 1931 Lah 53 : 1931 Cr C 117 ; AIR 1951 Raj 33 : 52 Cr LJ 217. offence of kidnapping from lawful guardianship is not continuing offence but the offence under Section 366 is a continuing offence. AIR 1931 All 55 : 1930 ALJ 1485. Abduction is a continuing offence. Each fresh removal constitutes an offence. AIR 1925 Oudh 328 : 12 OLJ 27 : 26 Cr LJ 695 : 86 Ind Cas 71 : *see* also AIR 1924 Cal 389 : 50 Cal 1004 ; 25 Cr LJ 1082 : 81 Ind Cas 906 ; AIR 1931 All 55 : 1930 ALJ 1485.

16. Separate offences.—Convictions under this section and Section 363 are not maintainable. 93 Ind Cas 248 : 27 Cr LJ 456. Separate sentences can be passed under Section 376 and this section. 75 Ind Cas 77 ; 99 Ind Cas 344. Separate sentences are not maintainable for abduction for actual rape and abduction with intent to rape, 92 Ind Cas 850 : AIR 1926 Lah 212 : 27 Cr LJ 288. Kidnapping and abduction are distinct offences. 31 CWN 940 : 45 Cr LJ 561 : 28 Cr LJ 805 : 104 Ind Cas 23 : AIR 1927 Cal 644 ; 1953 Cr LJ 1356 : AIR 1953 J & K 21, Alternative charges of kidnapping and abduction should not be framed in one charge. Separate charges in the alternative should be framed for these offences AIR 1946 Cal 493 : 47 Cr LJ 325.

17. Procedure—Duty of Judge to specifically question jury.—In trying a case under this section, it is the duty of Judges with jury to adopt in part the system which is prevalent in England, and that is to put a specific question to the jury as to the conclusion they have come to in relation to the age of the girl whose maltreatment has been the subject of the charge. The Jury, unless it is specifically put to them, never really understand what their duty is under Section 366. AIR 1936 Cal 675 : 1936 Cr C 932.

18. Cases.—Under the British Law, a man cannot contract a valid marriage with a minor without her parent's consent, and therefore, sexual intercourse without such consent is illicit intercourse within the meaning of Section 365, IPC. UBR (1897-1901), Vol. I, 328. When a man kidnaps a minor girl from lawful guardianship and therefore co-habits with her without marriage, he has, subsequent to the kidnapping, seduced her to illicit intercourse and he has kidnapped in order that she may be seduced to illicit intercourse and he has committed an offence under Section 366 Penal Code, quite independently of any intention or consent on the part of the minor girl. 1 UBR (1902-1903), Penal Code, 15. Carrying off a woman by force is not an offence under Section 366, Penal Code, if there is not evident that the intention was to marry her against her will or to enforce her to illicit intercourse or that it was known to be likely that anything of the sort would result. 12 PWR 911 Cr : 12 Cr LJ 393 : 11 Ind Cas 577 ; *see* also 12 ALJ 265 : 15 Cr LJ 255. Removal of a minor Hindu girl by paternal guardian from the guardianship of a maternal relation for purposes of marriage is an offence under the section. Rat Un Cr C 820. Where a woman above eighteen years of age goes with the accused willingly and there is not evidence of force and deceit an offence under this section has not been committed. 160 Ind Cas 161 : 1936 Cr C 141 : AIR 1936 Pat 103 : 8 RP 352. Where there is no taking out of lawful guardianship no offence under this section has been committed. 15 Cr LJ 630 : 25 Ind Cas 638. The mere taking of a girl to an immigration recruiter is not necessarily the taking of the girl to his house with a knowledge that it was likely that she would be forced or seduced to illicit intercourse. 12 ALJ 91 : 15 Cr LJ 154 : 22 Ind Cas 730. Section 366 of the Penal Code is inapplicable where a girl at the time of kidnapping from lawful guardianship intends to co-habit on her own free will with the kidnapper ; as no intention to seduce to illicit intercourse can be presumed under the circumstances. UBR 1905, Penal Code 17 : 2 Cr LJ 476. The act of taking is completed as soon as the minor is actually taken out of the custody of his or her guardian. 26 All 196 : AWN 1903, 233 : 1 Cr LJ 561. The substantial offence under Section 366 is abduction or kidnapping and not seduction in the sense of loss of chasity for the first time. 1930 MWN 905 : 129 Ind Cas 463 : AIR 1930 Mad 980. A case under this section does not apply to the case of a girl over 12 and under 16 years of age who goes with a lover of her own free will, for the purpose of co-habitation. 1 LBR 297 (FB). The offence of kidnapping is not a continuing offence, but is complete directly when the minor has been taken from the keeping of lawful guardianship. AWN 1883, 67 ; AWN 1883, 164. Marriage is presumed in case of continual sexual intercourse. AIR 1934 Sind 119 : 1934 Cr C 960 : 28 SLR 235. An offence under this section is commited by removal of minor daughter from father's custody by mother and accused to have girl married against her wish. AIR 1934 Oudh 89 : 11 OWN 30 : 147 Ind Cas 670 : 35 Cr LJ 469. In case of kidnapping from lawful guardianship of husband prosecution must prove marriage between woman and alleged husband, AIR 1935 All 566 : 36 Cr LJ 1031 : 156 Ind Cas 914.

Section 366 is only aggravated form of the offence created by Section 363 and where the girl kidnapped from lawful guardianship is under 16 years, the intention of the accused in kidnapping her is the material matter and not the consent or willingness or otherwise of the kidnapped girl. 20 SLR 74 : 93 Ind Cas 248 : 27 Cr LJ 456 : AIR 1929 Sind 151 ; *see* also 95 Ind Cas 931 : 27 Cr LJ 851 : AIR 1926 Lah 547. Under the Hindu law, the eldest brother of a girl is the person who has the right to arrange for her marriage if the father is not alive. His right is superior to that of a mother. He cannot therefore be convicted under this section for getting his sister married without the mother's consent, merely because the girl afterwards says that she was not a consenting party. 158 Ind Cas 1047 : 36 Cr LJ 1498 : 1935 Cr C 1137 : AIR 1935 All 920. A motor-lorry was engaged for the purpose of abducting a girl. The driver of the lorry was ignorant of the criminal purpose as the lorry had been engaged through a contractor. He did not take any part in the crime in its initial stages but became *particeps criminis* after the girl, who was screaming, was brought to the lorry. He however continued to do his part of the work. It has been held, in such a case, that his sentence should be reduced from one year to six months. 161 Ind Cas 313 : 37 Cr LJ 430 : 38 PLR 323 : 1936 Cr C 2 : AIR 1936 Lah 15. Where the accused are charged under Section 366 and section 376, it is open to the jury to convict the accused under Section 366 and acquit them under the main charge under Section 376 and there is inconsistency in such a finding. Where a man has illicit intercourse with an adult with her consent after abducting her, it is not rape under the law. In such a case, the accused will be held guilty under Section 366 but not under Section 376. AIR 1938 Cal 460. Where a married girl of 14 years of age was married by the accused to another person on taking money from him as bride price, girl's mother being a consenting party, an offence under this section as well as under Section 420 has been committed. AIR

1943 Pat 212 : 44 Cr LJ 590. There is no necessary inconsistency in jury's acquitting the accused of the main charge of rape under Section 376 and convicting of abduction under Section 366. AIR 1938 Cal 460 : 39 Cr LJ 674. Conviction under this section can only be challenged on the ground of misdirection in the charge to the jury. 42 Cr LJ 154 : ILR 1941 Nag 157. In order to prove the charge of kidnapping it is incumbent on the prosecution to prove that the person kidnapped was under 16 years of age. AIR 1939 All 708 : 41 Cr LJ 142. The verdict of the jury as regards the age of the kidnapped girl cannot be questioned where they arrive at the verdict after considering the evidence of the father of the kidnapped girl and the doctor's evidence as her age to the effect that she was under 16 years, although it appears from the evidence of the girl that she was above 16 years of age. AIR 1941 Cal 315 : 42 Cr LJ 649. In order to convict an accused under this section it must be proved that the accused knew that the girl kidnapped is below 16 years of age. 43 CWN 196.

Separate sentences cannot be awarded for abducting a woman with intent to rape and for actually committing rape on her. 92 Ind Cas 850 : 27 Cr LJ 338 : AIR 1926 Lah 212. An accused cannot be convicted under Sections 366, 376 and 377 only on the strength of the uncorroborated statement of the girl abducted. 9 Lah LJ 111 : 28 PLR 235. Separate sentences under Sections 366 and 376 can be passed as they do not form part of the same transaction. 99 Ind Cas 344 : 28 Cr LJ 136 : 107 Ind Cas 388 : 29 Cr LJ 248 ; AIR 1927 Lah 88 ; 109 Ind Cas 213 : 29 Cr LJ 485. Kidnapping is an entirely different offence from abduction and where the Court finds the accused guilty under Section 366, IPC, it is necessary to state the definite offence and where the accused is charged of both, separate charges should be framed. 45 CLJ 561 : 31 CWN 940 : 104 Ind Cas 245 : 28 Cr LJ 805 : AIR 1927 Cal 644 ; *see* also 31 CWN 171 : 28 Cr LJ 201. If the effect of the inducement which is the cause of abduction continues till the time of the illicit intercourse, the girl is seduced to illicit intercourse. 101 Ind Cas 189 : 28 Cr LJ 413 : AIR 1927 Lah 320. The fact that *Rakshasa* form is in vogue among the *gondas* and the subsequent consent by the girl for the marriage cannot prevent the previous act of taking away the girl by force, having sexual intercourse with her, and renewal of her bracelets for preventing the girl, going away from constituting the offences of wrongful confinement and robbery when they are committed and it does not even reduce their culpability but under these circumstances there is no necessity for a heavy sentence. 103 Ind Cas 195 : 28 Cr LJ 659 : AIR 1929 Nag 279. Seduction is not to be confined to the first connection with an unmarried girl. 98 Ind Cas 188 : 27 Cr LJ 1292 : AIR 1927 Sind 97. In a case under Section 366, it is the duty of the prosecution to prove that the abduction took place with the intention mentioned in the section, but then the intention can also be inferred from the conduct of the accused and the circumstances of the case. Ordinarily it is not possible for the prosecution to establish the intention except by proving the conduct. A girl of about 14 years was forcibly abducted by the accused. *Held*, that no inference except of the intention such as is mentioned in Section 366 is possible. 31 PLR 388 : 123 Ind Cas 528 : 31 Cr LJ 529 : AIR 1930 Lah 92. The word "forced" in Section 366 can also be taken to be used in the ordinary dictionary sense as including 'forced by stress of circumstances'. Also, though the word "seduction" is sometimes used to mean to induce a girl to part with her virtue for the first time the word as used in Section 366 should not be taken to have that narrow meaning but that even though a girl may have by the first act of seduction surrendered her chastity, subsequent seduction for further acts of illicit intercourse can also be taken to be included. 50 CLJ 593 : 1930 Cr C 209 : AIR 1930 Cal 209. This section is an aggravated form of Section 363. The consent of the girl does not exonerate the seducer. 120 Ind Cas 433 : 31 Cr LJ 85 : 1930 Cr C 35 : AIR 1930 All 19. It is practically impossible for the prosecution in cases of kidnapping and abduction to establish affirmatively the then intention with which a woman is abducted. But it is a fair and justifiable presumption that when any woman is kidnapped or abducted it is undoubtedly with one or other of the intents specified in Section 366. 120 Ind Cas 606 : 31 Cr LJ 131 : 1930 Cr C 171 : AIR 1930 Lah 163. Seduction is a comprehensive expression and it does not exclude the possibility of deceitful means being used in order that reduction may be practised with effect. AIR 1930 Cal 432 : 1930 Cr C 741. Where the accused found the minor girl at a place away from the lawful guardianship of her mother and took her to another place in order to sell her and pocket the proceeds. *Held*, that the accused was liable to be convicted under Section 366, Indian Penal Code. 1930 Cr C 582 : AIR 1930 Oudh 289 : 7 OWN 499. Abduction is a continuing offence. A girl is abducted not only when she is first taken from any place but also when she is removed from one place to another. AIR 1931 Lah 55.

Consent of the victim though it may be a defence to a charge under Section 366 may be taken into consideration for awarding sentence. AIR 1970 SC 1029 : 1979 Cr LJ 591 ; 1970 SCD 461 ; 1980 Chand Cr C 165.

When accused present in meeting made speech showing complainant as corrupt and same is established by testimony of witnesses. Guilt of accused is proved beyond reasonable doubt. *Pyarelal Maganlal Jaiswal* v. *State*, 1996 Cri LJ 989 (Bom).

19. Proof of inducement.—The mere fact that girl of 15 and a man were found together could not create a presumption that he persuaded her to go to him. Where there is nothing directly to show that he induced her to leave her husband's home and on the other hand it appeared he had previously an intrigue with her, this section is inapplicable. 38 PLR 98.

A girl aged 18/19 years left her house with her own consent. She never made any objection or raised any cry. There was no evidence to show that she had even been induced to compel her marriage rather she flatly denied about performing the marriage. It was held that the prosecution had failed to establish the charge under Section 366, IPC. *Ranjeet Lahra v. The State of Bihar*, 2002 Cri LJ 329 (Jharkhand) : AIR Jhar HCR 33 : 2001(4) Cur Cri R 237.

20. Charge under Section 366, against two persons.—Where another allegation is made that two persons have joined in taking or enticing another, the direction to the jury should be that the prosecution must prove that the taking or enticing was by the accused persons of either of them. It is necessary to examine the evidence against each accused jointly charged with the particular offence. In dealing with the intention required under Section 366, it is wrong for the Judge to say that if the jury was not satisfied that the offence under Section 366, was made out against both the accused, then alternative is under Section 366A. If the intention required by Section 366 was not proved, the direction should be that the jury was bound to acquit them or one of them against whom intention had not been made out. AIR 1938 Cal 475. Where an accused person is charged with the commission of an offence under Section 366 he can in appropriate case be convicted for abetment. 1956 Madh BLJ 422 : Madh BLR 1956 Cr 78.

21. Sections 363 and 366, chargesframed under both.—When two separate charges are framed against an accused person—one under Section 363 IPC and another under Section 366, IPC, he can be convicted under Section 363, although he is acquitted of the charge under Section 366, 52 Cr LJ 1484 : AIR 1951 Assam 168. Conviction under both the Sections 363 and 366 is bad. The offence under Section 366 is only an aggravated form of an offence under Section 363, IPC, 1979 Bihar Cr C 200 ; *see* also 1980 Cr LJ 1145 (for jurisdiction of Court); AIR 1969 Raj LW 534 ; AIR 1970 Raj 250.

22. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable exclusively by Court of Session.

Jurisdiction of ordinary criminal Courts is not taken away inasmuch as the offence under Section 366, IPC is not one of the offences mentioned in First para of Section 45 of the Navy (Discipline) Act, 1934, (1956) 58 Bom LR 157.

23. Charge.—"I, (*name and office of the Sessions Judge, etc.)* hereby charge you, (*name of the accused*) as follows :

That on or about the.......day of ....at.........you kidnapped or abducted a woman or by means of compulsion (or criminal intimidation, or abuse of authority) induced to wit........with intent that she may be compelled (or knowing it to be likely that she will be compelled) to marry *C, D* against her will [or in order that the said *A, B* may be forced (or seduced) to illicit intercourse] and thereby committed an offence punishable under Section 366 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried by the said charge."

24. Evidence and proof.—In a case under this section the evidence of abducted woman should be taken with caution. AIR 1949 All 139 : 50 Cr LJ 158. Need of corroboration of statement of prosecutrix was emphasised in (1974) Cr LJ 86 ; (1978) 1 Kant LJ 26 ; (1978) 1 Kar LJ 26 ; 1978 Cr LJ 1241 ; (1973) 1 SCC 533 ; 1981 All LJ 139 ; 1983 (1) Crimes 582.

Where the abduction is made by *A*, who passes the girl to *B*, who takes forcibly to *C* and *C* marries her without consent. It was held that *C* can not be convicted under Section 366 read with Section 34 in the absence of any evidence to show a prior consent between *B* and *C*. 96 Pat LR (SC) 644, but *see* 1983 All WC 425 : 1983 All Cr R 304 (offence under Section 363 not under Section 366).

Accused, along with two other accused, brought the victim girl from her residence in a car and then she was made to stay along with them in lodge. When the prosecution has established the fact that accused brought the victim girl to the said lodging and stayed with her in the said lodging, then the burden came to be shifted on the accused, of explaining as to what happened thereafter in the said room or, of showing that nothing happened as deposed by prosecutrix. By remaining silent, this accused has not discharged this burden.

The facts constituting forcible sexual intercourse on the victim girl said to have been committed by the accused in the said lodging were within the special knowledge of accused and the victim girl. The victim girl has stated on oath that after she was brought there, accused and also other two persons committed forcible sexual intercourse on her one after another against her will and despite her request that they should not do so. This accused, though has denied the entire evidence of victim girl, has not brought anything in her cross-examination-in-chief to disbelieve her evidence in examination-in-chief as to he committing forcible sexual intercourse on her while she was made to stay in the said lodging.

If the relevant allegations in the complaint and also the evidence of prosecutrix are carefully scrutinised, it could be seen that her evidence falls in line with the allegations in the complaint. Incident of accused and other two other accused taking the prosecutrix from her residence to the said lodging and making her to stay with them in the said lodging is consistent with the allegations in the complaint. Further, as could be seen from the evidence of victim girl, she has given all the minor details of the acts of forcible sexual intercourse committed on her by the accused while she was made to stay in the said lodging. In the absence of any explanation by the accused as to what happened between himself and victim girl after he took her into the room in the said lodging, the positive evidence of victim girl given on oath before the Court which is quite consistent with her allegations in her complaint as to the factum of forcible sexual intercourse committed by him on her being trustworthy, deserves acceptance and the same has been rightly accepted and relied upon by the Trial Court. Besides this nothing is brought on record by the accused through the evidence of either victim girl or any other witness to show that the prosecutrix falsely implicated him at the cost of her reputation. *N. Vijaya alias Ameen vs State of Karnataka*, 2010 Cri LJ 1050 (Karn).

For burden of proof and appreciation of evidence *see* AIR 1979 SC 1029 : 1979 Cr LJ 991 (burden on the prosecution to prove all the elements necessary to establish the offence).

In a case where the accused was convicted for offence under Section 366 and 354, IPC about 16 years had elapsed from date of incident. It was held that imposition of sentence of one years R.I. instead of 4 years R.I. under Section 366 and six months R.I. instead of his years R.I. for offence under Section 354, IPC would meet the order of justice. *Shoukat v. State of Rajasthan*, 2002 Cri LJ 364 (Raj) : 2002(2) Raj LW 1128.

There was no evidence that girl was taken away from lawful guardianship of her parents. Hence ingredients of offence were lacking and offence is not proved. *Chouhal Singh* v. *State of Rajasthan*, 1995 Cr LR 237 (Raj).

Where a victim was a grown-up girl. Conviction of accused under Section 366, IPC. Evidence showed that both accused and victim went to District Court premises for swearing an affidavit before Notary and thereafter stayed at Rest House. Hence attempt on her part to marry with accused can be inferred. Conviction of accused not proper. *Goverdhan* v. *State of M.P.*, 1995 Cr LJ 633 (MP).

Conviction was based on the basis of solitary testimony of prosecutrix which was challenged in appeal. The evidence on record show that she was a woman of bad character and conduct. Further evidence was not corroborated by medical evidence or any other evidence. Hence order of conviction recorded was not maintainable. *Rajaram* v. *State of M.P.*, (1994) 2 Crimes 1021 (MP).

In an Orissa case, it was alleged that the accused entered the house of prosecutrix, gagged her mouth, lifted her and raped her after taking her to field. Prosecutrix had seen the culprits from close range and, therefore, the possibility of mistaken identity was ruled out. Entire incident had been broadly stated in FIR. The testimony of prosecutrix was reliable and trustworthy. There was evidence which corroborated her evidence. Conviction of accused was held proper. *Prasanta Kumar Sahoo* v. *State of Orissa*, 2004 Cr LJ 3501 (Orissa) : 2004(28) OCR 692.

The accused allegedly kidnapped a minor married minor girl, confined her and raped her. The victim made the statement giving clear picture of occurrence in detail about her kidnapping, rape and recovery. The evidence of victim established that it was accused who kidnapped her and committed rape on her. It was held that conviction of accused on sole testimony of victim was proper. *Chandra Sekhar Pandey* v. *State of Bihar*, 2004 Cr LJ (NOC) 2 : AIR 2004 Jhar HCR 266 : 2003(3) East Cri C 344.

Where there was prosecution under for charge of abduction and rape—Conviction and sentence—Revision petition for same was filed.—The prosecutrix has not given consistent evidence. Her evidence on point of rape is very vacillating hence not worthy of credence. Conviction and sentence not sustainable. *Sadhray* v. *State of Madhya Pradesh*, (1995) 3 CCR 541 (MP).

The accused along with another went to the house of the victim in the night and by deceitful means induced her to accompany him and when they were going, the accused seeing the lonely place outraged her modesty. The name of the co-accused was not mentioned in the FIR. No identification parade was conducted to identify the co-accused and thus the presence of co-accused on scene was doubtful. The co-accused was acquitted but conviction of accused under Section 366 and 354 IPC was held proper. *Shoukat v. The State of Rajasthan*, 2002 Cri LJ 364 (Raj) : 2002(2) Raj LW 1128.

Confessional statement of accused in presence of police officer is inadmissible in evidence. *N. Nagarajan* v. *State of T.N.*, 1996 Cr LJ 1007 (Mad).

Burden of proof. Accused, along with two other accused, brought the victim girl from her residence in a car and then she was made to stay along with them in lodge. When the prosecution has established the fact that accused brought the victim girl to the said lodging and stayed with her in the said lodging, then the burden came to be shifted on the accused, of explaining as to what happened thereafter in the said room or, of showing that nothing happened as deposed by prosecutrix. By remaining silent, this accused has not discharged this burden.

The facts constituting forcible sexual intercourse on the victim girl said to have been committed by the accused in the said lodging were within the special knowledge of accused and the victim girl. The victim girl has stated on oath that after she was brought there, accused and also other two persons committed forcible sexual intercourse on her one after another against her will and despite her request that they should not do so. This accused, though has denied the entire evidence of victim girl, has not brought anything in her cross-examination-in-chief to disbelieve her evidence in examination-in-chief as to he committing forcible sexual intercourse on her while she was made to stay in the said lodging.

If the relevant allegations in the complaint and also the evidence of prosecutrix are carefully scrutinised, it could be seen that her evidence falls in line with the allegations in the complaint. Incident of accused and other two other accused taking the prosecutrix from her residence to the said lodging and making her to stay with them in the said lodging is consistent with the allegations in the complaint. Further, as could be seen from the evidence of victim girl, she has given all the minor details of the acts of forcible sexual intercourse committed on her by the accused while she was made to stay in the said lodging. In the absence of any explanation by the accused as to what happened between himself and victim girl after he took her into the room in the said lodging, the positive evidence of victim girl given on oath before the Court which is quite consistent with her allegations in her complaint as to the factum of forcible sexual intercourse committed by him on her being trustworthy, deserves acceptance and the same has been rightly accepted and relied upon by the Trial Court. Besides this nothing is brought on record by the accused through the evidence of either victim girl or any other witness to show that the prosecutrix falsely implicated him at the cost of her reputation. *N. Vijaya alias Ameen vs State of Karnataka*, 2010 Cri LJ 1050 (Karn).

25. Approbation of Evidence.—Due to the margin stated by the witness it cannot be said that the medical evidence militates against the other consistent evidence regarding the age of the prosecutrix. The Supreme Court decision in Ram Murti's Case, 1970 Cri LJ 991: (AIR 1970 SC 1029) is clearly distinguishable. In that case despite medical advice for X-Ray examination of the prosecutrix to find out her age, it was not got done. The appellant had been acquitted of the offense under Section 376 of the IPC and in the circumstances it was observed that for the offence under Section 366 of the IPC the question of age deserved to be examined more closely. On the material on record the trial court's conclusion that the prosecutrix was under sixteen years is upheld. The testimony of the prosecutrix Ku. Sandhya (PW1) that the appellant thrice had sexual intercourse with her at Kalyan is, in the circumstances of the case, entitled to credence though she had not complained of it to anyone earlier. This omission is explicable as according to the finding of the learned trial Judge she had willingly eloped with the appellant. *Manpyara and Others v. The State*, 2002 Cri LJ 3046 MP : 2002 Cri LR (SC&MP) MPJ 133 : 2002(1) MPHT 253 : 2002(2) MPLJ 11.

26. Sentence.—Where the kidnapped girl went away with the accused willingly and the medical evidence indicated that although the girl was under 16 years of age she was accustomed to sexual intercourses, *held*, four years rigorous imprisonment is excessive sentence, AIR 1941 Cal 315 : 42 Cr LJ 649. Where the accused has committed a very serious offence punishable with rigorous imprisonment for 10 years under Section 366 read with Section 114 Penal Code, to let off a person found guilty of such an offence lightly because the other co-accused were let off, is to perpetrate injustice. 1956 Madh BLJ 422 : Madh BLR 1956 Cr 78 ; but *see* AIR 1954 Pat 218 : 32 Pat 728 : 1954 Cr LJ 565 (where sentence was reduced on the ground of tender ages of the accused).

Accused were charged with committing rape on the prosecutrix. Prosecturix had stated in detail as to circumstances under which she was taken towards the ditch and was ravished there. Her evidence was corroborated by evidence of others. Non-examination of the head constable before whom accused and prosecutrix were taken had lost its importance. *Held*, that evidence so far discussed clearly brought home the guilt of the offences under Sections 366 and 376. 1987 Cri LJ 940 (Kant).

Criminal appeal under Section 374, Cr PC against conviction and sentence under Section 366, IPC. The circumstances show that victim girl accompanied appellants at her own accord. The prosecution failed to establish guilt of the appellants as stated in the version. Hence conviction and sentence is set aside. *Nisar Mohammad and others v. State of M.P.*, 1994 Cr LR (MP) 182 (N).

Accused sentenced to 7 years RI and fine of Rs. 1,000 and in default RI for one year—Appeal to High Court and sentence was confirmed—Special leave petition under Article 136 of Constitution.—Plea of false story of abduction was rightly rejected by Lower Court and High Court. There were no compelling circumstances warranting interference and conviction and sentence of the appellant. *Ganga Dayal Singh* v. *State of Bihar,* (1994) 1 PLJR (SC) 108 ; 1994 Cr LJ 951 ; AIR 1994 SC 859.

Women being forced to prostitution in guise of employment—False provisions of jobs—no sympathy with accused, hence order of sentence was not to be interfered with. *Ramu* v. *State, rep. by Inspector of Police,* 1995 Cr LJ 2525 (Mad).

27. Probation of offenders Act if to extend.—In 1979 Cr LR 573 it was held that it is an insulting stultification of the amelioratory legislation *viz* the Probation of offenders Act to extend its elaborate provisions to such anti-social, and specialist criminals in their act of abducting unsophicated girl of 17 for enforcing her into sexual submission with commercial object.

28. Conviction.—Offence of kidnapping of prosecutrix from custody of her parents—Prosecutrix being less than 16 years her consent is of no consequence—Accused's offence established—She was not forced or adduced to illicit intercourse. It was held that accused is liable to be convicted under Section 366. *Santosh Dhodu Chavan* v. *State of Maharashtra,* (1994) 3 Crimes 42 (Bom).

The view of the High Court that prosecutrix above 16 years of age eloped found well based. Her silence about not reporting it can be because of fear of repraisal or to protect her image. Prosecutrix was not a girl of easy virtue and could not have agreed voluntarily to allow respondent No. 1 got married with Respondent No. 2 within 10 to 15 days of her elopement. Hence respondent No. 1 is liable to be convicted under Section 376, IPC but as offence was committed in year 1982 the sentence is reduced to period already undergone. *State of A.P.* v. *P. Narasimha,* (1994) 2 Crimes 263 (SC) ; (1994) 4 SCC 453 : 1994(3) JT 576 : 1994(2) Scale 760 : 1994(2) CCR 506 (SC).

Where prosecutrix, studying in 10th standard on date of incident and was minor then the conviction of accused under Sections 366 and 376, IPC was liable to be sustained. *Suresh Babu* v. *State*, 2005 Cr LJ NOC 38 (Ker.) : 2005(2) All Cri LR 379 : 2005(2) Rec Cri R 90.

Poor women enticed away on the name of job, to brothels. Delayed filing of complaint—Satisfactory explanation provided—Evidence was fully established that women was being taken away for prostitution—Certain discrepancies of minor nature in evidence was found but—Prosecution case not to be affected by the same—Typographical error in the evidence of a particular witness.—No weight to be attached to such plea, conviction was upheld. *Ramu* v. *State rep. by Inspector of Police*, 1995 Cr LJ 2525 (Mad).

The statement of the girl that accused used to give fist blows in her stomach is beyond understanding as that would be seen by others also. In instant case she was willing lady as she had come from her house. Hence conviction under Section 367, IPC, is bad. *Santosh Kumar* v. *State of U.P.*, 1994 (31) ACC 587.

Rape of minor prosecutrix and her categorical statement that she was sexually assaulted against her wishes. There was found no infirmity in her statement. Delay of one day in filing FIR in such cases not held fatal. Conviction of accused was upheld. *Manan Seikh* v. *State*, 1995 JCC 171 (Del).

The accused abducted a girl in order to compel her to illicit intercourse and evidence showed that she had purchased her like a cattle and had control and dominion over her. The accused was present physically when victim was recovered by the police. The conviction of accused was held proper but keeping in view of 76 years of age instead of sending her to jail only fine was imposed. *Shamshad* v. *State of UP*, 2003 Cr LJ 1322 (All) : 2003 AllLJ 518 : 2003(46) All Cri C 890 : 2003(1) All Cri R 241 : 2003(3) All indcas 663 : 2003(1) Cur Cri R 335.

When circumstantial evidence regarding offences under Sections 366, 376 and 300, IPC committed by accused and relied by prosecution were found proved and of conclusive nature and were consistent with guilt of accused then accused was held rightly convicted for. *Ratan Lal* v. *State of Rajasthan*, 2004 Cr LJ 228 (Raj) : 2004(1) Raj Cri C 139 : 2004(1) Raj LR 774 : 2004(2) Raj LW 1131 : 2004(1) WLC 243.

The accused enticed away a minor girl and committed rape on her. The evidence of the prosecutrix was supported by witnesses including informant at whose house the accused had taken her after enticing her away. Non appearance of signs of rape on body of prosecutrix was of no effect as medical examination was conducted after the considerable time of occurrence. The conviction of accused for offences under Sections 366A/376 was held proper. The accused had subsequently married the girl and sentence was reduced from 9 years to five years. *Surendra Kumar Singh Kushwaha* v. *State*, 2003 Cr LJ 392 (Pat).

Where the victim girl was below 16 years of age and she had tried her best to prevent accused from committing rape, the conviction of accused under Section 366/376 was held proper. *Morab Wankhede* v. *State*, 2003 Cr LJ 725 (P&H) : 2002(1) CurLJ (CCR) 621 : 2002(1) Rec Cri R 148.

When both prosecutrix were aged less than 16 years, conviction of accused is proper. *Baran Singh* v. *State*, 1996 Cri LJ 3636 (Alld).

29. Acquittal.—Victim was found wandering with the accused to many places without complaint—Giving her Talibottu for pledging to the accused—Consent of the victim can be deduced from her conduct—Victim was aged 16 years—Acquittal of the accused was acquitted by the lower court which is held Not to be interfered with. *Dudala Edukondalu* v. *Eduru Ramanaiah*, (1994) 1 ALT (Cri) 73 (AP).

Appeal against acquittal. Accused took prosecutrix, passed through various crowded and public places during day time to house of co-accused persons and ruped her.

From Kasauli upto Patiala she passed through various crowded and public places during day-time. She could have easily raised hue and cry on the way attracting public attention. Importantly, as per her deposition threats were meted out by accused only till the time they reached Patiala. At least thereafter, as per her own admission that she was free to move in and out of the house, she could have contacted people in the colony or made a phone call to her parents or relatives at Kasauli, disclosing her whereabout. This was not done so. She could have conveniently slipped out of the house and returned to her house or at least gone to the local police station for help. She knew accused since long and it appears to be a case of prosecutrix having voluntarily left with him from Kasauli and be with him thereafter.

Farther prosecution fail to prove that the prosecutrix was under eighteen years of age at time of incident. Delay in registration of FIR not explained. Sole testimony of prosecutrix was not reliable and hence acquittal of accused persons is proper. *State of H.P. vs. Narender Kumer @ Hira*, 2010 (3) CriLJ 3545 (HP).

Two eye-witnesses examined by the prosecution who happen to be the brother and the friend of the deceased did not support the prosecution version and resiled from their statement made during investigation. Therefore, the residual question is the acceptability of two dying declarations. The trial Court did not place any reliance on the dying declarations.

The discrepancy pointed by the trial Court is that in Exh. PD there is mention about one incident of rape on her on 28.07.1989 in a hotel at Sector 22 Chandigarh by Honey and two other accused. She does not state in the dying declaration in Ex PJ that she was raped on July 17th and stated that accused Honey had simply taken her to Rose Garden. In Exh. PJ she does not mention the date of the first incident as July 17th but states that her friend Rajni was also with her and they were taken to some unknown hotel while Honey raped her and accused Longoal raped Rajni. She also did not mention the second incident to have taken place on 28th July and stated that it was 2/3 days ago and not yesterday, when the boys took them to a hotel in Sector 22 and raped them. There are several inconsistencies and contrediations in the Exh. PD1 and PJ1.

Above being the position, when two Courts on analysis of the evidence found the respondents not guilty, there is no scope for interference in this appeal. The reasons indicated by the trial Court and affirmed by the High Court discarding the two dying declarations do not suffer from any infirmity. The appeal fails and is dismissed. *State of Punjab vs. Chatinder Pal Singh*, AIR 2009 SC 974 : 2008 (16) SCR 23 : 2008 (15) Scale 359.

The accused was alleged to have kidnapped, raped and criminally intimidated the victim. The nude photographs were merely found in his possession and evidence showed that the girl was above 16 years of age but no other evidence connecting the accused with the offence charged was produced. The accused was held entitled to acquittal. *Palaparthy Vijaya Kumar* v. *State*, 2003 Cr LJ 1670 : 2003(2) ALD (Crl) 611 : 2003(1) Andh LT (Cri) AP 355 : 2003(2) Crimes 132 : 2003(2) Cur Cri R 214.

In a Punjab & Haryana case it was alleged that victim was abducted and raped for two months continuously but she was 30 years of age having children also but accused was unmarried youngman of 21/22 years old. The victim never raised any alarm or made any complaint during her two months stay with accused. It was held that it was a case of elopement of victim and voluntarily submitting her to accused. The conviction was, hence, set aside. *Tara Devi* v. *State*, 2003 Cr LJ 329 (Jhar) : 2003(2) All ind Cas 555 : 2003 Cri R (SC Mah Guj) Guj 141 : 2003(1) Cur Cri R 241 : 2002(3) Gcd Guj 2389 : 2002(3) GujLR 2561.

Where there was no evidence to show that the victim, who was aged about 18 years, was taken away from her house by accused against her wishes and the medical evidence showed that the victim was habituated to sex and there was no evidence of violence on her person, it was held that the conviction of accused under Section 366, 376 was not proper. *Balwant Singh* v. *State of Rajasthan*, 2004 Cr LJ 3962 (MP) : 2004 (2) Ker LJ 732 : 2004 (4) MpLJ 423.

In the instant case, the victim, on her own consent had travelled with the accused knowingfully well that she was going to meet her boy friend. The act could not be said to have amounted to taking her out of keeping of her lawful guardian. Kidnapping could be said to have taken place only when she was detained against her will for the purpose of pressurising her to agree to the proposal to marry her boy friend. The accused had no knowledge about other designs or more of her boy friend. *Mihir Das* v. *State of Tripura*, 2006 Cr LJ 1500 (Gau).

In absence of *prima facie* case made out against petitioners entitled to be discharged. *Dr. V.N. Sharma* v. *State*, 1996 Cri LJ 1116 (Del).

30. Consent.—In the context of Indian Culture, a woman-victim of sexual aggression would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent. Insofar as the present case is concerned, the circumstances referred to and pointed out by the learned Counsel are neither sufficient nor do they justify discarding the evidence of the prosecutrix. There is nothing on record that creates any doubt/disbelief or a suspicion about the evidence of the prosecutrix. In a case, such as this, where the prosecutrix was misrepresented by the accused that he would show her to his cousin (a doctor) as she was suffering from some throad pain and she accompanied him but the accused took her to other places and when it became dark, took her to a lonely place and committed sexual intercourse, the prosecutrix was not expected to put any resistance lest her life would have been in danger. In the facts and circumstances, the absence of injuries on the person of the prosecutrix does not lead to an inference that she consented for sexual intercourse with the accused. The young girl became victim of lust of the accused who was more than double her age and yielded to sexual intercourse against her will. *Rajinder vs. State of Himachal Pradesh*, AIR 2009 SC 3022 : 2009 CrLJ 4133 : 2009 (3) Crimes 222 (SC) : 2009 (9) JT 9 : 2009 (9) Scale 176 : 2009 (10) SCR 248 : 2009 (5) Supreme 233 : 2009 (9) SLT 361.

It was contended that the prosecutrix of 16 was a consenting party. Medical report and school certificate put her age at 12. *Held*, conviction of the accused was well founded and should be maintained as her consent is of no importance. (1986) 1 Crimes 524 (Del).

Where the evidence on record showed that the girl had voluntarily accompanied the accused on her own free will it was held that the offence of kidnapping was not made *Out-Keshav* v. *State*, 2001 Cri LJ 1201 (Delhi) : 2001(1) JCC 273 : 2001(1) B Cr C 683 : 2001(2) Rec Cri R 254 (Del.).

Where the girl had gone with the accused party at so many places the element of consent was there and it could not be said that the accused had taken, the girl out of lawful guardianship *Varda* v. *State of Rajasthan*, 2001 Cri LJ 1283 (Raj).

In rape case fact of prosecutrix accompanying accused and living with him in one room, is enough to infer that she was consenting party. *Madan Lal* v. *State of Punjab*, 1997 (1) Crimes 561 (P&H).

31. Custom—No valid defence.—Accused were charged with abduction of girls and giving them in *Nata* for money consideration. Accused belonged to Meena's community in which *Nata* of married daughters was said to be recognised. They were illiterate and aged persons and had already undergone imprisonment. It was held that the convictions of the accused appellants maintained and their sentences under different courts be reduced to one already undergone by them and fine imposed be increased. 1987 Cri LJ 997 (Raj).

Accused persons belonging to Meena's community were charged with abduction of girls and giving them in *Nata* for money consideration to other accused persons in spite of the fact that they were married and all of them are unwilling. It was observed that in this age and era., it was not possible to accept the practice of selling or auctioning married daughters in *Nata* by her father even if such practice used to exist before constitution came into force, a woman could not be treated as chattels and could not be sold in *Nata* against their wishes. 1987 Cri LJ 997 (Raj).

32. Kidnapping, rape and offence of business of prostitution.—It is clear from the statement of the prosecutrix under Section 164 Criminal Procedure Code, recorded by the Magistrate, in her written report and in her statement before the Court that the accused appellant kidnapped her from Nagpur on the pretext of leaving her to her house at Vardha, but he taken her away to his village Ramnagar in Bundi where he committed rape with her and also business of prostitution by collecting money from other persons. The brother of the accused appellant also stated that he has seen Sharda prosecutrix with the accused appellant in a rented house, though he has been declared hostile. The police witnesses in equal vocal terms stated about the mischief done with the prosecutrix by the accused appellant. I am in agreement with the finding of rape arrived at by the trial Court with the prosecutrix and she has been forced by the accused appellant to do prostitution with other persons and collected money from them. It is also clear from the evidence of the prosecution witnesses mentioned above and as per the statement of the prosecutrix coupled with the report of FSL and medical examination done by the doctors, her statement under Section 164 Criminal Procedure Code and her written report submitted to the police, that accused committed rape with her and further the accused appellant forced her to do the business of prostitution and he collected money from the persons who came to him for sex satisfaction with the prosecutrix. The findings arrived at by the trial Court cannot be said to be perverse. I am also in agreement with the finding of the trial Court that the prosecution has been able to prove the charges levelled against the accused appellant beyond reasonable doubt. The judgment of conviction recorded by the trial Court on the charges levelled against him and proved by the evidence of prosecution witnesses is confirmed. But looking to the age of the accused appellant his sentence can be reduced from 10 years to 7 years.

In the result the conviction of the accused appellants for Sections 366, 366-A, 368, 372, 376 IPC and for Sections 3, 6 and 9 of the Immoral Traffic (Prevention) Act, 1956 is confirmed but his sentence is reduced from 10 years to 7 years. *Yogesh vs. State of Rajasthan*, 2010 (1) CriLJ 629 (Raj).

33. FIR.—*Delay in lodging FIR.* We find no merit in the submission made for the appellants that FIR was ante timed and brought into existence so as to falsely implicate the appellants. There is no reason to disbelieve the evidence of prosecutrix and her mother that attempts were made to lodge the FIR on the next day of the occurrence of the incident but the police did not co-operate and intimated any action. The attempt on the part of the police to protect the accused from day one of the occurrence is clear and obvious.

This Court, in exercise of its jurisdiction under Article 136 of the Constitution of India, does not act as a third appellate Court. Suffice it to hold that the verdict in the instance case did not result in any miscarriage of justice. The impugned judgment is not an erroneous one. Nor the judgment is vitiated on account of any error either in appreciation of evidence or application of legal principles. *Jaswant Singh & Ors. vs. State of Punjab*, AIR 2010 SC 894.

* * * * *

Sec. 366-A. Procuration of minor girl.—Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and shall be liable to fine.

Synopsis

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1. Amendment.—This section and Section 366B were inserted by the Indian Penal Code (Amendment) Act, 1923 (20 of 1923) Section 3, in order to give effect to the international convention for the suppression of the traffic in women and children signed at Geneva on behalf of the Governer-General in Council on the 18th day of May, 1922.

2. Scope.—The intention or knowledge that the minor girl abducted was to be forced to illicit intercourse is the gist of the offence under Section 366A. 28 PLR 260 : 102 Ind Cas 552 : 28 Cr LJ 548 : 8 AI Cr 239. On each occasion when a woman is persuaded to indulge in illicit intercourse she in being tempted into sin and so "seduced" consequently, though a woman has lost her chastity and become a prostitute, she can be "seduced" again for the purpose of Section 366A of the Penal Code. 99 Ind Cas 98 : 28 Cr LJ 66 : AIR 1927 Sind 109 ; see also 27 ALJ 800 : 118 Ind Cas 384 : 30 Cr LJ 904 : AIR 1929 All 535. The prosecution must prove that the accused intended that the girl would be forced or seduced to illicit intercourse with some one other than himself ; or that the accused knew that it was likely that she would be so forced or seduced. 49 CWN 533 : AIR 1945 Cal 432 ; AIR 1948 Oudh 1 : 48 Cr LJ 542. It is not the law that if the minor is a consenting party no offence is committed under Section 366A of the Penal Code. 119 Ind Cas 14 : 30 Cr LJ 985 : AIR 1929 All 700. The word "induced" is used in its ordinary meaning of any words of inducement flowing from one person to the girl. AIR 1930 All 197 : 1930 Cr C 732. Mere fact that accused tried to sell girl for immoral purpose is not sufficient to establish offence under Section 366A. AIR 1938 Lah 648. Where a married girl is unhappy with her husband and the father takes her from the husband's house and gives her as a wife to somebody else, that can hardly be called trafficking in women having regard to the provisions of Section 366A, the act of the father would come within those provisions, 1930 Cr C 732 : AIR 1930 All 497. Persons selling girl with knowledge and intention that she would be subject to illicit intercourse are guilty. It is not necessary that accused should know that the girl is married. AIR 1930 Lah 463 : 1930 Cr C 531. Woman with whom illicit intercourse is committed need not be married woman. 138 Ind Cas 597 : 33 PLR 727 : 1932 Cr C 719 : 33 Cr LJ 673 : AIR 1932 Lah 555. Person committing illicit intercourse with girl will not be permitted to plead that he bona fide believed her to be over the prescribed age, if in fact she is below the age. 138 Ind Cas 597 : 33 PLR 727 : 1932 Cr C 719 : 33 Cr LJ 673 : AIR 1932 Lah 555. Where accused induces girl between 16 and 18 years without force or fraud to go from any place with intent to have illicit intercourse with himself is not guilty of any offence. AIR 1933 Cal 362 : 34 Cr LJ 341 : 37 CWN 317. An offence under this section is a continuing offence. 1936 Cr C 873 : AIR 1936 Lah 850.

Where there is no evidence to show that the accused had induced the victim minor girl to leave her father's custody with an intent that she might be forced or seduced to have illicit sexual intercourse with him, the offence under Section 366A, IPC cannot be said to have been established. *Mahendra Murtiyan Madrasi* v. *State*, 2004 Cr LJ 539 (Guj) : 2004(2) All Cri LR 325 : 2004 Cri LR (SC Mah Guj) Guj 242 : 2004(2) Rec Cri R 913.

A bare perusal of Section 366 would indicate that the kidnapping or abduction of any woman with a view to compel her for marriage etc. is covered by this section. in the instant case, this provision has not been applied because although the victim is a woman in this case she being minor, Section 366-A has been invoked. Now a perusal of the section would indicate that if the minor girl is induced to go from any place or to do any act with an intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine. The title to the section is procuration of minor girl. The essential ingredient is inducement of a minor girl to go from any place or to do any act with intent that such girl may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another. The minor must be proved to have been induced to go or to do something. If the charge is under Section 366-A then "Kidnapping" is not the essential ingredient. While kidnapping abduction is a part of the offence under Section 366, its latter part, viz., "inducement" is the only common ingredient in Section 366 and Section 366-A, IPC. *Kailash Laxman Khamkar vs. State of Maharashtra*, 2010 (3) Cri LJ 3255 (Bom).

Where there is no inducement on the part of the accused persons to the victim girl from her house to do the act as mentioned in Section 366A of IPC and since the inducement is found to be absent on the basis of the testimony of the witnesses, the accused persons cannot be convicted under Section 366A. *Golapi Bibi* v. *State*, 2004 Cr LJ 2209 (Gau) : 2004(1) Gau LT 607 : 2004(2) Gau LR 338 ; 2004 Cr LJ 2211 (Gau) : 2004(3) All Cri LR 608 : 2005(1) Bank Cas 170 : 2004 Mad LJ (Cri) 438 : 2004(3) Rec Cri R 628.

There are three principal ingredients of the offence contemplated under Section 366A (a) that the minor girl below the age of 18 years is induced by the accused ; (b) that she is induced to go from any place or to any act, and (c) that she is so induced with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person. A person who merely accompanies a woman going out to play her profession of a prostitute even if she has not attained the age of 18 years, does not thereby commit an offence under Section 366A. The word "seduce" is used in two senses. It is used in its ordinary narrow sense as inducing a woman to stray from the path of virtue for the first time ; it is also used in the wider sense of inducing a woman to submit to illicit intercourse at any time or on any occasion. AIR 1962 SC 1908 : 1963 All Cr R 236 : 1963 (1) Cr LJ 16 ; see also AIR 1961 Bom 282 : 1962 All Cr R 14 : 63 Bom LR 408 : 1961 (2) Cr LJ 578.

The word "seduced" in Section 366A is used in the ordinary sense of enticing or tempting irrespective of whether the girl has been previously compelled or has submitted to illicit intercourse. AIR 1961 Bom 282 : 1962 All Cr R 14 : 63 Bom LR 408 : 1961 (2) Cr LJ 578 (AIR 1933 Cal 718 and AIR 1955 Cal 100 and AIR 1958 Punj 323, dissented from but AIR 1935 Bom 189 relied on). The section requires that a minor must be induced to go from any place or to do any act with the intention or knowledge that such minor may be forced or seduce to illicit intercourse with another person. AIR 1961 Bom 282 : 63 Bom LR 405 : (1961) 2 Cr LJ 578.

In a case the evidence of the prosecutrix was unambiguous and clear to show that she was abducted by the accused. The evidence, of the prosecutrix was also fully collaborated by the statement of accused recorded under Section 313, IPC. It appeared from the record, though not proved that she was only 16 years old. In view of the fact, situation and corroborative evidences the court held that the accused had induced the prosecutrix who was under the age of 18 years to go with him and as such he committed an offence of abduction under Section 366-A, IPC. *Shri Sushanta v. State of Tripura*, 2002 Cri LJ 195(Gau) : 2002(1) Gau LR 400.

So far as the conviction of the accused appellants for the offence under Section 366A is concerned, that cannot be sustained because of the simple reason that Section 366A and 366B, IPC have been introduced to punish the export and import of girls for prostitution and this is not the case of the prosecution in the present case, as from the evidence on record, it is very much clear that both prosecutrix PW2 Pinky and the accused appellant Rajan were having love affair and because of that reason, she herself had gone along with the accused appellants from Churu to Delhi and the fact that she was having Bichhua in the finger of her foot also goes to show that she was very much close to the accused appellant Rajan. *Rajan and Others v. State of Rajasthan* 2002 Cri LJ 3152 Raj : 2002(2) Raj Cri C 1035 : 2002(3) Raj LR 788.

3. Onus of proof.—The onus of proof, in a prosecution under Section 366A, IPC, that the girl was under 18 years of age at the time of her alleged abduction is on the prosecution, unless this is established satisfactorily a conviction under Section 366A cannot be sustained. 168 Ind Cas 833 : 1937 ALJ 547 : 38 Cr LJ 621 : AIR 1937 All 353. There can be no direct evidence about the intention of a person who induces a minor girl to go from one place to another with the intention that she may be forced (or reduced) to illicit intercourse, it has to be inferred from the surrounding circumsta-nces of each particular case. 1954 All WR (HC) 296 : 1955 Cr LJ 168.

Where the offence was of rape on minor girl—Minority of prosecutrix was not established—Her conduct showing that she willingly accompanied accused—No forcible act committed with prosecutrix in medical opinion, hence no offence made out. *Y. Srinivasa Rao* v. *State of Andhra* Pradesh, 1995 Cr LJ 1597. (AP).

4. Evidence and Proof.—*Evidence of prosecutrix.* The prosecutrix was sixteen years old and was abducted and subjected to rape. As regards the conviction for the offence of abduction under Section 366-A, I.P.C. of the appellant-Sushanta, on perusal of the evidence, it was found that the prosecution has proved the same. The evidence of P.W. 4 the prosecutrix is unambiguous and clear to show that she was abducted by the appellant - Sushanta. The said evidence of the prosecutrix was also fully corroborated by the statement of the appellant - Sushanta recorded under Section 313, Cr. P.C. wherein, the appellant has categorically admitted that he had taken away the prosecutrix from the 'Surjya Mela', but with a denial that she was taken away forcibly. The appellant-Sushanta also stated that the prosecutrix accompanied him though he told her that he had his wife and son. Therefore, it appears from the record, though not proved, that the prosecutrix was only 16 years old, *i.e.* below 18 years. *Shri Sushanta alias Tutan Chakraborty alias Bhattacharjee etc. v. State of Tripura* 2002 Cri LJ 1951 (Gau.).

Absence of any direct evidence of kidnapping. The appellants were arrested along with the victim girl. The said circumstance has no help to the case of prosecution. In the absence of any direct evidence of kidnapping, it cannot be ruled out that the girl might have gone to Kuju on her own or with some other persons. It may also be possible that on the same day appellants might have gone to Kuju and after seeing the victim girl at Kuju Chowk, they might have started talking to her and by that time police might arrive there and arrested them. Thus, from the aforesaid circumstance, it cannot be inferred that the present crime has been committed by the appellants and none else.

It is well settled that statement under Section 164 CrPC is not a substantive piece of evidence. It can be used only to corroborate or contradict the statement of witness. It is equally well settled that the statement under Section 161 of the CrPC of a witness can be used only for contradicting him. Under the said circumstance, the aforesaid two statements of Sarita Kumari under Sections 161 and 164 CrPC cannot become the basis for conviction. Held, the Court below had committed serious illegality by convicting the appellants on the basis of aforesaid statements. *Rajesh Kumar & Anr. vs. State of Jharkhand*, 2010 (3) CriLJ 3512 (Jhar).

5. Corroboration.—It cannot be absolutely laid down that in cases under this section, the evidence of the girl always needs corroboration. 229 IC 173 : 48 Cr LJ 301.

6. Procedure.—Cognizable—Warrant—Not Bailable—Not compoundable—Triable by Court of Session.

7. Charge.—"I (*name and office of Sessions Judge, etc.*) hereby charge you (*name of the* accused) as follows :

That on or about the....day of .....at.......you induced *A, B* a minor girl, under the age of eighteen years to go from (*here name the place*) (or to do the following act, namely:—) with the intent that the said *A, B* may be (or knowing that it is likely that the said *A, B* will be) forced (or seduced) to illicit intercourse with *C, D* and thereby committed an offence punishable under Section 366A of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

When the accused is charged under Section 366A and this is no charge under Section 363, IPC, the accused cannot be convicted under Section 363. 1959 Ker LJ 755 : 1959 Ker LT 684.

8. Age.—Age of prosecutrix was below 18 years at the time of incident not established by prosecution. Evidence showing that she left house on her own accord—For first time after two years it was disclosed in court that accused had sexual intercourse against her will—It establishes that it is made out case against accused after due deliberation.—Conviction was held not sustainable. *Y. Srinivasa Rao* v. *State of A.P.*, (1994) 2 APLJ 309 (AP).

Where though in FIR it is mentioned that the prosecutrix was 17 years of age at the time of the enticing away by the accused but the medical estimation of her age from the number of teeth and their position and the ossification test had shown that she was above 18 years and circumstances showed that she had love affairs with the accused, no offence under Section 366A of IPC was made out. *Kuber Chandra Das* v. *State*, 2004 Cr LJ 4776 (Jhar) : AIR 2004 Jhar HCR 2944 : 2004(2) Crimes 421 : 2004(2) JCR Jha 88.

The appellant belonged to the same Caste and Gotra of the prosecutrix and was a frequent visitor to the house of the prosecutrix. There was a love affair between them and the Court also observed that she did not ever resist her being repeatedly deflowered by the appellant Sunil. In this background, close and careful determination of the age of the prosecutrix is imperative. Doctor, who had clinically examined the prosecutrix, found that her secondary sex characters were well developed.

Doctor who examined the prosecutrix referred her for verification to the Dental Surgeon and the Radiologist. The failure of getting the prosecutrix examined from the

Dental Surgeon or the Radiologist despite the fact that she was referred to them by doctor is a serious flaw in the prosecution version. The prosecution also failed to produce any Admission Form of the school which would have been primary evidence regarding the age of the prosecutrix.

The School Leaving Certificate produced by the prosecution was also procured, six days after the incident and three days after the arrest of the appellant. As per that certificate also, she joined the school in the middle of the session and left the school in the middle of the session. The attendance in the school of 100 days is also not reliable.

The prosecutrix was admitted in the school by her brother. The said Ashok Kumar was not examined. The alleged School Leaving Certificate on the basis of which the age was entered in the school was not produced.

The father of the prosecutrix has also not been able to give correct date of birth of the prosecutrix. In his statement he clearly stated that he is giving an approximate date without any basis or record.

On consideration of the totality of the facts and circumstances of this case, it would unsafe to convict the appellant when there are so many infirmities, holes and lacunas in the prosecution version. The appellant is clearly entitled to benefit of doubt and consequently the appeal filed by the appellant deserves to be allowed. The appellant is directed to be released forthwith, if not required in any case. The appeal is accordingly disposed of. *Sunil vs. State of Haryana,* 2009 (4) Crimes 321 (SC) : 2009 (14) JT 644 : 2009 (14) Scale 370 : 2009 (8) Supreme 20 : 2009 (9) SLT 92 : 2010 (1) JCC 140.

9. Conviction.—The alleged allegation of rape made by prosecutrix for the first time in court during evidence after lapse of two years. There was no evidence to show that she was forcibly taken by accused rather she accompanied accused of her own accord. Hence prosecution was not to establish offence for which accused-appellant was convicted. Conviction and sentence set aside. *Y. Srinivasa Rao* v. *State of A.P.*, (1995) 1 ALT (Cr) 133 (AP).

Guilt of accused established by circumstances—Plea that accused being aged 55 years cannot develop fancy for minor girl, negatived by both lower Courts—It was found out that there is no ground for interference in conviction and sentence. *Ganga Dayal Singh* v. *State of Bihar*, 1994 Cri LJ 951 (SC) ; (1994) 1 PLJR 108 ; AIR 1994 SC 859.

Major girl leaving the house of her own—Conviction under Section 366A is not maintainable. *Md. Ismail Ansari* v. *State of Bihar*, (1995) 2 East Cr C 648 (Pat) (RB).

If it is established that the girl is major and she had voluntarily gone with the accused order of conviction is unwarranted. *Kabirmali* v. *State of Bihar*, 1997 (2) East Cr C 323 (Pat).

10. Consent.—Consent of victim aged 15 years and married is no valid consent. *Syed Amjad Ahmed* v. *State of A.P.*, 1993 Cri LJ 1920 (AP).

Where the prosecutrix, a major girl, had been taken away from the house of her mother by the accused and on the pretext of the promise of marriage ravished her on several occasions and then refused to marry her and solemnized his marriage with another girl, the prosecutrix could be said to be consenting party to the sexual intercourse and as such the accused could convicted under Sections 366A and 376, IPC. *Kuber Chandra Das* v. *State*, 2004 Cr LJ 4776 (Jhar) : AIR 2004 Jhar HCR 2944 : 2004(2) Crimes 421 : 2004 (2) JCR Jha 88.

Abduction and rape—Consent. Appellant abducted victim girl and committed rape on her. Victim girl was a minor aged about 13 years. It was established that at time of abduction, appellant offered laddu to victim and after taking laddu she was under intoxication. Further plea that victim girl left her house out of her own will and that she stayed with appellant has got no relevancy since there is no value of her consent she being minor. Conviction of appellant is proper. *Pappu Rajak vs State of Jharkhand*, 2010 (4) CriLJ 3998 (Jhar).

11. Bail.—Accused had already been granted bail by CJH but still apprehend an arrest. He claims to belong to a respectable family and aggress to abide by conditions. He was directed to be enlarged on bail in the event of an arrest. (1986) 2 Crimes 61 (Gau).

12. Essential ingredient.—A bare perusal of Section 366 would indicate that the kidnapping or abduction of any woman with a view to compel her for marriage etc. is covered by this section. in the instant case, this provision has not been applied because although the victim is a woman in this case she being minor, Section 366-A has been invoked. Now a perusal of the section would indicate that if the minor girl is induced to go from any place or to do any act with an intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine. The title to the section is procuration of minor girl. The essential ingredient is inducement of a minor girl to go from any place or to do any act with intent that such girl may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another. The minor must be proved to have been induced to go or to do something. If the charge is under Section 366-A then "Kidnapping" is not the essential ingredient. While kidnapping abduction is a part of the offence under Section 366, its latter part, viz., "inducement" is the only common ingredient in Section 366 and Section 366-A, IPC. *Kailash Laxman Khamkar vs. State of Maharashtra*, 2010 (3) Cri LJ 3255 (Bom).

13. Kidnapping, rape and offence of business of prostitution.—It is clear from the statement of the prosecutrix under Section 164 Criminal Procedure Code, recorded by the Magistrate, in her written report and in her statement before the Court that the accused appellant kidnapped her from Nagpur on the pretext of leaving her to her house at Vardha, but he taken her away to his village Ramnagar in Bundi where he committed rape with her and also business of prostitution by collecting money from other persons. The brother of the accused appellant also stated that he has seen Sharda prosecutrix with the accused appellant in a rented house, though he has been declared hostile. The police witnesses in equal vocal terms stated about the mischief done with the prosecutrix by the accused appellant. I am in agreement with the finding of rape arrived at by the trial Court with the prosecutrix and she has been forced by the accused appellant to do prostitution with other persons and collected money from them. It is also clear from the evidence of the prosecution witnesses mentioned above and as per the statement of the prosecutrix coupled with the report of FSL and medical examination done by the doctors, her statement under Section 164 Criminal Procedure Code and her written report submitted to the police, that accused committed rape with her and further the accused appellant forced her to do the business of prostitution and he collected money from the persons who came to him for sex satisfaction with the prosecutrix. The findings arrived at by the trial Court cannot be said to be perverse. I am also in agreement with the finding of the trial Court that the prosecution has been able to prove the charges levelled against the accused appellant beyond reasonable doubt. The judgment of conviction recorded by the trial Court on the charges levelled against him and proved by the evidence of prosecution witnesses is confirmed. But looking to the age of the accused appellant his sentence can be reduced from 10 years to 7 years.

In the result the conviction of the accused appellants for Sections 366, 366-A, 368, 372, 376 IPC and for Sections 3, 6 and 9 of the Immoral Traffic (Prevention) Act, 1956 is confirmed but his sentence is reduced from 10 years to 7 years. *Yogesh vs. State of Rajasthan*, 2010 (1) CriLJ 629 (Raj).

14. Procuration of minor girl.—Provisions of Ss. 359 and 361 clearly shows that the legislature did not confine to constitute the offence only if a minor girl is taken away from the place where she used to reside but the emphasis is upon taking away the girl from the "lawful guardianship". Sections 359 and 361, IPC do not spell-out any territorial jurisdiction for committing the offence. Thus the rigour of the law travels with the ward/subject and any person involving himself or herself in the offence of kidnapping or procuring a minor girl at any point of time would also come within the purview of Sections 359 and 361, IPC. Therefore, even if the victim girl was initially enticed by the co-accused, giving company to the main accused in the half-way for taking the girl to different places would be sufficient to affirm conviction of appellant-accused under S. 366A as well. *Taru Das v. State of Tripura*, 2008 CriLJ 3143 (Gau).

* * * * *

Sec. 366-B. Importation of girl from foreign country.—Whoever, imports into *India* from any country outside *India or from the State of Jammu and Kashmir* any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person.

shall be punishable with imprisonment which may extend to ten years and also be liable to fine.

Synopsis

1. Amendment 2268
2. Notes 2269
3. Procedure 2269
4. Charge 2269

1. Amendment.—*Vide* Amendment under Section 366A. In India the word 'India' has been successively substituted for the words "British India", *vide* Indian Adaptation of Laws Orders of 1948 and 1950 and Act 3 of 1951, Section 3 and Sch. The words "or from the State of Jammu and Kashmir" were inserted by Act 3 of 1951, Section 3 and Sch. certain words appearing at the marked place (****) "and whoever with such intent or knowledge imports into the States from any part of State any such girl who has with the like intent or knowledge been imported into India, whether by himself or by another person" were omitted by Section 3 and Sch of Act 3 of 1951.

2. Notes.—Where it is never the case of the prosecution that the girls concerned had been imported into the State with intent that they may be or knowing it to be likely that they will be forced or seduced to illicit intercourse with another person a conviction under Section 366B, would be wholly unjustified. AIR 1951 Raj 33 : 52 Cr LJ 217.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable exclusively by Court of Session.

4. Charge.—I (*name and office of Sessions Judge etc.*) hereby charge you (*name of the accused*) as follows :—

That on or about the............day of ....at.........you imported into *India* from....... a country outside India (*or the State of Jammu and Kashmir*) by yourself or by another person to wit.....*A,B* a girl under the age of 21 years with intent (or knowing it to be likely) that she will be forced (or seduced) to illicit intercourse with another person *viz., C,D,* and thereby committed an offence punishable under Section 366B of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

* * * * *

Sec. 367. Kidnapping or abducting in order to subject person to grievous hurt, slavery, *etc*.—Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Scope 2269
2. Procedure 2270
3. Charge 2270
4. Motive 2270
5. Evidence and Proof 2270
6. Kidnapping for ransom 2271

1. Scope.—For a conviction under this section, it is necessary to prove actual force and not mere show of threat of force. (1937) MWN 198 (1). For conviction under Section 367 read with Section 149, there must be abduction in order that the person abducted may be subjected to grievous hurt and this must have been done in prosecution of common object. Madh BLR 1954 Cr 290 : Madh BLJ 1951 HCR 1589. A person can be charged with an ancillary offence under Section 367 when he stands charged with main offence under Section 325 and Section 326. (1969) 1 Andh LWR 1256.

An additional factor which is not in Section 364 that even knowledge apart from the intention of the abductor or kidnapped that the victim is likely to be subjected to grievous hurt or slavery or to unnatural lust is sufficient to make the kidnapping or abduction an offence under Section 367. AIR 1962 Andh Pradesh 267 : 1962 (2) Cr LJ 28 ; *see* also AIR 1984 SC 911 (where as the High Court did not accept the story of murder by the accused nor record a finding of grievous hurt caused by the accused, its conviction under Section 367 is not warranted).

2. Procedure.—Cognizable—Warrant—Not Bailable—Not compoundable—Triable exclusively by Court of Session.

3. Charge.—"I (*name and office of the Sessions Judge, etc.)* hereby charge you (*name of the accused*) as follows :

'That on or about the.......day of......at......you kidnapped or abducted *A,B* in order that the said *A,B* may be subjected (or may be so disposed of as to be put in danger of being subjected) to grievous hurt (or slavery or to the unnatural lust of *C,D* or knowing it to be likely that such person will be subjected or disposed of and thereby committed an offence punishable under Section 367 of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge."

4. Motive.—When the victim was abducted and was caused grievous hurt—Identification of the accuseds only by the victim solely on the basis of the conversation heard by him during his abduction. There was found absence of any motive or enmity against the assailants. False implication of the accuseds ought to be ruled out. *Darshan Singh* v. *State of Punjab*, 1994 SCC (Cri) 281 ; 1994 East Cr C 364 ; 1994 Cr LJ 226 (SC).

5. Evidence and Proof.—According to medical report *anus coitus* was tried. There was found no injury on the anus—Offence established by medical and circumstantial evidence—Conviction was held fully justified. Imprisonment reduced to undergone. *Raj Murti* v. *State of Haryana*, (1994) 1 CC Cases 193 ; (1994) 1 CCR 13 ; (1994) 1 CC Cases 430 ; (1994) 1 Recent Cr R 33 (P & H).

Contradictions in evidence. The medical report clearly indicate that the doctor did not find any Gandasa injury either on the body of the deceased or on the body of witnesses who were stated to be injured witnesses. The number of contradictions, which are referred to by the High Court in its judgment, in respect of all the witnesses definitely make out a case of plausible view which could be deduced from the evidence on record. Moreover, the High Court has given detailed reasons for disbelieving the prosecution case and for acquitting the accused persons.

It is a settled principle of law that when on the basis of the evidence on record two views could be taken–one in favour of the accused and the other against the accused – the one favouring the accused should always be accepted.

In the present case, it is also not clearly established from the records as to who was in possession of the property in question where the occurrence had taken place. In view of the aforesaid situation and the two possible views taken by the Courts below – one taken by the trial Court and the other taken by the High Court – and the view taken by the High Court being a plausible view, we find no ground to interfere with the order of acquittal passed by the High Court. *State of Uttar Pradesh vs. Nandu Vishwakarma*, AIR 2009 SC 3188 : 2009 CrLJ 4157 : 2009 (9) Scale 81 : 2009 (8) JT 657 : 2009 (5) Supreme 500 : 2009 (7) SLT 675 : 2009 (10) SCR 185.

Where the High Court did not accept story of murder by accused alleged to have abducted deceased nor recorded a finding that grievous hurt was caused to deceased by the accused alleged to have abducted the deceased, it was held that conviction under Section 367 was not warranted. 1986 Cr LJ 814 ; AIR 1984 SC 911 ; (1983) 1 Crimes 675 (MP) reversed.

6. Kidnapping for ransom.—Accused kidnapped victim girl for ransom, as and when he picked up the ransom amount which was kept at a spot as per his directions in the ransom note, he was arrested. He made a disclosure statement and pursuant thereto led the police to the house of co-accused wherefrom Sonam was recovered.

Victim girl did not disclose as to where she was kept was immaterial as she was about 4 1/2 years old when incident took place.

The first is of Mahesh Kumar being apprehended at the spot when he came to collect the ransom money and after he picked up the ransom note he was apprehended at the spot. The prosecution has also successfully proved that after Mahesh Kumar made the disclosure statement he led the Investigating Officer to the house of Ram Ashish from where the young girl was recovered.

Save and except the evidence of the kidnapped child being recovered from the house of Ram Ashish we find no evidence where from his intention or knowledge can be gathered. *Mahesh Kumar vs. State*, 2010 (3) Cri LJ 3208 (Del).

Accused kidnapped victim girl for ransom. Accused wrote ransom note to father of victim girl only stating that if ransom is not paid, his daughter would be sold.

It is obviously not a case where any threat was extended either to the victim or to her father of causing death or causing injury to the kidnapped child. We note that victim girl has not stated that she was maltreated by either accused.

Thus, the offence made out against accused does not attract Section 364-A IPC. He has committed the offence punishable under Section 363, IPC as also the offence punishable under Section 367, IPC. *Mahesh Kumar vs. State*, 2010 (3) Cri LJ 3208 (Del).

* * * * *

Sec. 368. Wrongfully concealing or keeping in confinement, kidnapped or abducted person.—Whoever, knowing that any person has been kidnapped or has such been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

Synopsis

1. Scope 2272
2. Kidnapping for ransom. 2273

3. Procedure 2273
4. Charge 2273

1. Scope.—This section refers to some other party who assists in concealing any person who had been kidnapped and does not refer to the kidnappers. 6 WR Cr 17. Knowledge of kidnapping or abduction is essential. "Knowledge" means facts observed by himself or communicated by somebody whose veracity is not doubted. AIR 1932 Oudh 28 : 1932 Cr C 60 : 8 OWN 1325 : 136 Ind Cas 243. To sustain a conviction under this section it is not enough to show that the accused was concealing or confining in his house the girl who was kidnapped or abducted, it must further be proved that he knew that she had been kidnapped. 157 Ind Cas 168 : 36 Cr LJ 1089 : 1935 A Cr C 156. Section 368, IPC, presupposes that the offence of kidnapping or abduction had taken place, so that any one wrongfully concealing or confining the person kidnapped or abducted is guilty of an offence under that section. If, therefore, no offence of kidnapping or abduction is made out, the charge under the section fails. 167 Ind Cas 676 : 38 Cr LJ 401 : 1936 A Cr C 221 : 1937 ALR 216 : AIR 1937 All 182 ; 49 CWN 533 : AIR 1945 Cal 432 ; AIR 1939 Lah 180. "Concealment" means a withdrawal from the actual observation of others of the person kidnapped or abducted and not merely taking her away to a long distance so that her father or guardian would not know where she was. Hence where a kidnapped girl is taken to a well where she is allowed to move in the neighbouring fields it cannot be said that she is concealed. AIR 1939 Lah 26. The withdrawal of a person from the actual observation of others by removal or otherwise is necessary to constitute the offence of wrongfully concealing a person kidnapped or abducted, the mere giving of false information about such person not being sufficient. 10 PR 1874 Cr ; *see* also 6 Bom LR 785 ; 7 WR 56 ; 5 NWP 133 ; 5 NWP 189 ; 15 CPLR 185. 'To constitute the offence, the concealment or confinement must be by person who knows of the kidnapping or abduction, and must also be wrongful. A concealment of one who has escaped from slavery or who endeavours to avoid his kidnappers who are in pursuit of him is no offence. This mode of abetment by aid is punishable as the substantive offence which is abetted."—*Morgan and Macpherson.*

The mere circumstance of kidnapped girl staying in the accused's house for a day or two does not warrant the conclusion that she was wrongfully concealed with the object of batting any search that might be made for her. 5 NWP 189 ; *see* also 5 NWP 133 ; 15 CPLR 185 ; 7 WR Cr 56. In a charge to a jury for an offence under Section 368, IPC, a distinction should be drawn between evidence of knowledge and suspicion. 87 Ind Cas 845 : 26 Cr LJ 1021 ; AIR 1926 Cal 226. For a conviction under this section it must be proved that the accused concealed the girl or kept her in wrongful confinement. 27 Cr LJ 554 : 93 Ind Cas 1050. This section refers to some other party who assists in concealing any person who had been kidnapped and does not refer to the kidnapper. 97 Ind Cas 960 : 27 Cr LJ 1200. Where a person was abducted at *B* but concealed at *S*, person concealing can be tried not only at *S* but also at *B*. AIR 1933 Oudh 45 : 1933 Cr C 220 : 9 OWN 1181 : 141 Ind Cas 741. In order to convict a person under this section, it must be proved thus the abducted girl is below the age of 16 years. 43 CWN 543.

In order to establish an offence under Section 368 it is necessary for the prosecution to prove that the person in question had been kidnapped or abducted that the accused knew of such kidnapping or abduction, that he having such knowledge wrongfully concealed or kept such person in confinement. 1954 All WR (HC) 296 : 1959 Cr LJ 168. *See* also AIR 1973 SC 201 : 1973 Cr LJ 267. The prosecution must establish : (l) the person has been kidnapped or abduction; (2) knowledge of the accused of such kidnapping or abduction; (3) the accused must wrongfully conceal or confine the abducted person. 1967 Jab LJ 234 (SC) ; 1980 All Cr R 222 ; 1978 WLN (UC) 501.

2. Kidnapping for ransom.—Accused kidnapped victim girl for ransom, as and when he picked up the ransom amount which was kept at a spot as per his directions in the ransom note, he was arrested. He made a disclosure statement and pursuant thereto led the police to the house of co-accused wherefrom Sonam was recovered.

Victim girl did not disclose as to where she was kept was immaterial as she was about 4 1/2 years old when incident took place.

The first is of Mahesh Kumar being apprehended at the spot when he came to collect the ransom money and after he picked up the ransom note he was apprehended at the spot. The prosecution has also successfully proved that after Mahesh Kumar made the disclosure statement he led the Investigating Officer to the house of Ram Ashish from where the young girl was recovered.

Save and except the evidence of the kidnapped child being recovered from the house of Ram Ashish we find no evidence where from his intention or knowledge can be gathered. *Mahesh Kumar vs. State*, 2010 (3) Cri LJ 3208 (Del).

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by the Court by which kidnapping or abduction is triable. (*Vide* 152 Ind Cas 550 ; AIR 1935 All 673).

4. Charge.—"I (*name and designation of Magistrate/Sessions Judge*) hereby charge you (*name of the accused*) *as* follows :—

'That you on or about the.........(date).........(time)..........and...... (place) knowing that Shri/Smt................................. had been kidnapped (or had been abducted) wrongfully concealed (or conclude) him/her thereby committed an offence punishable under Section 368, IPC and within my cognizance.

"And I hereby direct that you be tried in this Court on the said charge."

* * * * *

Sec. 369. Kidnapping or abducting child under ten years with intent to steal from its person.—Whoever kidnaps or abducts any child under the age of ten years with the intention of taking dishonestly any moveable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Notes 2274
2. Separate sentences 2274
3. Evidence and Proof 2274

4. Procedure 2275
5. Charge 2275

1. Notes.—Where kidnapping was with intent to steal, a conviction under this section is proper. 13 Cr LJ 249 : 14 Ind Cas 601 ; *see* also 16 Cr LJ 167 : 27 Ind Cas 551. Kidnapping was not committed on the fact of the case, in 1981 Cr LR (SC) 218 : 1981 Cr App SC 275.

2. Separate sentences.—The offence described in Section 363 includes that which is described in this section and as such should not be punished separately. 8 WR 35 Cr ; *see* also 8 WR 84.

3. Evidence and Proof.—*Sufficient evidence.* Rape and murder of a girl aged 2 years. The evidence of PW-5 and PW-6 reveals that appellant had been seen around the complainant's house on the previous day and as he was not a resident of this area, he had been quickly singled out. These witnesses further stated the appellant had been seen in the vicinity again after the rape and murder and he had accordingly been apprehended and handed over to the police and two chains worn by deceased had been taken from his pockets. PW-13 also identified the chains in Court. It is true that in the cross-examination of these two witnesses, several improvements *vis-a-vis* their statements under Sec. 161 of Criminal Procedure Code had been pointed out by the defence Counsel, but the fact that the appellant had been present in the vicinity of the house and had been arrested, soon after the incident has been admitted even by the defence.

Another significant piece of evidence is the statement of PW-7 who testified to the fact that about 2:30 a.m. on the night of the murder he had gone out of the house to urinate and had seen the appellant outside and on being questioned, the appellant had threatened him with dire consequences with the result that he had not informed anybody till the third day after the police had come to the village to verify the facts. He too stated to the fact that two chains had been recovered from the pocket of the appellant. It is true that several improvements have been made by the three primary witnesses but there is absolutely no reason as to why they would involve the appellant in a false case as admittedly he was a stranger to the locality and they bore him no ill will.

We have also gone through the evidence of PW-12 relating to the recovery of the frock pursuant to a disclosure statement made by the appellant under Sec. 27 of the Evidence Act. Nothing could be spelt out from the cross-examination of this witness except that the recovery had not been made from a closed place, though he explained that there was very little movement of human beings in that area as no one was residing close by. This witness also identified the frock that had been recovered. It is equally significant that the strands of fibre recovered from the place of incident had been matched with the material of the frock and were found to be from the same source.

It is true that in a criminal matter the onus of proof lies almost exclusively on the prosecution. As already mentioned above, however, the appellant has not been able to give any explanation in his statement under Sec. 313 of Criminal Procedure Code as to what he had been doing in that locality. On the contrary he admitted his presence by stating that he had been caught by the neighbours on suspicion of the murder and beaten up, and had suffered several injuries in the process. The medical evidence on the contrary reveals that these injuries could also have been sustained while raping and killing the young child.

The evidence that the appellant was a paedophile with extremely violent propensities also stands proved on record in that he had been convicted and sentenced for an offence punishable under Sec. 354 in the year 1998 and later for offences punishable under Secs. 363, 376, 379, 302 and 201 of the IPC for the rape and murder of a young child and had been awarded a sentence of imprisonment for life under Sec. 302, and several other terms of imprisonment with respect to the other Secs., though, an appeal in this connection was pending as on date. It is also extremely relevant that the appellant, had, in addition, been tried for the murders of several other children but had been acquitted on the 28.07.2005 with the benefit of doubt. The present incident happened three days later. We accordingly dismiss the appeals but modify the sentence of death to one for the rest of his life in terms of the judgment in *Shraddananda's* case. *Sebastian vs. State of Kerala*, 2010 (1) SCC 58 : 2009 (4) Crimes 121 (SC) : 2009 (13) JT 136 : 2009 (13) Scale 210 : 2009 (7) Supreme 8 : 2009 (8) SLT 96.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by a Magistrate of the first class.

4. Charge.—I (*name and office of Magistrate, etc.*) hereby charge you *[name of the accused)* as follows :—

"That on or about the.........day of ....at..........you kidnapped (or abducted) *A,B* a child then under the age of ten years, with the intention of taking dishonestly any moveable property, to wit.....from the person of the said *A,B* and thereby committed an offence punishable under Section 369 of the Indian Penal Code, and within my cognizance."

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 370. Buying or disposing of any person as a slave.—Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Scope 2275
2. Slavery 2276
3. Evidence 2276
4. Procedure 2276
5. Charge 2276

1. Scope.—"By this section the sale are disposal of any person "as a slave', that is, on the pretext of his being in a condition of slavery, is made an offence. The clause extends not only those immediately concerned in the contract of sale or disposal, but extends to those who aid them by knowingly conveying or removing the person who is the subject of the bargain, or knowingly receiving or detaining such person as a slave. This section in general prohibits the traffic in all human beings, whether children of tender years or adults".—*Morgan and Macpherson.*

2. Slavery.—Where a person transferred to another his rights over a girl of 13 years for 25 years, whom he described as her *villati, held,* that both were guilty under this section. 7 M 227 : 1 Weir 354 ; *see* also UBR (1897-1901) Vol. I, 337. But where a girl is bought or sold for purposes of marriage, no offence is committed under this section. 20 PR 1884 ; 19 PR 1867. If knowing that a girl had been kidnapped, the accused wrongfully confines her, and subsequently detains her as a slave, he is guilty of two separate offences under Sections 368 and 370. 3 NWP 146. This section is only directed against attempts to place person in the position of slaves, or to treat them in a way that is consistent with the idea of the person so treated being free as to his property service or conduct in any respect. 2 All 723. Keeping a woman against her will as a slave is an offence under this section. 16 WR Cr 73. The purchase of a girl in a foreign territory, knowing her to be a slave, is not in itself an offence punishable under the Penal Code, and to make the importing of her into British territory an offence, it is necessary that it should appear that the accused imported her as a slave. 26 PR 1882 Cr. Slavery in Section 370 IPC, includes something very far short of slavery in its most extreme forms wherein the master has absolute and unlimited power over the life, fortune and liberty of the laws. 33 MLJ 430 : 22 MLT 262 : 1917 MWN 894 : 6 LW 600. The performance of a *Gejjee* ceremony on a minor girl does not amount to her disposal within the meaning of Section 372 of the Penal Code, 1860. 22 Bom LR 893 : 58 Ind Cas 145 : 21 Cr LJ 721.

3. Evidence.—Where evidence of prosecutrix clearly corroborated by testimony of witnesses and free from blemish or ambiguity and is implicitly reliable therefore even on sole testimony of prosecutrix, conviction can be recorded. *State of Rajasthan* v. *Biram Lal*, 2005 (3) East Cr C 48 (SC). *See also Rajesh Sah* v. *State of Bihar*, 2006 Cr LJ 1476 (Pat).

4. Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by a Magistrate of the first class.

5. Charge.—1 (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

'That on or about the..................day of ....at................you imported (or, exported, removed, bought, sold or disposed of) *A,B*, as a slave (or accepted, *etc.* the said *A,B* against his will as a slave), and thereby committed an offence punishable under Section 370 of the Indian Penal Code, and within my cognizance."

"And I hereby direct that you be tried on the said charge."

* * * * *

Sec. 371. Habitual dealing in slaves.—Whoever habitually imports, exports, removes, buys, sells, (traffics or deals in slaves, shall be punished with *imprisonment for life*, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Synopsis

1. Amendment 2277
2. Scope 2277
3. Procedure 2277
4. Charge 2277

1. Amendment.—The words in italics have been substituted for the words "transportation for life" by Act 26 of 1955, Section 117 and Sch with effect from 1.1.1956.

2. Scope.—"The section is for punishment of the slave-trader, who is habitually engaged in the traffic of buying and selling human beings. This section extends to masters of vessels and other persons who habitually aid the traffic by importing, exporting or removing the subjects of it".—*Morgan and Macpherson.*

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by a Court of Session.

4. Charge.—I (*name and designation of the Sessions Judge, etc.*) hereby charge you (*name of the accused*) as follows :—

That between.........and...............(dated) at........(place) you habitu-ally imported (exported, removed, bought trafficted or dealt in slaves) and thereby committed an offence punishable under Section 371, IPC and within my cognizance."

"And I hereby direct that you be tried in the Court on the said charge."

* * * * *

Sec. 372. Selling minor for purposes of prostitution, *etc.*—Whoever sells, lets to hire, or otherwise disposes of any "person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be" employed or used for any such purpose shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.—For the purposes of this section "illicit intercourse" means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to marriage, or recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both communities, as constituting between them a quasi morital relation.

Synopsis

1. Amendment 2278
2. Ingredients of offence 2278
3. Prostitution 2279
4. Disposes of 2280
5. Conviction 2280
6. Jurisdiction of Court 2280
7. Procedure 2280
8. Charge 2280

1. Amendment.—The words within quotations in Section 372 have been substituted by the Indian Criminal Law (Amendment) Act, 1924 (18 of 1924). Section 2 for certain original words. The two Explanations of this section have also been inserted by *ibid*, Section 3.

2. Ingredients of offence.—The ingredients of an offence under this section are (l) that the minor sold or otherwise disposed of must be under the age of sixteen, (2) there must be a sale or other disposal, (3) it must be with the guilty intent described in the section. AWN 1900, 133 ; 6 BLR App 34 : 14 WR Cr 39 ; 35 MLJ 157 : 24 MLT 77 : 19 Cr LJ 965 : 47 Ind Cas 865 ; AIR 1943 All 324 : 35 Cr LJ 571 : 1934 Cr C 408 ; 40 CWN 1188. In order to constitute an offence under this section there need not be a disposal tantamount to a transfer of possession or control over minor's person. 1 M 164. The words "dispose of" has many meanings. It denotes *inter alia* "to bestow for an object or purpose, to make a change in the circumstances" ; it does not necessarily imply that there has been a transfer of possession nor do the terms "sell or hire" necessarily connote a present or immediate transfer or possession. Where a transfer of possession is contemplated, the offence is complete on proof of the sale or hiring without any proof of transfer of possession. 9 Weir 359 (FB). Where a minor daughter is dedicated in the service of a temple she becomes incapable of contracting a marriage. The change in the circumstances of the minor is a "disposal" within the terms of this section. *Ibid*. 15 M 75 : 1 Weir 372 ; 1 M 154 ; 16 Bom 737 ; 6 BHCR Cr 69 ; 15 M 41 ; 15 M 323 ; 1 Weir 364. Performance of a *Gejjee* ceremony on a minor girl does not amount to her disposal within Section 372. 21 Cr LJ 721 : 22 Bom LR 894 : 58 Ind Cas 145. But where minor girls were being taught singing and dancing and were made to accompany their grandmother a *dasi* to the temple, to take part in the ceremonies of the temple with a view to qualify them as *dasis*, held, that the facts proved did not amount to a disposal under this section. 1 Weir 364. But the dedication of minor girls to the service of a temple and their registration as dancing .girls amounts to such a disposing and obtaining as this section contemplates. 1 Weir 356 ; 24 MLJ 211, 12 M 373. Where there was no proof that the accused knew that the girl was a married woman or was likely to be employed for a purpose which was both unlawful and immoral, *held*. that he could not be convicted under Section 372 Penal Code, 13 PR 1904 Cr : 1 Cr LJ 949 : 114 PLR 1904. Where the accused by falsely representing that a girl belonging to a low caste belonged to a higher caste, induced a member of a higher caste to take her in marriage and to pay money, for her to the accused, in the full belief that the representations were true, *held*, that the accused had not committed offences under Sections 372 and 373. 2

All 694 (FB). The offence made punishable by Section 372 is complete when the person intending that a minor should be employed or used for the purpose of prostitution or for any unlawful or immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, intentionally places the minor in a position calculated to bring about the result intended or known to be likely. 7 Bom LR 562 : 2 Cr LJ 500. Where the accused brought a young prostitute to a brothel at the request of the complainant for his supposed use for a single occasion and where it was not contemplated that the girl should be sold or let out for a period of employment, or for the purpose of being employed by the complainant as a prostitute, or for the purpose of being disposed of by the person for that course of life. *Held*, that the commission of an immoral act of sexual intercourse at an interval so brought about was not in the contemplation of Section 372, Penal Code. 21 Cal 97. The performance of the ceremony of tying *Talimani* to a minor girl, worshipping a basic of water and distributing food does not come within the provisions of Section 372 of the Indian Penal Code. 27 Bom LR 1022 : 89 Ind Cas 1050 : 26 Cr LJ 1482 : AIR 1925 Bom 478. A mere direction or recommendation to a girl to live in a brothel, would not constitute a disposal within the meaning of Section 372. The word “disposal” connotes some control by the person disposing, over the minor disposed of. Nor can it be a case of “selling or letting to hire of a minor” as there is no evidence of any passing of pecuniary consideration. 21 LW 472 : 86 Ind Cas 804 : 26 Cr LJ 868 : 48 MLJ 594 : AIR 1925 Mad 716. It is not requisite for the purpose of Section 373 that the possession of the minor should be obtained from a third person. It is enough if it is established that the accused in fact obtained possession of the minor with the intent that the minor shall be used for the purpose of prostitution. 11 Pat LT 341 : AIR 1930 Pat 219.

The sale of minor girl is not criminal *per se* but only on proof of one of the intentions mentioned in the section. Further the point for time which is crucial for determining the culpability of the accused is the one when the sale of the girl takes place. AIR 1954 HP 43 : 1953 Cr LJ 859 ; 1954 All WR (HC) 296 : 1955 Cr LJ 168.

3. Prostitution.—In the absence of any special custom it is unlawful for a guardian to enter into a transaction by which a minor may be transferred to another as his concubine. 1 Weir 373. This section declares as a matter of general law, that no person under the age of majority, shall be devoted to a life of prostitution, nor employed in, nor used for any unlawful or immoral purpose, nor placed in a position in which it is likely that such person will be employed in, or used for any such purpose. This rule, which is obviously suggested by the highest considerations of justice and morality, must control the exercise of all private law, even in those cases in which the private law assumes to vindicate itself on the serious plea of religion. 1 Weir 359. The word “unlawful” in this section must be *ejusdem generis* with immoral. Rat Un Cr C 310. The offence of selling or buying a minor for the purpose of prostitution is committed even when the minor, prior to such transaction, has been leading an immoral life. 8 Bom LR 236 : 3 Cr LJ 334. It may be regarded as settled law that the dedication of a minor girl to a temple in order that she might serve the temple as a dancing girl amounts to the disposal of the minor for the purpose of prostitution, especially where there is evidence of the kind of the life that girls so dedicated have led. (1911) 2 MWN 479 : 12 Cr LJ 566. Prostitution cannot be treated as a profession by which a girl can earn her livelihood for the purpose of Section 488, Cr PC. 1913 MWN 695 : 14 MLT 224 : 25 MLJ 349 : 14 Cr LJ 525 : 20 Ind Cas 1005 : 37 M 565.

Doctors in nursing homes who, contrary to all norms of professional ethics, sell a recently born child without ascertaining satisfactorily the purpose for which the child is being purchased and without taking proper precautions to ensure that the child may not fall in undesirable hands must, *prima facie*, be imputed with the knowledge that the child, at some age, is likely to be employed or used for any unlawful and immoral purpose within the meaning of Section 372 of the Indian Penal Code. It has to be taken notice of that the word "likely" in the section denotes "probability" and not "certainty". *State of MP* v. *Dr. P.K. Jain*, 2005 Cr LJ 877 (MP).

4. Disposes of.—The word "disposal" shows that the person disposing has some control over the minor. 48 MLJ 503 : 86 Ind Cas 804. A change in the circumstance of the minor is a disposal. 1 Weir 359 (FB).

5. Conviction.—A charge under Section 372 IPC, in respect of alleged hiring out of a minor by the accused for a certain sum of money to various visitors going to his house should not be drawn up as though the offence were a general one of living upon the immoral earnings of a woman. Separate charges would be drawn up with regard to each of the visitors. A single charge in respect of all the various visitors necessarily leads to scrabby and inept cross-examination and causes prejudice to the accused. The conviction of the accused on such a charge cannot be seperated. 40 CWN 1188. Where an accused has been convicted under Section 372 he cannot at the same time be convicted under Section 366A. Section 366A will be applicable where there is no sale of the girl, but she is induced by some other means to go from any place or to do any act so that she might be forced or seduced to illicit intercourse with another person. 1954 All WR (HC) 296 : 1955 Cr LJ 168.

The accused kidnapped a minor girl in broad daylight and kept her in a room for over a month where two accused raped her repeatedly. The victim had no enmity against accused to tender false evidence at risk of its adverse effect on her future. Her evidence was sufficiently enough to prove the guilt of accused. It was held that acquittal of accused for want of corroboration of her evidence was not proper. *Public Prosecutor, High Court of AP* v. *Sannaila Subba Rao*, 2004 Cr LJ (NOC) 45 (AP) : 2004(2) ALD (Crl) 213 : 2004(2) Andh LT (cri) AP 15.s

6. Jurisdiction of Court.—Where the sale of her girl had taken place outside the jurisdiction of the Court, it cannot try the accused. 1948 AMLJ 40.

7. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

8. Charge.—I (*name and designation of the Sessions Judge, etc.*) hereby charge you (*name of the accused*) as follows :

'That on or about the......day of ....at..........you hold (or let to hire or disposed of) one *A,B*, then a minor under the age of eighteen years, with intent that the said *A.B* shall at any age be employed or used for the purpose of prostitution or illicit intercourse (or for any unlawful and immoral purpose, to wit......) or knowing it to be likely that such minor will be employed or used for any such purpose) and thereby committed an offence punishable under Section 372 of the Indian Penal Code, and within my cognizance."

"And I hereby direct that you be tried (by the said Court) on the said charge."

* * * * *

Sec. 373. Buying minor for purposes of prostitution, *etc.*—Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such "person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age" be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.—Any prostitute or any person keeping or managing a brothel, who buys, hires otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II.—"Illicit intercourse" has the same mean-ing as in Section 372.

Synopsis

1. Amendment 2281
2. Scope and Object 2281
3. Otherwise obtains possession 2283
4. Explanation 1 2283
5. Procedure 2283
6. Charge 2283

1. Amendment.—The words within quotations in Sections 373 have been substituted by the Indian Criminal Law Amendment Act, 1924 (18 of 1924).

Section 2, for certain original words. The two explanations of this sections have also been inserted by *ibid.* Section 4.

2. Scope and Object.—The mischief against which this section is directed, is a trafficking in the prostitution or other unlawful and immoral use of minors. It is not intended to make punishable the buying hiring or otherwise obtaining possession for a single act of sexual intercourse with the person so obtaining possession. 1 Weir 377 : 5 MHC 473. Possession in this section indicates with a power of disposal. It is something more than such possession as is obtained for the purpose of single act of sexual intercourse. 58 Bom 498 : 151 Ind Cas 877 : 35 Cr LJ 1437 : 36 Bom LR 379 : AIR 1934 Bom 200. Possession need not be obtained from third party. Possession can be obtained by stealing a minor girl with requisite intention. *Ibid ; see* also AIR 1930 Pat 219 : 11 PLT 341 : 125 Ind Cas 154 ; AIR 1942 Bom 23 : 43 Cr LJ 400. A prostitute received into her house two girls, one of them being of mature age, and promised to give the elder good clothes and ornaments if she live with her. *Held*, that from these facts it might be reasonably inferred that the accused obtained possession of the girls with intent that one or both of them should be employed for the purpose of prostitution, or knowing it to be likely that they would be so employed, and that, therefore an offence under Section 373 had been committed. 1 ALJ 559 : 1 Cr LJ 972. To constitute the offence under Sections 372 and 373, it is necessary that there should be a making over of possession of the minor girl either by sale or hire or by a similar arrangement. 35 MLJ 157 : 24 MLT 77 : 47 Ind Cas 865 : 19 Cr LJ 965 ; *see* also 35 CWN 316 : 33 Cr LJ 553 : AIR 1932 Cal 417. It is not requisite for the purpose of Section 373 of the Indian Penal Code, 1860, that the possession of the minor should be obtained from a third person. It is enough if it is established that the accused in fact obtained possession of the minor with the intent that the minor shall be used for the purpose of prostitution. 22 Bom LR 1234 : 45 Bom 529 : 59 Ind Cas 141 : 22 Cr LJ 29. It is necessary for the prosecution to prove in a case under Section 373, IPC, that the girl is under the age of 16 years. 26 CWN 972 : 36 Cr LJ 152 : AIR 1922 Cal 505. Where a minor girl was brought from Kashmir to Bombay by accused No. 2 and put in the brothel of accused No. 1 *held*, (1) that the offences under Sections 373 and 114, IPC, were committed in Bombay and not in Kashmir. 101 Ind Cas 593 : 28 Cr LJ 465 : 39 Bom LR 490. Sections 373 of the Penal Code must be read in conjunction with the previous Section 372 which is its counterpart. And the questions whether a person under eighteen has been brought and sold, hired and let to hire, disposed of and possession obtained are all in each case questions of fact for the jury and not of law to the Judge. The law does not the specify the nature of the possession nor its duration nor intensity. It merely specifies the objects, namely, prostitution or illicit intercourse whether in each case the possession is such as to be consistent with the purpose, or intention or knowledge of prostitution of illicit intercourse is the only proper test. 52 Bom 403 : 112 Ind Cas 209 : 30 Bom LR 613 : 29 Cr LJ 993 : AIR 1928 Bom 336. If the accused is proved to have obtained possession of a female under the age of 18 years and is proved to be a person who occupies or manages a brothel, then he is presumed to have obtained possession of that girl with the intent that he shall use her for the purpose of prostitution. 30 PLR 414 : 115 Ind Cas 65 : 30 Cr LJ 376 ; *see* also 35 Cr LJ 451 : 24 Cr LJ 104 : 71 Ind Cas 232. Proof of intention or knowledge must almost be entirely a matter of inference from circumstances. 24 Cr LJ 104 : 35 Cr LJ 45. Before an offence under this section can be established it must be proved ; (1) that a minor under sixteen years of age was bought, hired or otherwise obtained possession of by the accused, and, (2) that the minor was bought, hired, or otherwise obtained possession of by the accused with the intent that the same minor while under sixteen years of age shall be employed or used for the purpose of prostitution, or with knowledge that it was likely that the said minor, while still under the age of sixteen, will be employed or used for an unlawful or an immoral purpose. The offence would be, and is complete as soon as the buying, etc. by the accused and the guilty knowledge or intent on his part are proved, though the person bought may not enter upon prostitution until years after she had attained maturity, or may never enter upon such profession at all. 18 All 24 ; *see* also 23 M 159. It is not essential to the offence, under this section, that the buying, hiring or otherwise obtaining the possession of, should be from a third person. The language of the section is quite applicable to an agreement or understanding come to with the minor, without intervention of a third person, and the vice against which the section is directed is not of less enormity in the latter case. But to bring a case within the section, it is essential to show that the possession of the minor has been obtained under a distinct agreement come to between the parties that the minor's person should be for some time completely in the keeping and under the control and direction of the party having the possession.

whether ostensibly, for a purpose or not. 5 MHC 473 : 1 Weir 377. This section is not applicable where the accused solicite a girl merely to have sexual intercourse with her. 7 NWP 295. The words, "otherwise obtains possession of" must be read together with the proceeding words, and the accused is not punishable under this section for mere enticement. 11 CPLR Cr 6.

Accused cannot be convicted under Sections 373, 376 and 378 for marriage certificate being wrong on account of wrong entries. 1987 Cri LR (MP) 13.

3. Otherwise obtains possession.—The words "otherwise obtains possession" in Section 373, must be construed *ejusdem generis* with "buying" and "hiring". Further the word "possession" implies some sort of control. Where, therefore, a girl under 18 years of age ran away with the accused of her own accord and the intention of the accused was not other than to have intercourse with the girl himself, and there was nothing to show that he had possession of her in any sense of the term or that he attempted to control her movements in any way, the accused cannot be convicted of the offence under Section 373, IPC. ILR (1937) 2 Cal 187 : 169 Ind Cas 76 : 38 Cr LJ 696 : 41 CWN 447 : AIR 1937 Cal 250. A valid adoption would be covered by the expression 'otherwise obtains possession'. Therefore, it is of no consequence whether the accused could or could not adopt the girl and whether the alleged adoption was valid and effective. 1959 Jab LJ 614 : 1960 MPLJ 177 : 1960 MPC 52.

4. Explanation.—AIR 1943 Bom 150 ; 44 Cr LJ 534. Where no presumption arises under this explanation a presumption may well arise under Sections 14, 15 and 114 of the Evidence Act, *Ibid.*

In order that presumption under Explanation 1 to Section 373 IPC, could be raised against the accused, it should first be proved either she is a prostitute or that she is keeping or managing a brothel, 1959 Jab LJ 614 : 1960 MPC 52 : 1959 MPLJ 177.

5. Procedure.—Cognizable—Warrant—Not compoundable—Triable by Court of Session.

6. Charge.—I (*name and office of Sessions Judge, etc.)* hereby charge you *(name of the accused*) as follows :—

'That on or about the......................day of................ at............... you bought (or hired or obtained possession of) *A, B,* a person then under eighteen years of age, with intent that the said A, *B* shall be employed (or used) for the purpose of prostitution (or illicit intercourse or for any unlawful and immoral purpose), or knowing it to be likely that the said *A, B* will be employed or used for any such purpose) and thereby committed an offence punishable under Section 373 of the Indian Penal Code, and within my cognizance."

And I hereby direct that you be tried on the said charge."

* * * * *

Sec. 374. Unlawful compulsory labour.—Whoever unlaw-fully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Synopsis

1. Notes 2284
2. Procedure 2284
3. Charge 2284

1. Notes.—"Compulsory labour is by various laws now in force permitted. Under the General Exceptions of Code nothing is an offence which is done by a person who is justified by law. Where there is no law to justify it. the compelling of a person by force, or by threats which reasonably cause him to apprehend hurt or injury, to labour against his free will is an offence".—*Morgan and Macpherson ; see* also 19 Cal 572 ; 5 WR Cr 1 ; To make person work forcibly is not an offence under this section, where she was made over by her mother to the accused in consideration of certain amount of money. UBR (1897-1901) Vol. I, 337.

Convicted and sentenced under Section 374, IPC for 3 years, R.I. which was challenged in appeal. It was held that the accused is a poor labour and has undergone sentence of 7 or 8 months. Hence though conviction confirmed the sentence reduced to period already undergone. *Hari Shanker* alias *Tillu* v. *State*, 1995 JIC 201 (All).

2. Procedure.—Non-cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate.

3. Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused) as* follows :—

"That on or about the . . . . day of . . . . at . . . . you unlawfully compelled one *A, B* to labour by . . . . *(specify the labour)* which was against the will of that person, and thereby committed an offence punishable under Section 374 of the Indian Penal Code, and within my cognizance."

"And I hereby direct that you be tried on the said charge."

* * * * *

[1]*SEXUAL OFFENCES*

Sec. 375. Rape.—A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following description :—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death, or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes, that he is another man to whom she is or believes herself to be lawfully married.

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[1] *Substituted* by the Criminal Law Amendment Act (43 of 1983) with effect from 25.12.83.

Fifthly.—With her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under "sixteen" years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under "fifteen" years of age, is not rape.

STATE AMENDMENT

Manipur.—Section 375, *clause fifthly* read for the word "sixteen" the word "fourteen" *in the exception* read for the word "fifteen" the word "thirteen"—*Vide* the Act 30 of 1950. Section 3(2) dated the 16th May 1950.

Synopsis

1. Amendment. 2285
2. Scope. 2286
3. Presumption as to obsence of consent in certain prosecutions for rape. 2286
4. Amendment of Section 327. 2287
5. Amendment of the Schedule. 2287
6. Consent. 2288
7. Age of the Prosecutrix. 2291
8. Penetration. 2292
9. Jurisdiction. 2294
10. Attempt. 2294
11. Evidence. 2295
12. Burden of proof. 2300
13. Rape and outraging of modesty of woman 2300
14. Amendment in provisions—Object of 2300
15. Intention to introduce Sexual offences — Scope — Discussed 2301
16. Promise of marriage 2301

1. Amendment.—In the Penal Code, the heading "of rape" occurring immediately before Section 375 and for Sections 375 and 376 the heading and the section have been substituted by The Criminal Law (Amendment) Act, 1983 (43 of 1983) which received the assent of the President on 25.12.1985 in the Criminal Law (Amendment) Act (43 of 1983) a new section numbered 114A has been added in the Evidence Act.

2. Scope.—The prosecutrix was about 17 years as per medical evidence. There were no efforts to resist or overcome the sexual assault. She remained with company of accused for pretty long time, and was a consenting party. The offence of rape is not established. Acquittal. *Subhash Koli* v. *State of Rajasthan*, (1995) 2 Cr LR 675 (Raj).

Accused was charged of committing rape on the prosecutrix. The accused induced the girl to accompany him under the pretext that her father was ill and she was required to visit her father, on the way she was made victim of sexual assault. It was observed that she might have not resisted or she might have passively suffered the assault but that would not amount to free consent. That would amount to obtaining consent by deception. 1987 Cr LJ 374 (Guj).

When informities found in conduct of identification parade and independent panch witnesses absent, identity of accused as offender not established and thus liable to be acquitted. *State of Gujarat* v. *Mahmud*, 1996 Cr LJ 3400 (Guj.).

In *Sakshi* v. *Union of India*, 1999 Cr LJ 5625 (SC) attention of the Apex court was drawn to existing section 375/376, IPC and various other section and it was pointed out that the interpretation being placed by the courts or those section cannot be said to be in tune with the current state of affairs existing in the society particularly in the matter of sexual abuse of children. The court made the following observations:—

> "We have perused the issues, as submitted for consideration by the petitioners and find *prima facie* that the 156th Report of the Law Commission does not deal with most of the issues raised herein. The issues are important and concern sexual abuse of child. Keeping in view, the rise in crime and the growing menace of sexual abuse of child, we consider it appropriate and once again request the Law Commission to examine the issues submitted by the petitioners and examine the feasibility of making recommendations for amendment of the Indian Penal Code or deal with same in any other manner so as to plug the loopholes.
>
> "A copy of the 'precise issues" together with appendix and the affidavit shall be sent to the Secretary Law Commission with a request to him to place the same before the Hon'ble Chairman of the Law Commission for his consideration. The Law Commission may, if so advised, call upon the petitioners to assist it in whatever manner it considers it appropriate. The issues, it appears to us do need a through examination.
>
> "We are adjourning the matter by three months and hope that the Law Commission would be able to devote its attention to the issue raised on the submission note in the mean while."

3. Presumption as to obsence of consent in certain prosecutions for rape.—"In a prosecution for rape under Clause (a) or Clause (b) or Clause (c) or Clause (d) or Clause (e) or Clause (g) of sub-section (2) of Section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent."

There have been amendment of Section 327 and of the First Schedule of the Criminal Procedure Code, 1973 to the following effect.

4. Amendment of Section 327.—In the Code of Criminal Procedure, 1973 (hereinafter referred to as the Criminal Procedure Code). Section 397 shall be renumbered as sub-section (1) of that section and after it, as so renumbered, the following sub-sections shall be inserted, namely :—

(2) Not withstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376A, Section 376B, Section 376C or Section 376D of the Indian Penal Code shall be conducted in camera :

Provided that the Presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in the room or building used by the court.

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any proceedings, except with the previous permission of the court.

5. Amendment of the Schedule.—"In the First Schedule to the Criminal Procedure Code, under the reading "I,—offence under the Indian Penal Code".

(a) after the entrie relating to Section 228, the following entries shall be inserted, namely :—

1	2	3	4	5	6
228A	Disclosure of identity of the victim of certain offences etc.	Imprisonment for two years and fine.	Cognizable	Bailable	Any Magistrate.
	Printing or publication of a proceeding without prior permission of Court.	Ditto	Ditto	Ditto	Ditto.

(b) for the entries relating to Section 376, the following entries shall be substituted, namely :—

1	2	3	4	5	6
"376	Rape	Imprisonment for life or imprisonment for ten years and fine.	Cognizable	Non-bailable	Court of Session
	Intercourse by a man with his wife not being under twelve years of age.	Imprisonment for two years or fine or both.	Non- cognizable	Bailable	Ditto.
"376A	Intercourse by a man with his wife during separation.	Imprisonment for two years and fine.	Ditto	Ditto	Ditto
376B	Intercourse by public servant with woman In his custody.	Imprisonment for five years and fine.	Cognizable (but no arrest shall be made without a warrant or without an order of a Magistrat).	Ditto	Ditto.

1	2	3	4	5	6
376C	Intercourse by Superintendent of jail. Remand home, etc.	Imprisonment for five years and fine.	Cognizable (but no arrest shall be made without a warrant or without an order of a Magistrat).	Bailable	Court of Session
376D	Intercourse by manager, etc., a hospital with any woman in any hospital.	Ditto	Ditto	Ditto	Ditto.

6. Consent.—Sexual intercourse by a man with a woman without her free consent i.e., a consent obtained without putting her in fear of injury, amount to rape. 1 WR Cr 21. Where there is consent of the girl no rape has been committed. AWN 1884, 91 ; 12 Cr LJ 584 ; 12 Ind Cas 848; AIR 1927 Lah 858. The fact that the girl was *virgo intacta* up to the date of occurrence is very strong proof of non-consent. AIR 1925 Lah 619; 96 Cr LJ 1488 ; 89 Ind Cas 1056. In a rape case the question of consent does not arise where the girl is under fourteen years of age. 9 PLT 186 ; 29 Cr LJ 12. The mere fact that the woman did not bear the best of character may at best only render it likely that she might be a consenting party. It would not necessarily follow that she was a consenting party. 1953 Cr LJ 1196 ; AIR 1953 Ajmer 12. Consent can be presumed from the conduct of the raped girl. 1962 Jab LJ 825 ; 1963 (1) Cr LJ 686 ; 1962 MPLJ (Notes) 325. From the circumstances that there were no injuries found on the person of the woman and that the woman had been undergoing forms of marriage with a number of persons some are still alive it cannot be concluded that it was a case of voluntary consent by the woman and that she yielded her body to the accused out of her free will and volition. Absence of resistance does not necessarily imply consent. AIR 1960 Punj 303 ; 1960 Cr LJ 849. Consent on the part of a woman as a defence to an allegation of rape, requires voluntarily participation not only after the exercise of intelligence, based on the knowledge of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. AIR 1958 Punj 123 ; 1958 Cr LJ 563 ; 59 Punj LR 519 ; where the fear to which the woman is subjected is neither death nor of hurt but of being arrested when as a matter of fact there is no warrant of arrest against her, then consent, though obtained by fraud, is nonetheless consent for she is willing to allow sexual intercourse for a price, which is fictitious one because there is no warrant of arrest against her. AIR 1955 Nag 121 ; ILR 1954 Nag 922 ; 1955 Cr LJ 819, *see* also 1958 MPLJ (Notes) 120 (presumption of consent) ; 21 Cut LJ 527 ; 1953 BLJR 727. Where after a petition for divorce had been presented by the wife but before it was heard, the husband had intercourse with her without her consent. *Held*, that in the absence of any evidence that wife's implied consent had been revoked by act of parties or by an act of Court, the husband could not be held guilty of rape. (1954) 2 All ER 529.

Factors, set out in the first part of Section 90, namely, that the consent given by a person under fear of injury or under misconception of fact is not consent are from the point of view of the victim; whereas the factors, set out in the second part of Section 90, namely, that the person doing the act knows, or has reason to believe, that consent was given in consequence of such fear or misconception are corresponding provisions from the point of view of the accused. Thus, the second part of Section 90 lays emphasis on the knowledge or reasonable belief of the person, who obtains consent, that the consent given by the victim is in consequence of fear of injury or misconception of fact. What is, however, of paramount importance to note is that the existence of the twin requirements of Section 90 must be cumulatively satisfied in order to enable a Court to hold that no consent in law existed at the relevant time. In other words, when these two conditions precedent are co-existent in a case, it can be safely held that no consent, as envisaged under the Indian Penal Code, existed. Such a finding can be reached by examining as to whether the person, giving consent, had given the same under fear of injury or misconception of fact and, further, whether the offender knew, or had reason to believe, that but for fear or misconception of fact, 'consent', would not have been given. The submission of the body by a woman under fear or misconception of fact cannot be construed as consented sexual act for the purpose of Sec. 375, IPC, Section 375 requires voluntary participation by the victim not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but after having fully exercised the choice between resistance and assent. Whether consent existed or not has to be ascertained on the basis of the facts of a given case. There is, indeed, a firm and fine distinction between 'consent' and 'submission'. Every 'consent' involves 'submission', but every 'submission' is not 'consent' and the mere fact that a woman had submitted to the promise of the accused does not necessarily indicate that her 'consent' existed unless the evidence on record establishes that the sexual act, which the prosecutrix had allowed, was accompanied with deliberation after the mind had weighed, as in a balance, the good and the evil on each side with the existing capacity and power to withdraw the assent according to one's will or pleasure. *Md. Jakir Ali v. The State of Assam*, 2007 CriLJ 1615 (Gauhati).

Absence of injuries either on the accused or on the prosecutrix showed that the prosecutrix did not resist but absence of injuries is not by itself sufficient to hold that the prosecutrix was a consenting party. Where consent, in case of grown up lady to sexual intercourse is likely to be inferred, the prosecution may prove negative consent by producing evidence of threat or fear of death or hurt held out the accused. *Jogi Dan v. State*, 2004 Cr LJ 1726 (Raj) : 2004 Cri LR (Raj) RAJ 411 : 2004(2) Raj Cri C 780 : 2004(2) Raj LR 635 : 2004(3) WLC 73.

Fear or misconception. Factors, set out in the first part of Section 90, namely, that the consent given by a person under fear of injury or under misconception of fact is not consent are from the point of view of the victim; whereas the factors, set out in the second part of Section 90, namely, that the person doing the act knows, or has reason to believe, that consent was given in consequence of such fear or misconception are corresponding provisions from the point of view of the accused. Thus, the second part of Section 90 lays emphasis on the knowledge or reasonable belief of the person, who obtains consent, that the consent given by the victim is in consequence of fear of injury or misconception of fact. What is, however, of paramount importance to note is that the existence of the twin requirements of Section 90 must be cumulatively satisfied in order to enable a Court to hold that no consent in law existed at the relevant time. In other words, when these two conditions precedent are co-existent in a case, it can be safely held that no consent, as envisaged under the Indian Penal Code, existed. Such a finding can be reached by examining as to whether the person, giving consent, had given the same under fear of injury or misconception of fact and, further, whether the offender knew, or had reason to believe, that but for fear or misconception of fact, 'consent', would not have been given. The submission of the body by a woman under fear or misconception of fact cannot be construed as consented sexual act for the purpose of

Sec. 375, I. P. C., Section 375 requires voluntary participation by the victim not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but after having fully exercised the choice between resistance and assent. Whether consent existed or not has to be ascertained on the basis of the facts of a given case. There is, indeed, a firm and fine distinction between 'consent' and 'submission'. Every 'consent' involves 'submission', but every 'submission' is not 'consent' and the mere fact that a woman had submitted to the promise of the accused does not necessarily indicate that her 'consent' existed unless the evidence on record establishes that the sexual act, which the prosecutrix had allowed, was accompanied with deliberation after the mind had weighed, as in a balance, the good and the evil on each side with the existing capacity and power to withdraw the assent according to one's will or pleasure. *Md. Jakir Ali v. The State of Assam*, 2007 CriLJ 1615 (Gau).

Where accused running an Ashram and known as Godman having control over Ashram, obtained consent of girls by deceitful means that sex with Godman is service to God therefore such offence comes within ambit of Section 375, clause thirdly. *Kamalanatha* v. *State of T.N.*, 2005 (3) East Cr C 78 (SC) : AIR 2005 (SC) 2132 : 2005(5) SCC 194 : 2005(4) JT 170 : 2005(3) Crimes 24 (SC) : 2005 SCC (Cri) 1121.

A representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying victim and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Sec.375 clause second. *Pradeep Kumar Verma v. State of Bihar and Anr.*, 2007 CriLJ 4333 (SC).

Section 114-A of the Evidence Act enables the court to raise a presumption that the woman who was the victim of rape had not consented and that the offence was committed against her will. The legislature has brought in the aforesaid provision because of the obtaining social backdrop. Apex Court in the case of *State of Karnataka* v. *Mahabaleshwar Gourav Naik*, AIR 1992 SC 2043 : 1992) Cr LJ 3786, went to the extent of laying down that even if the victim of rape is not available to give evidence on account of her having committed suicide the prosecution case cannot be thrown away over board. An offence of rape is not only an offence against a person but an offence against the entire society. In this backdrop version of the prosecutrix is to be appreciated and scrutinised. As far as spending of time by the prosecutrix is concerned, it is worthwhile to note that she has categorically stated that she was ravished twice by each of the two accused persons and after the act when they got into their sleep, she could leave the place. It is apparent that the two accused persons after statisfying their carnal desire did not bother themselves about her existence and went off to sleep. A panick-striken young girl could not have left earlier but had to wait till the accused person got into their sleep. There is no reason to doubt the aforesaid statement of the prosecutrix. It cannot be said that she remained there out of her own volition. It cannot also be said that she surrendered to the desire of the accused persons by expressing her free-will. Even if she surrendered it was because of compulsion, terror and the instinctual proclivity to save oneself. *Miyanlal* v. *State of M.P.* 1999 Cr LJ 2227 (M.P.).

Sexual intercourse with woman's consent, except in cases referred to in clause thirdly and fourthly is an offence under the section. 1980 All Cr. C 373 : 1979 Cr LR

118 ; 1972 Cr LJ 270 ; 1967 All Cr R 547. *See* also AIR 1979 SC 185 ; 1978 Cr LJ 1864 (question of consent depends on the circumstances— passive or active) ; AIR 1967 Raj 159 ; 1967 Cr LJ 922 ; (1981) 3 NLR 585 ; but *see* 1972 Cr LJ 824 ; AIR 1977 SC 1307 ; 1977 Cr LJ 347.

Where there was allegation of raping 3-1/2 years old child. Accused was seen in compromising position—No injuries on private part—Delayed medical examination of both accused and the prosecutrix. It was held that there was faulty investigation and no proof showing penetration hence no intercourse— Offence not made out. It was finally held that since accused guilty of attempt to rape. Conviction converted into one under Section 376 read with Section 511. *Jagdish Pd. Sharma* v. State, 1995 Cr LJ 2501 (Del).

The Doctor who examined victim deposed that if a lady of normal height and weight holds her thigh close tight, sexual intercourse with her from behind is not possible without the co-operation of the lady. In the re-examination the doctor deposed that if the assailant uses force with hand or anything else (not penis) and wins over the lady and separates the thighs, he could have sexual intercourse by force from behind. It is clear from the opinion given by doctor in the re-examination that sexual intercourse for a man with a woman without her co-operation from behind in standing posture is absolutely impossible is not at all correct or acceptable. *Thomas* v. *State of Kerala*, 1999 Cr LJ 1297 (Ker).

Sexual intercourse without consent of handicapped and young girl which was corroborated by medical expert—Accused escaped from the date of incident.—Offence was fully proved and hence conviction order was passed. *Devo* v. *State*, 1994 Cr LJ 2971 (HP).

F.I.R. was lodged after more than 3 months of the alleged incident and only after pregnancy was shown and that too by a stranger. From the delay in lodging F.I.R., the inference can be safely drawn that any person other than the accused was responsible for the alleged pregnancy of the prosecutrix. The finding that the girl was minor cannot be accepted since there is no definite corroborative evidence as to the age of the girl and benefit of doubt should be given to the accused person. Since there is a clear case of the consent and since the age of the girl has not been properly determined, the accused person should be given benefit of doubt. *M.S. Prasannan* v. *State*, 1999 Cr LJ 998 (Cal).

7. Age of the Prosecutrix.—In the case of an offence under Section 376 where there is no suggestion that the several intercourse was with the consent of the girl, the question whether she is over or under 14 years of age is not vital importance. 157 Ind Cas 147 ; 36 Cr LJ 1095 ; 1935 A Cr C 123 ; AIR 1935 All 590 ; 1935 Cr C 595 ; AIR 1939 A 708 ; AIR 1931 Lah 401. In ascertainment of age the entry in kotwal book which is genuine can certainly be taken into consideration as a strong piece of evidence. 1962 Jab LJ 825 ; 1963 (1) Cr LJ 686 ; 1962 MPLJ (Notes) 325. In case of rape, age of the prosecutrix must positively be established. 1962 MPLJ (Notes) 330 ; 1962 Jab LJ 840 ; 1963 (2) Cr LJ 354.

Where age of prosecutrix victim was about 11 years on date of incident according to duly proved birth registration certificate issued by municipal corporation it was held that the offence fell under Section 375(6), IPC. *Rafik Khan Asgarkhan Pathan* v. *State of Gujarat*, 2005 Cr LJ 1284 (Guj) : 2005(30) All Ind Cas 837 : 2004(3) Guj LH 601 : 2005(1) Guj LR 913 : 2005(2) Rec Cri R 694.

School record—Credibility. Simply because an information furnished by someone else had been duly entered in the school records giving a date of birth at the time of admission of the student, it cannot be presumed that such date of birth is the correct date of birth, unless the informant comes to the Court and deposes that it was he who gave such information to the school authorities and unless he establishes that the said information furnished by him was relating to the correct date of birth. To see whether this condition precedent has been satisfied, I have gone through the evidence of witnesses would be the proper witnesses to speak about this information. When P.W.1 was admitted initially in an elementary school at Mallapuram, for the first time the information regarding the date of birth of PW 1 would have been given either by PW 2 or by PW 3 or by some other relative. But, neither PW 2 nor PW 3 has spoken to anything about the date of birth of PW 1 or the information furnished by either of them to the elementary school. In the absence of any evidence, either from PW 2 or PW 3 or any other relative regarding the date of birth of PW 1 while she was admitted initially in the elementary school, it cannot be conclusively held that the date of birth originally entered in the elementary school records of PW 1 reflects the correct date of birth of PW 1. PW 10 speaks about the admission of PW 1 in the high school in IX Std. It is quite natural that the date of birth as found in the elementary school transfer certificate would have been entered by PW 10 in the high school register. Therefore, unless it is established that the original entry made in the elementary school register is correct, it cannot be concluded that the entry of date of birth found in the high school register is correct. In this regard I may also refer to a judgment of the Honourable Supreme Court in the *State of Chhattisgarh vs. Lekhram* reported in 2006 (2) Crimes 91 = AIR 2006 SC 1746 = 2006 Cri LJ 2139 wherein it was observed:—

> "It may be true that an entry in the school register is not conclusive but it has evidentiary value. Such-evidentiary value of a school register is corroborated by oral evidence as the same was recorded on the basis of the statement of the mother of the prosecutrix." *Ravi vs. State by Inspector of Police*, 2010 (3) CriLJ 3493 (Mad).

8. Penetration.—By a process of judicial interpretation the provisions of Section 375, IPC cannot be altered so as to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration within its ambit. Section 375 uses the expression "sexual intercourse" but the said expression has not been defined. The dictionary meaning of the word "sexual intercourse" is hetrosexual intercourse involving penetration of the vagina by the penis. Prosecution of an accused for an offence under Section 376, IPC on radically enlarged meaning of Section 375, IPC *i.e.* by including all forms of penetration violate the guarantee enshrined in Article 20(1) of the Constitution which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Such a wide definition so as to include all forms of penetration to be given to "rape" as defined in Section 375, IPC so that the same may become an offence punishable under Section 376, IPC has neither been considered nor accepted by any Court in India so far. Only sexual intercourse, namely, hetrosexual intercourse involving penetration of the vagina by the penis coupled with the explanation that penetration is sufficient to constitute the sexual intercourse necessary for the offence of rape has been held to come within the purview of Section 375, IPC. An exercise to alter the definition of rape, as contained in Section 375, IPC, by a process of judicial interpretation, and that too when there is no ambiguity in the provisions of the enactment, is bound to result in good deal of chaos and confusion, and will not be in the interest of society at large. *Sakshi* v. *Union of India*, 2004 Cr LJ 2881 : AIR 2004 SC 3566 : 2004 (3) Crimes 177 (SC) : 2004 (5) SCC 518 : 2004 SCC (Cri) 1645 : 2004 (5) Supreme 68.

Depth of penetration. It has been a consistent view of this Court that even a slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial. *Wahid Khan vs State of Madhya Pradesh*, AIR 2010 SC 1 : 2010 (1) CrLJ 517 (SC).

Penetration—Male organ completely, partially or slightly. A bare perusal of explanation to Section 375 clearly shows that penetration is necessary to constitute the sexual intercourse to the offence of rape. In the absence of any penetration the offence would not fall within the four corner of Section 375 of the Indian Penal Code. However, it is not necessary that the entire sexual act should be completed. Mere penetration of the male organ within the private part of the woman with or without any emission of semen is sufficient to constitute a rape. Penetration of the male organ completely, partially or slightly would be enough to constitute an offence within the meaning of Sections 375 and 376 IPC. *State of H. P. v. Amrish Kumar*, 2009 CriLJ 2126 (HP).

To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rapture of hymen. The depth of penetration is immaterial in an offence punishable under Sec. 376, IPC. *Aman Kumar* v. *State of Hayana*, 2004 Cr LJ 1399 at p. 1403 (SC) : 2004(4) SCC 379 : 2004 SCC (Cri) 1266 : AIR 2004 SC 1497 : 2004(2)JT 274 : 2004(2) Supreme 5 : 2004(2) Crimes 66.

To constitute rape penetration is sufficient. 19 PR 66 Cr. Vulva penetration is sufficient for conviction. AIR 1923 Lah 536 ; *see* also 100 Ind Cas 116 ; AIR 1927 Lah 735; 36 PLR 35 ; AIR 1934 Lah 797 ; 1934 Cr C 1125 ; AIR 1942 Mad 285 ; 43 Cr LJ 576 ; AIR 1962 Cal 641 ; 1963 All Cr R 11 ; 1962 (2) Cr LJ 751 (medical evidence of non-rupture of hymen is conclusive) ; 1963 (2) Cr LJ 715 (non-detection of injury or semen in private parts or clothes immaterial).

To constitute the offence or rape it is not necessary that there should be complete penetration of the penis with the emission of semen and rupture of the hymen. 1960 (2) Orissa JD 437 ; 1961 (1) Cr LJ 688 : 1961 Ker LT 933 ; (1962) 2 Cr LJ 688 ; examination of the accused necessary ; AIR 1960 Mad 308 ; 1961 (2) Mad LJ 459 ; 1961 Mad LJ (Cr) 681 ; 1960 Cr LJ 927 ; 1950 Ker LT 235 ; *Dingalal v. State of Rajasthan*, 2001 Cr LJ 3652 ; *D.A. Jakat* v. *State of Karnataka*, 2005 Cr LJ 2687 (Kant).

Partial penetration of penis or even an attempt at penetration is sufficient for purpose of law. In such cases no question arises that penis of accused must have received injuries. *Bhagwania v. State of Rajasthan*, 2001 Cr LJ 3719 (Raj).

Rape of minor child aged 7 years—Slight penetration of female organ or even an attempt of penetration constitutes offence of rape. *Shobha Bind* v. *State of Bihar*, (1995) 2 PLJR 363 (Pat).

Absence of hymen injury forming opinion that victim has sexual intercourse prior to time when she was subjected to rape, is no ground for acquittal of accused. *State of A.P. v. Gangula Satyamurthy*, 1997 Cr LJ 774 (SC) : AIR 1997 (SC) 1588 : 1996(10) JT 550 : 1996(8) Scale 391 : 1996(4) Crimes 203 (SC).

Merely because the doctor found that the vagina admits one finger, it cannot be inferred that there was no penetration as the muscles must have contracted by then. The Apex court has also stated in so many cases that absence of injuries on the prosecutrix is not fatal to prosecution case. Thus it cannot be said that whenever resistance is offered there must be some injury on the body of the victim. In the instant case, it was held that redness around the vaginal orifice of the prosecutrix was found and this fact itself was sufficient to constitute that offence of rape was committed by the accused. It was further observed by the court that "in India under Section 375, IPC, it is clearly mentioned that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Thus the argument that if sexual intercourse is committed by accused appellant, as stated by PW-I Laxmi ; her hymen should have been ruptured and since her hymen has not been ruptured whole story of rape should be treated as false one, is wholly untenable inasmuch as penetration is sufficient and there is redness around the vaginal orifice of PW-I Laxmi, which leads to the conclusion that some sort of penetration was there and if her hymen is not ruptured, it does not mean that no rape was committed by the accused—Appellant". *Pooran Ram* v. *State of Rajasthan* 2001 Cr LJ 91 (Raj) ; *See also Durgalal v. State of Rajasthan*, 2001 Cr LJ 3652 (Raj).

The doctors who examined the prosecutrix did not find any injury over the private parts. Therefore there could not have been any penetration so as to held that the rape had taken place. It was held that on the ground that the hymen may or may not be ruptured itself was not sufficient to hold that the rape was committed. *D.A. Jakati* v. *State of Karnataka*, 2005 Cr LJ 2687 (Kant) : AIR 2005 Kant HCR 1289 : 2005(3) All Cri LR 871 : 2005(4) Crimes 382 : 2005(3) Rec Cri R 290.

9. Jurisdiction.—The offence of making a false charge of rape is triable exclusively by the Court of Session, Rat Un Cr C 953.

Exception.—18 Cal 49.

10. Attempt.—A little boy of 12 years physically incapable of committing the offence of rape can nevertheless be held guilty of an attempt to commit it. 42 Ind Cas 175 ; see also Rat Un Cr C 865. As regards attempt to rape, *vide* 45 PWR 1910 ; 1 Weir 383 ; 103 Ind Cas 199 ; 28 Cr LJ 663 ; AIR 1927 Lah 580 ; 28 Cr LJ 575 ; 100 Ind Cas 110; 28 Cr LJ 244 ; AIR 1927 Lah 222 ; AIR 1923 Lah 536 ; 88 Ind Cas 705 ; AIR 1933 Lah 100. Attempt to commit rape must be distinguished from preparation to commit rape and from indecent assault. AIR 1925 Rang 247 : 27 Cr LJ 916 ; 96 Ind Cas 260 ; AIR 1960 MP 155; 1960 Cr LJ 612 ; 1972 C Cr LJ 270 (consent or absence of it can be presumed from attendant circumstances) ; 1983 Raj LR 795 : 1983 Raj Cr C 212 (absence of injuries on the body of the prosecutrix or the accused may be presumption of consent) : 1962 (2) Cr LJ 668 ; 1980 Chand Cr C 14 ; 1963 (1) Cr LJ 686 (no evidence of protest on the part of the grown up girl) ; 1980 Chand Cr C 165 ; 1984 Cr LJ 28 (love affair). No question of consent arises is case falling within the fifth (now the sixthly clause). AIR 1981 SC 361 : 1981 Cr LJ 1 ; AIR 1970 SC 1029 : 1970 Cr LJ 991 ; 1981 All LJ 775 : 1970 All WC 240.

For presumption see the newly inserted 114A of the Evidence Act by the Criminal Law (Amendment) Act (43 of 1983).

The presumption of English law that a boy under 14 years of age is incapable of committing rape has no application in India. 37 All 187 ; 13 ALJ 354.

Modi, in his 'Medical Jurisprudence' at Page 31 stated as follows :

"..........In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken an opinion should be given according to the following table, but it must beremembered that too much reliance would not be placed on this table as it merely indicates an average and is likely to vary individual causes even of the same province owing to the excceutricites of the development. Recent work has shown that the range of error may be upto (+) 3 years."

The table showing the age in years of the appearance and fusion of some of the epihysis shows that fusions of some of the joints occur in between the age of 14 to 17 and 17 to 19 years. The age given in this table is also not accurate as per the author himself who opined that the range of error in the table may be upto (+) 3 years. *M.C. Prasannan v. State,* 1999 Cr LJ 998(Call).

11. Evidence.—It cannot be said that the evidence of the prosecutrix in a rape case is on the same footing as that of an accomplice. In the case of a prosecutrix for rape she is the victim of the offence and not the offender. In law the evidence of the prosecutrix does not require corroboration like that of an accomplice. But in assessing the value or her evidence her conduct immediately after the offence if committed is of great value and would be relevant under Section 8 of the Evidence Act. ILR 1951 Mad 973 ; 52 Cr LJ 718 ; AIR 1951 Mad 760 ; (1951) 1 MLJ 110. The burden is on the prosecution to prove all the element of the offence. AIR 1979 SC 1276 ; 1979 Cr LJ 867.

It is well-settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the Court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would suffice. *Aman Kumar* v. *State of Haryana,* 2004 Cr LJ 1399 : AIR 2004 SC 1497 : 2004(2) Crimes 66 : 2004(2) JT 274 : 2004(4) SCC 379 : 2004 SCC (Cri) 1266 : 2004(2) Supreme 5.

The accused was charged with committing rape upon a girl of about 12 years of age. It was observed that in a rape case conviction of accused could be based solely on the evidence of prosecutrix. The testimony of the prosecutrix was corroborated by medical evidence and FIR. *Held*, that, in such case conviction of accused was justified. 1987 Cr LJ 557 (Madh Pra).

Accused were charged with committing rape on the prosecutrix. Plea that is there was no injury on either side did not mean that there was consent of prosecutrix. She was threatened and forcibly carried and raped. Absence of injuries did not mean that no sexual offence had been committed. 1987 Cr LJ 940 (Kant).

Where accused who allegedly had committed rape of his daughter-in-law is a handicapped person with one arm imputed then testimony of prosecutrix that while committing rape accused was holding a gun in his hand could not be relied upon to record conviction. *Mohan Singh* v. *State of Rajasthan*, 2005 Cr LJ 2127 (Raj) : 2005 Cri LR (Raj) RAJ 692 : 2005(2) Raj Cri C 988 : 2005(2) Raj LR 599 : 2005(2) WLC 768.

Since testimony of prosecutrix is not natural and reliable and also not corroborated by medical evidence hence such suspicious testimony cannot be relied upon to record conviction. *Mohan Singh* v. *State of Rajasthan*, 2005 Cr LJ 2127 (Raj) : 2005 Cri LR (Raj) RAJ 692 : 2005(2) Raj Cri C 988 : 2005(2) Raj LR 599 : 2005(2) WLC 768.

Uncorroborated testimony of prosecutrix that her father-in-law had raped her in absence of her husband cannot be relied upon. *Mohan Singh* v. *State of Rajasthan*, 2005 Cr LJ 2127 (Raj) : 2005 Cri LR (Raj) RAJ 692 : 2005(2) Raj Cri C 988 : 2005(2) Raj LR 599 : 2005(2) WLC 768.

When prosecutrix herself contradicted her earlier statement given in examination-in-chief then such unnatural and unreliable evidence cannot be relied upon. *Mohan Singh* v. *State of Rajasthan*, 2005 Cr LJ 2127 (Raj) : 2005 Cri LR (Raj) RAJ 692 : 2005(2) Raj Cri C 988 : 2005(2) Raj LR 599 : 2005(2) WLC 768.

Legal aspect with respect to appreciation of evidence of prosecutrix can be summarized in the following manner: (1) That the main evidence in all such cases is that of victim herself. (2) That corroboration of the testimony of the prosecutrix in the rape case is not required as a rule of law. But, corroboration should ordinarily be required in the case of a woman having attained majority and who is habitual to sexual intercourse and is found in a compromising position, as in such cases there is likelihood of her having levelled such an accusation on account of institution of self preservation or when the probabilities factor is found to be out of time. (3) That corroboration may be by facts and circumstances. (4) That the injury on the person of the victim, especially her private parts, had corroborative value. (5) That if the evidence of the victim does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. *Jogidan* v. *State of Rajasthan*, 2004 Cr LJ 1726 (Raj) : 2004 Cri LR (Raj) RAJ 411 : 2004(2) Raj Cri C 780 : 2004(2) Raj LR 635 : 2004(3) WLC 73.

The victim girl stated that she was in the house with children of one of the prosecution witnesses while some came from behind, caught hold of her and she lost her senses which she regained after one hour. After regaining her senses she did not see anybody in the house and she could not say who was that person who caught hold of her. None of the children who were present at the time of the alleged rape were examined. The medical evidence did not support the prosecution case. No spermatozoa were detected in vaginal fluid. The court held that the prosecution had not been able to establish by leading cogent convincing credible, consistent evidence that the accused committed rape on the prosecutrix. *State of Orissa v. Kamakshya Prasad Meher*, 2001 Cr LJ 3620 (Orissa).

Accused was charged for committing rape on the prosecutrix. It was observed that it could not be understood that on the basis of the circumstance that a woman used to sexual intercourse would be a consenting party to "a forcible sexual assault and intercourse". Once a girl is or woman was used to sexual intercourse, she did not become a vulnerable object or prey for being sexually assaulted. Because she was promiscuous, it could not be inferred that she must have given consent to alleged forcible sexual intercourse. 1987 Cr LJ 374 (Guj).

Accused was charged for committing rape on the prosecutrix. It was observed that discrepancy regarding clothes whether they were washed or not had no significance because complaint itself had been filed after about 3-1/2 months. Mother of prosecutrix was aged 65 and illiterate therefore discrepancy in calculation of days had also no bearing. A witness was liable to get confused or mixed up when interrogated later on. *Held*, that there was no reason why evidence of the mother of prosecutrix should not be accepted. 1987 Cr LJ 374 (Guj).

When testimony of prosecutrix is corroborated by medical evidence and rape committed without her consent conviction upheld. *Govinda Reddy* v. *State*, 1997 Cr LJ 148 (Mad).

When accused committed rape on minor girl of 10-12 years old with injuries on her private parts and her evidence corroborated by medical evidence and eye-witnesses, conviction proper. *Mahadeva* v. *State of Rajasthan*, 1996 Cr LJ 4219 (Raj) : 1996(2) Raj LW 608 (Raj).

The victim stated that on the date and time of the incident, as her school was closed, she was playing with her friends (at about 1.30 p.m) At that time the accused bodily lifted her, took her inside his bathroom, made her lie on the ground, undressed her and himself and thereafter committed rape on her. She then came and recounted these facts to her parents, who after washing her private pats and changing her clothes, took her to police station where she lodged her FIR the same day at 7.30 p.m. The manner of the incident as furnished by her referred to above corroborated by the medical evidence. The doctor who medically examined her same day found minor abrasions in her clitoris bleeding from vagina and tear of hymen. On these symptoms, he concluded and rightly that there was positive evidence that she had been raped. There was a litigation pertaining to land between her father and the father of accused and prior to the incident, her father had lodged a FIR against the father of the accused. But the court held that for the said reasons, she would not have falsely implicated the accused and by falsely implicating the accused her own image would have been tarnished and prospects of her marriage blasted. The Court further observed that at any rate, as the Apex Court has observed, times out of number, the mere circumstance that a witness is enimical, would not result in the mechanical rejection of the evidence of such a witness but, would only make the Court cautious while evaluating the testimony of such a witness. *Ramchandra Mohadev Shinde* v. *State Maharashtra*, 1999 Cr LJ 1428 (Bom).

The prosecutrix was a minor girl of nine years when the heinous crime of rape was committed on her and she came to her house crying with profused bleeding and informed her mother about the incident. It is quite natural that she was not in a free state of mind to give all the details either to her relatives or to the police. There is no reason for not to believe her evidence when she has stated that she was almost in an unconscious state of mind. The pains and shock to the prosecutrix were quite apparent and, therefore, considering her age and the mental condition, even if she had not given certain details, the same would not be a ground to discard her evidence. The fact that she was deposing before the court after a lapse of about two years there were found to be some improvements in her version before the court. As per the medical report, her hymen was ruptured and she was bleeding profusely from the vagina and the doctor in fact found blood clots when he examined her on the next day and that there was no injury on the male organ. Absence of injury on the male organ cannot be a ground to hold that accused is not responsible for rape. The conviction of accused was held proper. *Mohammad Zuber Noormohmad Changawadia* v. *State of Gujarat* 1999 Cr LJ 3419 (Guj).

The accused, a teacher in the school, stopped the prosecutrix, a minor student from going home on the pretext that she did not remember questions. She remained also alone in school and then accused unclothed her and then opened his pant and underwear and put her on the ground and thereafter he put his penis in her vagina forcibly. She made hue and cry, but he pressed her mouth and blood came out from her private part. The accused raped her for some time and, thereafter he left her. Thereafter in the state of warlong, she came to her house and told the whole incident to her mother and uncle. The medical evidence corroborated the statement of prosecutrix as well as the evidence of witnesses it was held that the minor contradictions and omissions in the statement of prosecutrix was immaterial. *Om prakash* v. *State of Rajasthan,* 2001 Cr LJ 230 (Raj).

The prosecutrix alleged that she was dragged from the camel she was riding and raped. She also alleged that the accused had caused injuries on her cheeks. The doctor disproved the allegation of injuries caused on the person of the prosecutrix. The prosecutrix, as also her husband stated in the deposition that at the time when the rape was committed, the prosecutrix was accompanied by two witnesses and they were also tied up by the accused persons. It was, however, highly improbable that such things could have occurred. The prosecutrix unequivocally stated that when she was being raped by one accused, other hold the camel and they exchanged the place. If the claim of the prosecutrix the prosecution witnesses who wanted to rescue the proscutrix were tied up by the accused was correct. It was occurred prior to commission of rape or during the commission of rape by one person. It was also obvious that both the accused persons were involved in tying up the two witnesses in which case there was nothing to prevent the prosecutrix from running away, however, nothing of the kind was done. No reason was given by the prosecutrix or witnesses for not disclosing the incident for three days. The entire narration of facts by the prosecutrix and witnesses was held to have rendered the prosecution story suspicious and fictitious. *Dhir Singh* v. *State of Rajasthan,* 2001 Cr LJ 235 (Raj).

The victim aged about 10 or 11 years had gone to play with his niece. The mother had heard an alarm which attracted her to the spot. On arriving at the spot, she had noticed the accused's emergence and thereafter his running away and found her daughter crying with pain. Apart from this, she had also noticed the clothes of her daughter heavily stained with blood. These circumstances, when taken cumulatively into consideration, proved that her daughter was ravished inside the house by the accused. Mere absence of undergarment belonging to victim was not held by the court as sufficient to discard the testimony of the victim and her mother. The court also observed that "it is common knowledge that in the villages clothes used during menstruation by the village ladies are generally being thrown of when it became stained with blood and the animals lottering on the road, including dogs remove them away beyond their recovery. Similarly her undergarments too must have been lost once thrown away. In view of the above conviction of accused was held proper. *Babu Yadav* v. *State of U.P.*, 2001 Cr LJ 356 (All) : 2001 (1) Femi-Juris CC 54 (All).

In *Maheshwar Sahu* v. *State of Bihar*, 2001 Cr LJ 1035 (Pat), it was alleged that the accused entered into the house of the prosecutrix and committed rape on her resulting in pregnancy. It was further alleged that the accused had assured her that he would marry her and due to fear and shame she did not tell about it to any one. According to the prosecutrix the accused on her refusal to get the abortion done, forcibly pushed tablet in her mouth and in the same night she suffered abortion and she told about rape and abortion to her mother. The Court did not believe that the mother of the girl could not know about the pregnancy of 6 to 7 months. She also said that no *Dai* or *Chamain* had been called. The court found it strange and improbable that a lady who will suffer abortion of an advanced stage of pregnancy will not be provided any medical help and no *Dai* or *Chamain* will be called. Medical evidence did not show signs of recent rape or recent abortion. Further, the parents or sister-in-law of the informant were not examined as a witness. The accused, in view of the above circumstances and facts was held entitled to benefit of doubt.

The accused dragged the prosecutrix to the fields and committed forcible sexual intercourse with her. The prosecutrix stated that she did not know the accused prior to the incident. FIR was lodged after 18 hours of deliberations and name of the accused was mentioned therein. No test identification was held during the course of investigation. The court held that as the prosecutrix did not know the accused before the occurrence, it was not possible for her to have named the accused in the FIR nor was it possible to her to give his address and that the naming of the accused in the FIR was the result of due deliberations. The court further held that the failure to hold test identification parade was fatal to the prosecution and conviction of accused was not proper. *Amrit Lal* v. *State of HP*, 2001 Cr LJ 1047 (HP).

The statement of the prosecutrix was bristling with infirmities and improbabilities and had not been corroborated by the only eye-witness to the occurrence as well as from the medical evidence on record. The conduct of the prosecutrix appeared to be doubtful inasmcuch as she did not report the occurrence to her grand-mother immediately after returning to the house or to anybody else during the same day and that she had stated to have washed the wearing pant which was stated to have been stained with blood. Above all the statement of the prosecutrix that the accused committed rape on her by removing her pant upto the knee and without removing her frock, was found to be incredible inasmuch as the accused could not have committed any sexual intercourse with her. When she had put on the pant, by removing the same up to the knee and without completely removing the same. There were no mark of any injury on the private part or body of the victim girl as well as of the accused and then wearing apparels were not stained with semen or blood. *Banamali Singh* v. *State of Orissa*. 2001 Cr LJ 1313 (Orissa).

When medical evidence shows no sign or recent sexual intercourse, acquittal of accused is proper. *State of Orissa* v. *K. Adinaragara*.1977 Cr LJ 1234 (Ori).

The medical certificate that prosecutrix was accustomed aimed to sexual intercourse, is of no relevance. *Arasappa* v. *State*, 1997 Cr LJ 1456 (Kant) : 1997(1) All Cr LR 580 : 1997(1) Cur Cr R 480 : 1997(1) Kant LJ 25.

While trying accused on charge of rape Court must show great sensitivity and should examine broader probabilities and not get swayed by minor contradictions and discrepancies in evidence of witnesses. *State of A. P.* v. *Gangula Satya Murthy*, 1997 Cr LJ 774 (SC).

When due to absence of hymen Court forms opinion that victim had sexual intercourse prior to time of present rape, it is no ground for acquitting accused. *State of A.P.* v. *Gangula Satya Murthy*, 1997 Cr LJ 774 (SC) : AIR 1997 (SC) 1588 : 1997(1) SCC 272 : 1996(10) JT 550 : 1996(8) Scale 391 : 1996(8) Supreme 328.

Absence of injuries on male organ of accused is not always fatal. It will discredit the evidence of the prosecutrix. *Dinesh* v. *State of Rajasthan*, 2005 Cr LJ 1452 (Raj).

12. Burden of proof.—In a case of rape, the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and her mother have falsely implicated the accused. The evidence of prosecution witnesses cannot be accepted merely because an accused person has not been able to say as to why they have come forward to depose against him. However, great the suspicion against the accused and however, strong the moral belief and conviction of the Judge, unless the offence of the accused is established beyond reasonable doubt or beyond the possibility of reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring the offence home to the accused by reliable evidence. The accused is entitled to the benefit of reasonable doubt. *Jogidan* v. *State of Rajasthan*, 2004 Cr LJ 1726 (Raj) : 2004 Cri LR (Raj) RAJ 411 : 2004(2) Raj Cri C 780 : 2004(2) Raj LR 635 : 2004(3) WLC 73.

13. Rape and outraging of modesty of woman.—The prosecution has clearly established commission of offence punishable under Secs. 354 and 506 IPC. So far as the offence punishable under Sec. 376 IPC is concerned, the basic ingredients are set out in Sec. 375 IPC. On a reading of the evidence of the prosecutrix, we find that a case of rape has not been established so far as the respondent is concerned.

That being the position, we allow the appeal of the State to the extent that the respondent is convicted for offences punishable under Secs. 354 and 506 IPC. The sentence are two years' and six months' rigorous imprisonment respectively. It is stated that the appellant has suffered more than that period of custody. If that being so, he need not surrender to custody. The appeal is allowed to the aforesaid extent. State of *Himachal Pradesh vs. Prem Singh*, AIR 2009 SC 1010 : 2009 (1) SCC 420 : 2008 CrLJ 786 : 2008 (15) SCR 1058 : 2009 (15) Scale 132.

14. Amendment in provisions—Object of.—The offence of rape occurs in Chapter XVI of IPC. In that Chapter, there is a separate heading for 'Sexual offence', which encompasses Sections 375, 376, 376-A, 376-B, 376-C, and 376-D. 'Rape' is defined in Section 375. Sections 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act, *i.e.* 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with iron hand, the offence of rape which affects the dignity of a woman. *State of Madhya Pradesh vs. Sheikh Shahid*, AIR 2009 SC 2951 : 2009 (12) SCC 715 : 2009 (8) JT 277 : 2009 (5) SCR 1038 : 2009 (5) Scale 679 : 2009 (3) SLT 744; See also *State of Madhya Pradesh vs. Basodi*, AIR 2009 SC 3081 : 2009 CrLJ 4284 : 2009 (2) Crimes 273 (SC) : 2009 (12) SCC 318 : 2009 (6) JT 92 : 2009 (6) SCR 1166 : 2009 (6) Scale 353 : 2009 (3) Supreme 501.

15. Intention to introduce Sexual offences — Scope — Discussed.—The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for 'Sexual offence', which encompasses Secs. 375, 376, 376-A, 376-B, 376-C and 376-D. 'Rape' is defined in Sec. 375. Secs. 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new Secs. were introduced by the new Act, *i.e.* 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-b); or as expressed more fully,' rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will (Hale PC 628). The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape; 1 Hon. 6, 1a, 9 Edw. 4, 26 a (Hale PC 628). In the crime of rape, 'carnal knowledge' means the penetration to the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephen's "Criminal Law" 9^{th} Ed. P. 262). In 'Encyclopaedia of Crime and Justice' (Volume 4, page 1356) it is stated ". . . . . . even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order. *Shekara vs. State of Karnataka*, 2009 (4) JT 360 : 2009(3) Scale 104 : 2009(1) Crimes 472 SC.

16. Promise of marriage.—Clause Fourthly of Sec. 375 of the Penal Code, applies when a man induces a married woman to have sexual intercourse with him by impersonating her husband. When consent by a woman to a man under misconception of fact that he was her husband, it amounts to rape by a person to whom the woman believes to be her husband. In the present case, prosecutrix and accused were residing in the neighbourhood. Prosecutrix was major and there was consent to the sexual intercourse by her. It is the case of the prosecutrix that she consented to sexual intercourse believing that the accused would marry her. Under such circumstances, the act of first sescual intercourse and repeated sexual intercourse between the two subsequently cannot be said to be illegal. The sexual intercourse which is not illegal would not become illegal by refusal by accused to marry. It would be at the most breach of promise. But the act of sexual intercourse with consent of a major girl cannot be termed as rape as a consequence of breach of promise even if it is assumed that there was breach of promise. *Sunil Vishnu Salve and Anr. v. State of Maharashtra*, 2006 CriLJ 587 (Bom).

* * * * *

[1][**Sec. 376. Punishment of rape**.—(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both :

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever :—

(a) being a police officer commits rape—

(*i*) within the limits of the police station to which he is appointed ; or

(*ii*) in the premises of any station house whether or not situated in the police station to which he is appointed ; or

(*iii*) on a woman in his custody or in the custody of a police officer subordinate to him ; or

(*b*) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him ; or

(*c*) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution ; or

(*d*) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital ; or

(*e*) commits rape on a woman knowing her to be pregnant ; or

(*f*) commits rape on a woman when she is under twelve years of age ; or

(*g*) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine ;

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[1] *Substituted* by Act No. 43 of 1983. Section 3.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence or imprisonment of either description for a term of less than ten years.

Explanation 1.—Where a woman is raped by one or mere in a group of persons acting in furtherance of their common intention each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.—"Woman's or children's Institution" means an institution, whether called an orphanage or a home for neglected woman or children or a widow's home or by any other name, which is established and maintained for the reception and care of woman or children.

Explanation 3.—"Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

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1. Corroboration.—Conviction for the offence of rape on the uncorroborated testimony of the complainant would be most dangerous. AIR 1924 Lah 669 ; 23 Cr LJ 475 ; 1949 NLJ 520 ; AIR 1949 Assam 13 ; 50 Cr LJ 589 ; AIR 1949 Cal 613 ; AIR 1944 Nag 245 ; ILR 1945 Nag 226. In AIR 1950 Lah 151, the Court observed ; "So far as the statements of the ravished woman are concerned they can certainly be used to corroborate her under Section 157 even if they are not admissible under any other provisions of the Evidence Act. But statements admitted under Section 157 are not substantative evidence and cannot be made the basis of a finding as to the existence of the facts mentioned in the statements. They are repetitions of her statement and can be either true or false. The next question is whether it is necessary that the aggrieved witness in a case of rape should be corroborated before a conviction can be based on her evidence. The rule of corroboration is meant to be applied to accomplices and ravished woman is not an accomplice but a victim of the crime, corroboration of the prosecutrix in a case of rape is not always indispensible. The thing to be remembered in such cases is whether it is safe to convict on the solitary statement of the complainant. The depends on the circumstances of each individual case". But what exactly amounts to corroboration of the main evidence of the prosecution in a case of rape, is always a quite fiction. It need not be the direct oral evidence of another person. It may be only independent evidence of such a character that if connects the accused directly or indirectly with the crime that he was said to have committed. A previous statement made by the prosecution and admitted under Section 157 of the Evidence Act cannot possibly be corroboration of the evidence given by her in the case. ILR (1937) 2 Cal 345 ; 41 CWN 641 ; AIR 1937 Cal 321. But this view has been dissented from in a latest Calcutta case reported in AIR 1949 Cal 613, where *Das Gupta, J.* observed as follows :—

"*Mr. Mukherjee's* final contention was that the learned Judge, erred in asking the jury to treat the evidence of the girl's mother as to what the girl had stated to her immediately after the occurrence as corroboration of the girl's evidence. For this *Mr. Mukherji* has relied on three decisions of this Court. They are : (1) a decision of *Lord Williams* and *Cunliff, JJ.*, in AIR 1936 Cal 18 ; 37 Cr LJ 359 ; (2) decision of *Cunliff and Henderson, JJ.*, in 41 CWN 641 ; AIR 1937 Cal 321 ; 39 Cr LJ 371 ; and (3) a decision of *Derbyshire, C.J.*, and *Lord Williams, J.*, in 44 CWN 835 ; AIR 1940 Cal 391 ; 41 Cr LJ 841. That the evidence of the victim of rape does require corroboration is the rule of prudence which had been followed in these Courts for sometime and the learned Sessions Judge did tell the jury to remember that it is very risky to convict the accused on the uncorroborated evidence of the girl alone. That rule is too well established to be uncorroborated now. The question whether the statement made by the girl shortly after the occurrence has any corroborative value or not depends, however, in my opinion, entirely upon Section 157, Evidence Act, which runs as follows ; In order.......proved. It appears that these provisions of Section 157, Evidence Act was not considered at all either........in AIR 1936 Cal 18 or in AIR 1940 Cal 391 or in AIR 1937 Cal 327. It is true that this Bench is bound by the previous decisions of this Court. But is still more bound by the Statute. *Harris C.J.*, said ; "According to the view of *Lord Williams, J.*, in the cases cited by my learned brother, this could not corroboration. But I do not understand why not ? It certainly is corroboration in India by Section 157, Evidence Act and so long that section remains, it appears to me the cases referred to by my learned brother cannot possibly be good law". See also AIR 1940 Cal 461 ; 44 CWN 830 ; ILR (1940) 2 Cal 180.

Testimony of prosecutrix as to commission of rape on her found to be remaining completey unchallenged. Same need not be corroborated by evidence of village meeting, where, accused allegedly admitted his guilt and decision taken that accused should marry prosecutrix. *indar Ali Sheikh vs. State of West Bengal*, AIR 2009 SC 1467 : 2009 (3).SCC 761 : 2009 CrLJ 1324 : 2009 (1) Crimes 315 (SC) : 2009 (2) JT 253 : 2009 (1) SCR 968 : 2009 (2) Scale 248 : 2009 (1) Supreme 617 : 2009 (2) JCC 861.

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Look for corroboration — Not necessary except in cases of high imporbability. In the context of Indian Culture, a woman-victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. *Rajinder @ Raju v. State of H. P.*, AIR 2009 SC 3022 : 2009 (10) SCR 248 (SC) : 2009 (9) JT 9 (SC) : 2009 (9) Scale 176 (SC) : 2009 (5) Supreme 233 (SC) : 2009 (9) SLT 361 (SC) : 2009 CrLJ 4133 (SC) : 2009 (3) Crimes 222 (SC).

Necessity of corroboration. Ordinarily evidence of a prosecutrix should not be suspect and should be believed, more so as her statement has to be evaluated at par with that of an injured witness and if evidence is reliable, no corroboration is necessary. But, said observation cannot be universally and mechanically applied to facts of every case of sexual assault which comes before Court. *Raju vs. State of Madhya Pradesh*, AIR 2009 SC 858 : 2008 (15) SCC 133 : 2008 (12) JT 457 : 2008 (16) SCR 1078 : 2008 (15) Scale 375 : 2009 (2) SLT 41.

Presumption of Correctness and absence of embellishment. Reference has been made in *State of Punjab vs. Gurmit Singh and Ors.*, 1996 (2) SCC 384, case to the amendments in 1983 to Sections 375 and 376 of the Indian Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined. *Raju vs. State of Madhya Pradesh*, AIR 2009 SC 858 : 2008 (15) SCC 133 : 2008 (12) JT 457 (SC) : 2008 (16) SCR 1078 : 2008 (15) Scale 375 : 2009 (2) SLT 41 (SC).

In a rape case, the complaint of the prosecutrix is admissible in evidence, not as evidence of the truth of the charge but as corroboration of the credibility of the prosecutrix. AIR 1944 Nag 245 ; 46 Cr LJ 68 ; ILR 1945 Nag 226. The law does not require corroboration in the rape of a child aged 10 years as to the identity of the accused. AIR 1944 Nag 363 ; 44 Cr LJ 371 ; AIR 1939 Rang 128. Where the person raped is a girl of seven years, the Court would not insist on the same amount of corroboration as in the case of an adult woman victim. AIR 1951 Ajmer 60 ; 52 Cr LJ 584. There is no rule of practice that there must be, in every case of rape, corroboration of that evidence of the woman alleged to have been raped, like that of an accomplice before a conviction on its basis can be allowed to stand. See AIR 1952 SC 45 relied on.

The rule which according to cases has hardened into one of law is not that corroboration is essential before there can be conviction but that the necessity of corraboration, as a matter of prudence, except where circumstances make it safe to dispouse with it, must be present in the mind of the Judge and must have been incorporated in the judgment. If the evidence of the prosecutrix does not suffer from the basic infirmity and the probabilities factor does not render it unworthy of credence, as a general rule, corroboration should not be insisted upon. The corroboration of the testimony of the prosecutrix in rape cases is not required as a rule of law. *Satpal* v. *State of Rajasthan* 2001 Cr LJ 564 (Raj.) : 2001 Cri R 288 (Raj).

Non-examination of doctor—Not fatal to prosecution case. Even without the examination of doctor, the evidence of prosecutrix stands fully corroborated by the evidence of Sub-Inspector of the Police Station who had virtually caught the appellant red-handed. Thus, even if doctor had not been examined it would not throw or completely discard the prosecution story. The evidence of prosecution witnesses is fully trustworthy and there is no reason to doubt genuineness thereof.

In the present case, there is consistency in the evidence of prosecutrix, which stands corroborated by the evidence of Sub-Inspector. He had no axe to grind against the appellant. In this case, the version of the prosecutrix right from lodging of the FIR, till her examination by the doctor and till she deposed in Court, had been absolutely consistent. Not only this, to corroborate further, the evidence of Sub-Inspector is also on record who had caught the appellant red-handed which fully establishes that it was the appellant who had committed offence of rape.

Thus, looking to the matter from all angles, we are of the opinion that there is no merit or substance in this appeal. The same is accordingly hereby dismissed. *Wahid Khan vs. State of Madhya Pradesh*, AIR 2010 SC 1 : 2009 (4) Crimes 265 (SC) : 2009 (14) JT 510 : 2009 (15) SCR 1207 : 2009 (14) Scale 220 : 2009 (7) Supreme 584 : 2009 (9) SLT 107.

Ordinarily, corroboration of a woman raped must be looked for but that is not an absolute rule and if he Court is completely satisfied with her evidence it is open to it convict the accused even on her uncorroborated testimony. 1962 Jab LJ 840; 1963 (2) Cr LJ 354 ; 1962 MPLJ (Notes) 330 ; AIR 1962 Cal 641 : 1962 (2) Cr LJ 751; 1963 All Cr R 11.

It is well settled that corroboration is not necessary in a case of sex offence when the victim is very consistent and definite about the occurrence. Conviction can be founded on her testimony alone unless there are compelling reasons seeking corroboration. Corroborating evidence is not essential as she is not an accomplice or in the category of child witness. *Imtiaz Ansari* v. *State of Bihar* 2000 Cr LJ 2576 (Pat.) : 2000(1) East Cri C 119 : 2000(2) PLJR 517 : 2000(1) PccR 318.

It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. Even if the doctor who examined the victim does not find sign or rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence been before her family members much less before public or before the police. The Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim girl had falsely implicated the accused did not appeal to the reasoning. There was no apparent reason for a minor girl to falsely implicate the accused after scating her own prestige and honour. *Birendra Sah* v. *State of Bihar*, 2000 Cr LJ 3673 (Pat.) : 2000(1) BLJ 605 (Pat).

The Supreme Court in *State of Punjab* v. *Gurmeet Singh*, (1996) 2 SCC 384 : (1996) AIR SCW 998 : AIR 1396 SC 1393; 1996 Cr LJ 1728 took note of the existing rate of Crime against the woman and held (para 20) :—

> "Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault. It is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutirx must be appreciated in the background of the entire case and the trial court must be alive of its responsibility and be sensitive while dealing with cases involving sexual molestations."

In *State of Maharashtra* v. *Chandraprakash Kewalchand Jain*, 1990 (1) SCC 550 : AIR 1990 SC 658 : 1990 Cr LJ 889 Ahmadi J (as the Chief Justice then was) speaking for the bench summarised the position in the following words:—

> "A prosecturix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act, similar to illustration (b) Section 114 which requires it to look for corroboration. If, for some reason, the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessary depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base of conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discussed that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence." *See* also *State of H.P.* v. *Lekhraj* 2000 Cr LJ 44 (SC) : AIR 1999 (SC) 3916 : 2000(1) SCC 247 : 1999(9) JT 43 : 1999(7) Scale 86.

In *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat*, AIR 1983 SC 753: 1983 Cr LJ 1096 the Supreme Court made the following observations.

> "In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt. Disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society."

Further:

> "...... Just as witness who has sustained an injury (which is not shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim or a sex-offence is entitled to great weight absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would, therefore be adding insult to injury to insist on corroborating drawing inspiration from the rules devised by the Courts in the western world (obeisance to which has perhaps

become a habit presumably on account of the colonial hung-over). We are therefore of the opinion that if the evidence of the victim does not suffer from any basic 'infirmity' and the 'probabilities-factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the reason the medical evidence, where, having regard to the circumstance of the case, medical evidence can be expected to be forth coming, subject to the following qualifications:

> "Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is likelihood of her having levelled such an accusation on account of the instinct of self preservation. Or when the probabilities-factor is found to be out of tune." *Chandan Paswan* v. *State of Bihar*, 1999 Cr LJ 371 (Pat.).

To insist on corroboration, except in the rarest of the rare cases is to equate woman who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by livelling a false charge concerning her chastity. The Court must not be oblivious of the emotional turmoil and the psychological injury that a prosecutrix suffers on being molested or raped. She suffers a tremendous sense of shame and the fear of being shunned by society and her near relatives including her husband. *Manik Debnath* v. *State of Tripura*, 1999 Cr LJ 607 (Gau).

Though ordinarily unless there are compelling reasons necessitating corroboration, testimony of the prosecutrix alone is sufficient to convict the accused where her testimony inspires confidence and is found to be reliable. In the present case it would not be safe to convict the accused solely on the statement of the prosecutrix. Keeping in view the medical evidence which shows that the prosecutrix had been used to sexual intercourse, in order to accept her statement that she was compelled, threatened or otherwise induced for sexual intercourse, some corroboration from same independent source is required in the present case (*See Ram Murti* v. *State of Haryana*, 1970 Cr LJ 991. *Prem Chand* v. *State of H.P.*, 2000 Cr LJ 951 : 2000(2) All Cr LR 363 (HP).

In a case, all the witnesses turned hostile, as there was a compromise outside the court. The mother of prosecutrix surrendered herself to the pressure of the local people. The prosecutrix categorically stated that she was raped by the accused and her statement was fully supported by the medical evidence. The evidence was found reliable and trustworthy. Conviction based or her sole testimony was held proper. *Laxman Das v. State of Rajasthan*, 2001 Cr LJ 4501 (Raj).

In *Jagannath Bania* v. *State*, 2001 Cr LJ 282 (Orissa), the victim girl aged about 14 years was dragged by accused to the place of incident and raped. The accused threatened her at the point of knife and detained her till midnight where after he took her to the village and left her. The victim went to her house and silently slept without disclosing the occurrence to any of her family members. On the following morning she narrated the occurrence to her father. The investigating officer stated that the place of occurrence was at a distance of about two kilometers from the bathing place which was at a distance of 300 yards from the village and that he did not find any mark of violence on the spot. As per the statement of the victim it was raining and the roof of the hut was looking and hence her wearing *saree* had been stained with mud. But there was no mention in the seizure list lest that the *saree* was stained with mud. The above circumstances and specially non-disclosure of the occurence to any body in the house during the night by the victim was held to have given rise to grave suspicion as to the veracity of the statement of victim. The court further held that line testimony of the victim woman can be made the sole basis for conviction and corroboration is not necessary in case the same is accepted as true and tree from suspicion. It is not necessary that there should be independent affirmation of every material circumstances in the sense that the independent evidence apart from testimony of the complainant should in itself be sufficient to sustain the conviction. The corroboration need not be direct evidence that the accused commited the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.

Prosecutrix 16 years of age was enticed away from parents house and was subject to sexual intercourse—Medical evidence providing corroboration to the fact of maintenance of sexual relations, hence offence of rape established. *Joaguim Constantinho Carvalho* v. *State*, 1992 Cr LR 215 (Bom).

2. Scope.—The impugned act must possess all elements or the substantive crime except for failure to consulate the act. *Gananath Jena* v. *State of Orissa*, (1995) 9 OCR 484 (Ori).

Adverse inference. Withholding of evidence of neighbours, brother and grandmother of prosecutrix. Prosecutrix was an orphan living on platform along with elder brother and grandmother. Evidence of prosecutrix, a minor girl that accused took her inside his house and on point of knife gagged her mouth and raped her. Similarly, the brother of the prosecutrix and her grandmother could not be located by the investigating officer despite search at the Railway Station. No inference, therefore, under Section 114 of the Evidence Act can be drawn against the prosecution for withholding the evidence of neighbours, brother and grandmother as well as the neighbour who probably was narrated the incident by the prosecturix. *Arshad vs The State*, 2010 Cri LJ 954 (Delhi).

Trial court recorded conviction which was challenged in appeal. As there was one month delay in filing complaint. It was stated that the matter was reported to Police but it did not take action. No effort was made to substantiate this charge. In the background of case the delay fatally affected the prosecution. Hence conviction was not sustainable. *Patra Mirgan* v. *State*, (1994) 2 Crimes 613 (Ori).

Accused camel-owner took prosecutrix tourist on ride and at isolated place committed rape on her. Prosecutrix was fear and helplessness position as to be unable to resist or spare herself. She was crying all the way - appellant asked her to sit her on back side to make drive fast and they reached at the starting point where jeep and other fellow tourists, drivers were and she narrated the entire incident. Prosecutrix very instantly and no sooner she reached starting point, where other persons and passengers were, she insinuated accused. *Bhopa S/o Sh. Jiya vs State of Rajasthan*, 2010 Cri LJ 1339 (Rajasthan).

Offence was under Section 376 IPC—FIR was delayed. Neither windows found broken nor door found open.—No sexual injury was found. Prosecutrix was naked while intercourse committed.—But offence of rape not, proved. *Bhanker* v. *State of Rajasthan*, 1995 Cr LR 88 (Raj).

When victim is married woman and living with her husband at time of occurrence and accused also an aged man, presence of semen on skirt and short cannot be incriminating piece of evidence to connect accused with offence. *Vijayan* v. *State*, 1993 Cr LJ 2364 (Mad).

Petition filed to interfere in the investigation and quashing the FIR interference can not be made—Direction to dispose off the bail application on merit and according to law given. *Om Prakash* v. *State of U.P.*, 1994 UP Cr R 97 (All).

Where offence under Section 376, IPC alleged—Prosecutrix voluntarily went with accused to several places and stayed with him in lodge for about ten day—Her age could not be determined correctly—Evidences showing her age about 16 years, sometimes under 18 years and sometimes below 20 years—Medical evidence showing her age between 18 to 20 years—Thus evidence regarding age doubtful—Medical evidence also revealing that she was used to sexual intercourse—Prosecutrix not clearly stating that she was subjected to sexual intercourse. Hence it was held that prosecution case not fully supported, offence under Section 376 not made out. Taking her away from lawful guardianship also not made out. *State of Karnataka* v. *Sureshbabu Puk Raj Porral*, 1994 SCC (Cri) 435 ; 1994 Mad LJ (Cr) 185 ; (1994) 1 SCC 468 (SC).

The earlier statement do not disclose the allegation of rape or attempt. Medical evidence is also lacking and no injury was found on any part of the body. Hence not proved and no case is made out. *Chouhal Singh* v. *State of Rajasthan*, 1995 Cr LR 237 (Raj).

Conviction can be only under Section 376 (1) or 376 (2) as the case may be and not under Section 376 as such. It was held that after amendment of 1983 it is incumbent that in rape cases charge and conviction, if recorded, should be either under sub-section (1) or sub-section (2) and never under Section 376 IPC as such. *Betu* alias *Kamal Khan* v. *State of Madhya Pradesh*, 1994 MP LJ 874.

In case of rapists aged 19 years when incident occurred 14 years before and amended section imposing minimum sentence of 10 years was not enacted at that time 5 years R.I. with fine of Rs. 5.000/- imposed. *State of Maharashtra.* v. *Savala Sagu Kokare*, 1997 Cr LJ 786 (Bom).

3. Cases.—The statement of a grandmother as to the child's complaint to her, is entirely insufficient to support a conviction, especially, in the absence of any medical evidence, establishing that the injuries to the child would only have been caused by rape or an attempt to commit the same. UBR 1906, Penal Code 31 ; 4 Cr LJ 288. Where a charge of rape brought against the accused was found untrue, *held*, that in the absence of a complaint from the husband the Court cannot take cognizance of the offence of adultery. 14 Cr LJ 284 ; 19 Ind Cas 716. Rape is an offence punishable with transportation for life or with imprisonment for a term which may extend to ten years. Rat Un Cr C 953. A little boy of 12 years though physically incapable of committing the offence of rape can nevertheless be held guilty of an attempt to commit it. 18 Cr LJ 1933 : 42 Ind Cas 175. An inference adverse to the accused in a case of rape should not be drawn from the fact the complaint was very much ashamed and even committed suicide owing to the shame brought on her. The fact of the complainant's suicide should not be taken into consideration in giving sentence in case of rape because that is neither the natural nor probable consequence of the accused's act. 43 Ind Cas 443 : 19

Cr LJ 155. In cases of rape, it would be quite unsafe to convict individual merely on the accusation of the woman who had been raped. 67 Ind Cas 827 ; 23 Cr LJ 475 ; 27 Cr LJ 1284 ; AIR 1927 Rang 67 ; *see* also 35 PLR 638 ; AIR 1933 Oudh 163 ; 34 Cr LJ 496 ; 10 OWN 107. In a case of rape a direct on that age or consent of girl need not be considered is a misdirection even where there is no plea of consent. 37 CWN 484 ; 1933 Cr C 970 ; AIR 1933 Cal 606. Jury should be warned as a matter of practice that complainant's evidence should not be accepted unless corroborated by independent evidence. AIR 1933 Cal 833. Where rape was committed on point of gun, sentence was enhance from 3 to 5 years. AIR 1932 Lah 483 ; 33 Cr LJ 564 ; 32 PLR 679 ; *see* also AIR 1933 Sind 87 ; 39 Cr LJ 618. Police-officer should ask the complaint to submit to medical examination. 17 NLJ 189. In cases of rape, the punishment depends on the atrocity of the crime the conduct of the criminal, and the defenceless state of the female. It has nothing to do with her status or nationality. 25 Cr LJ 1214; 82 Ind Cas 143 ; AIR 1925 Nag 74. It a girl is *virgo intacta* that fact affords proof against there being consent to the act. 89 Ind Cas 1065 : 26 Cr LJ 1488 ; AIR 1925 Lah 613. Valva penetration is sufficient 88 Ind Cas 705 ; 26 Cr LJ 1185 ; AIR 1923 Lah 536. An act which amounts to an attempt to commit rape does not lose that character merely because the offender does not display a determination to effect his object at all costs. AIR 1925 Rang 247 ; 4 Bur LJ 83. Partial penetration not sufficient to cause any injury to the hymen constitutes rape within Section 376, IPC. 100 Ind Cas 113 ; 28 Cr LJ 241. Where it is found that the girl upon whom rape has been committed was unchaste a severe sentence should not be passed. 100 Ind Cas 128 ; 28 Cr LJ 256 ; but *see* 100 Ind Cas 116 ; 28 Cr LJ 244 ; AIR 1927 Lah 222. Where the evidence showed that the woman who was alleged to have been raped did in fact consent to the sexual intercourse, *held*, that a conviction under Section 376, IPC, was not sustainable under those circumstances. 9 Lah LJ 337. Where there is no mark of resistance on aggressor and no marks of injury on private parts of woman, a conviction on mere statement of woman is not proper. AIR 1935 Lah 8. In a charge of rape by a woman the mere fact that she did not offer herself for medical examination cannot weigh against her. AIR 1935 Nag 69.

In the instant case the child prosecutrix, aged 6 years, was subjected to rape. She was cross-examined at length, but nothing came out which affected her testimony. Her statement appeared to be trustworthy and straight forward. Her statement was corroborated by medical evidence and other evidence. No injuries were found on her labia, minora and majora, but the Court held that it would not at all affect the case of prosecution as other injury on her private part was found which was visible in the medical report. The delay in lodging FIR was fully explained. Non-production of a listed witness was held to have no effect on the prosecution case. Conviction of accused was held proper. *Ghewar Ram v. State of Rajasthan* 2001 Cr LJ 4460 (Raj).

Where the accused stepped across from his own roof that of his neighbour at night caught hold of his daughter, got on the *charpoy* with her, untied the string of her *payjama* and was seen struggling with her when the respondents came up in answer to her daughter's cries and he then ran away. *Held*, that he had been rightly convicted under Sections 376 and 511. 28 PLR 575 : 103 Ind Cas 199 ; 28 Cr LJ 663 ; AIR 1927 Lah 580. When in a prosecution for the offence of rape, it was found that the woman made the first information report only one day after the occurrence even though the police-station was near at hand. *Held*, that under those circumstances, a conviction was not sustainable. 9 Lah LJ 384. In the case of a girl aged 10 years no question o consent arises as regards the offence of rape. 106 Ind Cas 348 ; 29 Cr LJ 12 ; 9 Pat LT 186. Where a person is charged with the offence of having committed rape the fact tha the injured girl has not been infected with gonorrhoea from which the accused i suffering is by no means conclusive of the innocence of the accused. 106 Ind Cas 341 29 Cr LJ 19 ; 9 Pat LT 186. Crimes of violence upon women who are not in a position t defend themselves must be put down with a strong hand and it would be a very sa state of affairs if criminal were to carry an impression that to criminally assault woman or to rape her was not a very serious matter and that they could always satisf their unholy passion if only they were prepared to undergo a commartively short term o imprisonment. 30 PLR 437 ; 116 Ind Cas 883 ; 30 Cr LJ 699 ; AIR 1929 Lah 584 Where in a prosecution for rape it appeared that the complainant was never examine by any medical witness and apart from the statement of the complainant herself ther was no evidence that the penetration was actually effected, *held*, that the accused wh were proved to have committed criminal assault upon her should be convicted unde Section 354 and not under Section 376, IPC. *Held*, also, that in such a case the repor of the Chemical Examiner regarding the presence of semen on the complainant' clothing was not sufficient to prove that the complainant was actually raped. 11 Lah L 391 ; 30 PLR 662. The punishment for an offence of rape should be proportioned to th greater or less atrocity of the crime, the conduct of the criminal and to the defenceles and unprotested state of the injuried females ; and payment of money to the famil should not be taken into consideration 52 Ind Cas 423; 20 Cr LJ 647. Mere presence o semen on complainant's clothing is not sufficient to prove rape. AIR 1930 Lah 193; 1 LLJ 391. A boy of ten who has attained sufficient maturity of understanding to judg the nature and consequence of his conduct can be convicted of an attempt to commi rape. 159 Ind Cas 450 ; AIR 1935 Rang 393. (AIR 1918 LB 96 and 37 All 187 relied) The mere existence of the injury to the vagina does not necessarily and justify th inference that there had been rape. AIR 1938 Rang 298. Corroboration as to identity o the accused is not necessary. ILR 1945 Nag 523 ; AIR 1944 Nag 263 ; but *see* AIR 194 All 393 ; 48 Cr LJ 851 ; 43 CWN 1180. To prove the charge under this section th prosecution is bound to prove that the girl is below the age of 14. AIR 1939 All 708 ; 4 Cr LJ 142.

In a prosecution for offence under Sections 366 and 376, IPC the question of th age of the girl abducted is very material. The fact that she was a consenting party to th abduction is entirely immaterial as regards the offence under Sections 366. Though i may have some bearing as regards the offence under Section 376. 51 Cr LJ 352 ; AI 1930 Cal 437. Where the accused were charged under Sections 376 and 366, it was th duty of the Judge to bring to the notice of the Jury the fundamental difference betwee the ingredients of the offence under Section 366 and one under Section 377. Seductio may take the act out of Section 366, when the girl is above the age of consent bu seduction will not necessarily take it out of Section 366, where seduction is for instanc the result of abuse of authority. AIR 1935 Nag 121; 1955 Cr LJ 819. Where in a charg of rape, girl, her mother and eye-witnesses depose in favour of prosecution convictio were held proper even in the absence of injuries on medical examination if bloodstain are found in *dhoti* of accused and cloth of girl. AIR 1935 All 590. It is the duty of th prosecution, if, according to the medical jurisprudence, medical examination wa capable of yielding conclusive results, to ensure that examination within a period of time when conclusive results could be obtained. AIR 1946 All 191 ; 47 Cr LJ 611 ; AIR 1944 Nag 245 ; 1947 AWR (HC) 407 ; 1947 A Cr C 172.

In cases of rape the alleged victim and the accused persons shall be specially examined with a view to ascertain if they are infected with general disease. AIR 1954 Orissa 33 ; 1954 Cr LJ 132.

Blood found on vagina public hair, nostril and the face of the deceased— Injuries antimortem and homocidal—Marks of violence upon whole of the body.—Offence was fully established. *Dhananjoy Chaterji* v. *State of West Bengal*, 1994 JIC 260 ; (1994) 1 CCR 89 ; (1994) 2 Crimes 319 ; 1994 SCC (Cr) 358 ; (1994) 2 SCC 220 ; (1994) 1 ALT (Cr) 388 ; (1994) 1 Recent Cr R 429 ; (1994) 1 East Cr C 245 (SC).

When incident took place in the morning—FIR lodged in the evening after consultations with relatives was not lodged after undue delay. It is known fact that considering the condition in our society a rape victim would not at once rush to lodge a report. *Betu* alias *Kamal Khan* v. *State of Madhya Pradesh*, 1994 MPLJ 874 (MP).

It would be fortuitous to expect marks of resistance on the person of girl of tender years who was assaulted by a fully grown up boy. AIR 1960 Mad 308 ; 1960 Cr LJ 927. However smegma need not be completely rubbel off or removed during intercourse. A negligibles amount of smegma may be present even if a person has intercourse. (1962) 2 Cr LJ 668. From the mere fact that was no dilation of the vaginal canal it can not be assumed that the offence was not committed when the injury to the hymen showed clearly that there was penetration by the male organ. AIR 1957 Ori 18 ; 1957 Cr LJ 469. *Held*, on facts of the case that the statement of witness was insufficient even to prove that the appellant assaulted or used criminal force against the woman with an intention to outrage her modesty. 1980 Cr LR 446.

In case of rape there can hardly be any eye-witnesses. The statement of prosecutrix supported by medical evidence can form basis of conviction. The sexual intercourse cannot be presumed in absence of medical report. The vaginal smear was also not sent for chemical examination to prove the act. The statement of prosecutrix is also not relied at. Hence acquittal. *Rashid* v. *State of U.P.*, 1995 (32) ACC 69 (All).

The accused was charged and convicted under Section 376 for the offence of committing rape. The accused committed rape on the prosecutrix when she had gone to jungle for grazing animals with her companions graziers. When her companions graziers went in search of animals which strayed away, she was left alone and accused finding the opportunity raped her. The accused admitted having subjected her to sexual intercourse and said it was with her consent. *Held*, that burden shifted upon accused to prove that he had sex act with prosecutrix with her voluntary consent which he failed to prove. Appeal failed and judgment of lower court affirmed. 1987 Cr LJ 1379 (HP).

The non-examination of the prosecutrix does not vitiates the trial. If the accused could be held guilty by other evidence. *State of Himachal Pradesh* v. *Madan Mohan*, 1995 Cr R 65 (HP).

It is difficult for any medical expert to give the exact duration of time when the rape was committed. 1980 MLT (Cr) 61 ; AIR 1983 SC 911 ; 1983 Cr LJ 1285. The demand of corroboration, which consider as obsolescent demand was thought can not be sacrificed to common sense. AIR 1980 SC 1252 ; 1980 Cr LJ 926. It must be however kept in mind that of the circumstances negative the existence of fee and stay of passive submission as provide in Section 375, the case cannot be said to be one of rape punishable thereunder. AIR 1979 SC 185 ; 1978 Cr LJ 1864 ; 1982 Cr LJ 2162. The examination of smegma loses all its importance after 24 hours of the performance of sexual intercourse. (1979) 1 SCC 21.

Victim was admitted in the Hospital of accused—Suffering from Malaria— Doctor assured to cure—Giving two tablets became naked—Alarm by father-in-law—Doctor ran away—Complaint against the same was filed.—Offence was made out. *Nathu Ram* v. *State of Haryana*, 1994 JIC 138 (SC) ; (1994) 1 SCC 491 ; (1994) 1 East Cr C (NOC) 9 ; 1994 SCC (Cr) 88 ; 1994 Cr LJ 1095.

Order of cognizance of offence can not be quashed on the basis of statements of witnesses not corroborating evidence *vis-a-vis* commission of offence. *K. Nageswar Rao* v. *State*, 1993 Cr LJ 1822 (Ori).

Where there was absence of spermatozoa in the swab. The test was conducted after 12 hours of the incident. The fact that there was no evidence of spermatozoa at the time when she was examined is quite inconsequential. *State of Maharashtra* v. *Umesh Krishna Pawar*, (1994) 1 Bom CR 575 ; 1994 Cr LJ 774.

Accused pushed the girl down and lifted her saree—But releasing her on account of victims shouts—It amounts to outraging the modesty of the woman. *Amirthingam* v. *State*, 1995 MLJ (Cr) 515 (Mad).

When there was sexual intercourse on a promise to marry the girl. Promise if made only for sexual pleasure. The consent of the girl shall stand vitiated and such a person can be convicted of rape. *Vincent* v. *State rep by Inspector of Police, Thisayan, Vilai*, (1995) 2 LW (Cr) 544 (Mad).

Where there was defective investigation with non-examination of two important witnesses and no proper seizure—Memo in regard to semen stained under garment (chaddi) drawn it was held that the court would not be right in acquitting an accused person solely on account of this defect. *Karnel Singh* v. *State of M.P.*, (1995) 3 Crimes 527 (MP).

In case of rape on married woman when report states that hymen of victim was torn with no fresh injury and that victim was girl of easy virtue, it cannot be inferred that accused had forcible intercourse with her. *Daya Nand* v. *State of U.P.*, 1996 Cr LJ 4263 (Alld).

It was not proper for High Court to seek independent corroboration at that stage and discharge accused in absence thereof. *State of Maharashtra* v. *Priya Sharan Maharaj*, 1997 (1) Crimes 275 (SC) : AIR 1997 (SC) 2041 : 1997(4) SCC 393 : 1997(4) JT 84 : 1997(2) Scale 687.

When accused is alleged to have sexual intercourse with prosecutrix by promising to marry her but prosecutrix not stating any rape on her, guilt of accused not proved. *Gaurish* v. *State of Goa*, 1997 Cr LJ 1018 (Bom).

Where cohabitation took place with consent of prosecutrix aged about 16 years, no offence of rape is proved but in view of promise to marry her, accused liable to be convicted for offence of cheating. *Maran Chandra Paul* v. *State of Tripura*, 1997 Cr LJ 715 (Gau) : 1996(2) Gau LR 15 (Gau).

On failure of Investigating Officer to carry out detailed paternity test for establishing paternity of child to connect accused with it, conviction of accused can not be based on such evidence. *Peter Fernandes* v. *State*, 1997 Cr LJ 954. (Bom).

The charge under section 376, IPC was mainly fastened upon the appellant on the last seen together theory. The factum of rape of the deceased is sought to be proved from a report on examination of vaginal smear collected and said to confirm the presence of semen and spermatozoa indicating that she should have had sexual intercourse before her death. The chemical report also showed that semen was detected in one of the under skirts found on the body of the deceased. The doctor also showed that the accused was potent. But in the chemical report, it was specifically stated that the dhoti of the accused subjected to chemical examination contained no stains of blood or semen. If there had been any forcible sexual intercourse the victim must have made some strong resistance being a grown up lady and in the process, some injuries would have been found on the vagina/private parts of the body or some other parts indicative of any such use of force and it would be too much to assume that there would have been no injuries whatsoever on the body, on this account. Though injuries on the body is not always a must or *sine qua non* to prove a charge of rape, having regard to the case of the prosecution that the victim had been subjected to brutal rape and forced sexual intercourse, this aspect of the matter cannot be completely lost sight of. The deceased was stated to be of about 26 years age, when she died and she was the sister of the wife of the accused. It was not as though they were shown earlier to be on inimical terms. Anything possible might have happened and the facts found proved did not irresistibly lead to the only conclusion of the guilt of the appellant in respect of an offence under section 376, IPC. Consequently the benefit of doubt was given to the appellant he was acquitted of the offence under Section 376, IPC. *Joseph* v. *State of Kerala*, 2000 Cr LJ 2467 (SC) : AIR 2000 (SC) 1608 : 2000(6) JT 195 : 2000(4) Scale 92 : 2000(3) Supreme 588.

There were no injuries externally, nor was there blood stain on her person. There was no mark of injury on her breasts or labia majora and labia minora, pubic hair not matted, a few hymenal tags found present without bleeding and no spermatozoa was found on vaginal fluid during microscopical examination. According to her there was no sign of rape. The appellant was aged about 23/24 years. Had the appellant forcibly committed rape on the victim against her will, she being a tribal lady, would have very well resisted him and escaped from his clutches. In other words, if at all it was believed for the sake of argument that the appellant had sexual intercourse, the same would have been with consent of victim which could be fortified from the finding of the medical officer that there was no injury on the person of the victim, the wearing saree having contained no mark of blood or semen, non-production of the torn blouse for seizure, absence of any mark of violence on the spot and absence of seizure of broken bangles from the spot which was a usual feature in a case of forcible rape. *Rabindra nath Ballirsingh* v. *State*, 2000 Cr LJ 2535 (Orissa) : 2000(1) Crimes 168 : 2000(1) Ori LR 612 : 2000(19) OCR 32 (Ori).

In such case it is not always necessary for hymen to be torn and hence injuries were trivial. *State of Maharashtra* v. *Savala Sagu Kokara*, 1997 Cr LJ 786 (Bom).

4. Rape on girl of loose morale and easy virtuess. *State of UP* v. *Pappu*, 2005 Cr LJ 331 (SC) : AIR 2005 (SC) 1248 : 2005(1) Crimes 37 : 2005(1) JT 153 : 2005(3) SCC 594 : 2005(8) Supreme 656.

5. Absence of injuries on back or other part of body of prosecutrix.—In th instant case the prosecutrix was a young girl of tender age, therefore she could n resist the sexual assault. When at the time of sexual act the prosecutrix was wearin clothes, it is not necessary that there should be some injuries on her back or other par of the body. *Premlal* v. *State of MP*, 2005 Cr LJ 1145 (MP).

Absence of injuries on her private parts—Effect.—Victim is married, grown up lad blessed with two children. One more aspect that requires our consideration is as t whether the medical evidence does not support the prosecution's case? The High Cour rightly expressed its indignation as to the manner in which the trial Court completel misread the vital medical evidence. Dr. A. Chakraborty, (PW-8) examined the victim o 29.04.1984. On examination he opined that the victim is habituated to sexua intercourse and, therefore, could not express his firm opinion in his report about th commission of rape at the time of medical examination. But in the evidence he clearl stated after considering the report of FSL regarding stains on victim's clothing, tha there is sufficient proof of recent sexual intercourse. The vaginal swab and smear wer sent to Chemical Examiner. Based on the FSL report and the report of Serologis (Exhibit 7) he found that the semen was present in the vaginal swab of the victim. Cour fail to appreciate as to how and in what manner the medical evidence supports the cas of the defence.

The Counsel for the appellants however, submitted that the medical examinatio report of the victim shows that no injuries were found on her private parts or on an part of her body. Court is required to note that victim Sita Rani Jha is a married grow up lady and blessed with two children and in such circumstances the absence o injuries on her private parts is not of much significance. The mere fact that no injurie were found on private parts of her body cannot be the ground to hold that she was no subjected to any sexual assault. The entire prosecution story cannot be disbelieve based on that singular assertion of the Counsel. In this regard another submission was made by the Counsel for the appellants that the sexual intercourse, if any, was with the consent of the victim. According to him it was consensual sexual intercourse. This proposition canvassed for the first time across the bar is absolutely untenable and unsustainable. There is not even a suggestion made to the victim that she has consented to sexual intercourse. The sequence of events clearly apparent from the evidenced of witnesses, leading to the sexual assault completely rules out the possibility of consensual sex. Court has no hesitation to reject the submission. *Utpal Das and Anr. vs. State of West Bengal*, 2010 (3) CrLJ 2867 (SC).

Even assuming that the victim was previously accustomed sexual intercourse, that is not a determinative question. On the contrary, the question which was required to be adjudicated was did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any person to rape her. It is the accused who was on trial and not the victim. Even if the victim in a given case has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. The finding that the victim was a girl of loose morale and easy virtues or is of bad character is no ground for acquittal of accused. *State of UP* v. *Pappu*, 2005 Cr LJ 331 (SC) : AIR 2005 (SC) 1248 : 2005(1) Crimes 37 : 2005(1) JT 153 : 2005(3) SCC 594 : 2004(8) Supreme 656.

6. Girl's age, proof of.—The only conclusive price of evidence of the girl's age may be birth certificate, but unfortunately, in this country such a document is not ordinarily available. The court or the jury has to base its conclusion upon all the facts and circumstances disclosed on examining all the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available. AIR 1958 SC 143 ; 1958 SCJ 349 ; 1958 SCA 147 ; 1958 SCR 749 ; 1958 Cr LJ 273. The burden of proving the age of the girl lay heavily on the prosecution in view of the fact that the girl was already used to sexual intercourse. 1958 Raj LW 60 ; ILR (1957) 7 Raj 440.

In actual life it often happens that persons give false age of the boy at the time of his admission to a school so that in later life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The court of the fact cannot ignore this fact while assessing the value of the entry and it would be improper for the court to base any conclusion on the basis of the entry, when it is alleged that the entry was made upon false information supplied with the above motive. *Brij Mohan Singh* v. *Priya Brat Narain Singh*, AIR 1965 SC 285.

Failure to examine any of her family members on point of age—Adverse inference. Doctor who had examined her. opined that she was 18 years of age. According to prosecutrix, she was only 13 years of age at the time of incident. Her parents or either of them or any other family member who could be most reliable and natural witness on point of her age, not examined.

It is the duty of the party to lead the best evidence in its possession which could throw light on the issue in controversy and in case such a material evidence is withheld, the Court may draw adverse inference under Section 114 illustration (g) of the Evidence Act notwithstanding that the onus of proof did not lie on such party and it was not called upon to produce the said evidence. *Musauddin Ahmed vs. State of Assam*, 2009 (3) Crimes 238 (SC) : 2009 (9) JT 65 : 2009 (9) Scale 155 : 2009 (9) SCR 1135 : 2009 (5) Supreme 277 : 2009 (5) SLT 700 : 2009 (3) JCC 2002.

Prosecutrix in love with accused and consenting party. Clinical examination showing that prosecutrix had well developed secondary sex characters. The short question in the facts and circumstances of this case remains to be determined is whether the prosecutrix was a minor? Doctor, PW1 who examined the prosecutrix referred her for verification to the Dental Surgeon and the Radiologist. The failure of getting the prosecutrix examined from the Dental Surgeon or the Radiologist despite the fact that she was referred to them by Doctor, PW1 is a serious flaw in the prosecution version. We are not laying down as a rule that all these tests must be performed in all cases, but in the instant case, in absence of primary evidence, reports of the Dental Surgeon and the Radiologist would have helped us in arriving at the conclusion regarding the age of the prosecutrix.

The prosecution also failed to produce any Admission Form of the school which would have been primary evidence regarding the age of the prosecutrix. The School Leaving Certificate produced by the prosecution was also procured six days after the incident and three days after the arrest of the appellant. As per that certificate also, she joined the school in the middle of the session and left the school in the middle of the session. The attendance in the school of 100 days is also not reliable.

The prosecutrix was admitted in the school by her brother and he was not examined. The alleged School Leaving Certificate on the basis of which the age was entered in the school was not produced. The father of the prosecutrix has also not been able to give correct date of birth of the prosecutrix. In his statement he clearly stated that he is giving an approximate date without any basis or record. In a criminal case, the conviction of the appellant cannot be based on an approximate date which is not supported by any record. It would be quite unsafe to base conviction on an approximate date. *Sunil vs State of Haryana*, 2009 AIR SCW 7656 : 2010 CrLJ 839 (SC)

The evidence as to the date of birth based on school records cannot be implicity believed unless it is corroborated by other evidence on record for ascertaining the age for the purpose of fastening criminal liability for the offence of rape, as defined under Section 373 of IPC. It is the school admission register which can be considered as a public document and it is the authenticated true extracts of such a register which is really admissible in evidence. A mere certificate from the Head Master as to the age of a student purporting to be based on the 'school records' does not satisfy the requirement of Section 35 of the Evidence Act. The age of the prosecutrix on the basis of the dental and ossification tests has to be determined where school certificate cannot be accepted and there is no oral evidence as to the age. In such a case, the opinion of radiologist by allowing certain margins can be accepted. Such a view has been taken by the Delhi High Court in the case of *Kanchan Dass* v. *State*, 1999 Cr LJ 2036.

When the prosecution witness stated that the age of prosecutrix was between 15 to 17 years. At the lowest it could be 15 years and at the highest it could be 17 years. As held in *Kanchan Dass* v. *State of Delhi*, 1991 Cr LJ 2036 (Delhi) the benefit of outer margin must be given to the accused the prosecution must prove by clinching evidence that the first sexual intercourse by the accused took place when she was below 16 Years. *Kondapallai Laxman Rao* v. *State of A.P.* 1999 Cr LJ 1928 (AP).

Birth entry must prevail as that is the conclusive evidence— *Mohandas Suryavanshi* v. *State of M.P.*, 1999 Cr LJ 3451 (M.P.)

In *State* v. *Kamruddin* AIR 1956 Nagpur 74 : 1956 Cr LJ 263 it has been held that the mere entry in the Register of Birth and deaths to the effect that a child was born to a person, without any statement as to the identity of the child is not sufficient to prove the birth of a particular person. The identity of that person has to be fully established by other evidence.

It is true that the entries in the Birth Register has to be preferred to the entries in the admission register maintained in the school. But in the absence of evidence about the identity of the child mentioned in the Birth Register could be relied upon to prove the age. *Suresh Babu* v. *State of Kerala* 2001 Cr LJ 1483 : 2001(1) CCR 233 (236) : 2001(2) Crimes 313 : 2001(1) Femi-Juris CC 302 (Ker).

In a rape case, no ossification test conducted neither age challenged nor doctor or mother of prosecution cross-examined in this respect, it was held that absence of test is of no consequence. 1987 Cr LR 797 (Raj).

When the medical evidence was based on Radiological examination that the prosecutrix was 12 years old, there could be a difference of one or two years on either side of approximate age as determined on radiological examination. It was held that the case would not fall under Section 376 (2)(f). *Shyam Lal* v. *State of Uttranachal*, 2005 Cr LJ (NOC) 201 (Uttra) : 2005(2) Cur Cri R 316 : 2005(1) UC 483.

In the instant case the father and mother categorically stated that the prosecutrix was below 16 years of age which was supported by the unimpeachable documents in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness of facts tendered by father and mother supported by unimpeachable statement. *Vishnu* v. *State of Maharashtra*, 2006 Cr LJ 303 (SC).

On proof as to age of victim school record is to be preferred against other documents. *Syed Amjad Ahmad* v. *State of A.P.*, 1993 Cr LJ 1920 (AP).

In the case of rape principle question cropped up was whether on the material date the prosecutrix was below 16 years of age. Birth certificate and school record showed her age below 16 years. According to medical opinion age was estimated to be between 16 to 18 years with a margin of 3 years on either side. *Held*, that medical evidence did not militate against other consistent evidence regarding age. Trial court's conclusion that prosecutrix was under sixteen years was upheld. 1987 Cr LJ 212 (MP).

The prosecutrix was above 16 years of age at the time of incident. Her consent can well be presumed even for sexual acts prior to marriage. Hence acquitted calls for no interference. *State of A.P.* v. *P. Narasimha*, (1994) 2 Crimes 263 (SC) : (1994) 4 SCC 453.

Appeal was held against conviction—Determination of age and Doctor opined 17 years—Elbow joint fused—Auxiliary and pubic hair not developed— The age was held to be 18 years. Conviction was set aside. *Anil Kumar* v. *State of U.P.*, 1994 JIC 243 (All).

7. Procedure.—If the sexual intercourse was by a man on his own wife—Not cognizable—Summons—Bailable—Not Compoundable—Triable by a Court of Session, in any othercase—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

8. Triable by Magistrate with Section 30, Cr PC—Powers.— Cases of rape and unnatural vice should, as far as possible, be tried by Magistrate with Section 30 Cr. Pro. Code powers so that if circumstances call for a heavy sentence then the same may be given, up to the outside limits of seven years. 161 Ind Cas 591 ; 37 Cr LJ 474 ; 38 PLR 437 ; 1936 Cr C 205 ; AIR 1939 Lah 256.

9. Sentence.—In some States in the USA, emphasis was laid on psychotherapic treatment of the offender while he was under detention. For that purpose , Psychopath Sexual Offenders Laws have been enacted in certain jurisdiction in USA. These laws treat the sex offenders as neurotic persons and psychotherapic treatment is given to them during the period of their detention which may, in some cases, be an indefinite period, in the sense that they would not be released till they are cured. But the provision for indefinite detention even beyond the maximum period of imprisonment for that offence was seriously objected to by a group of lawyers and, therefore, in many of the States, this provision was dropped from the Statute. Here, statutory provision for psychotherapic treatment during the period of incarceration in the jail is not available in India but reformist activities are systematically held at many places with the intention of treating the offenders psychologically so that he may not repeat the offence in future and may feel repentant of having committed a distardly crime. *T.K. Gopal* v. *State of Karnataka*, 2000 Cr LJ 2286 (SC) : AIR 2000 (SC) 1669 : 2000(6) JT 177 : 2000(4) Scale 373 : 2000(3) Supreme 706 : 2000(2) Crimes 245 (SC).

(a) Sex with a third person.—There is some participative act committed by Sunita. It is not a case where the appellant forced herself on prosecutrix. There is no evidence that the appellant compelled prosecutrix to have sex with the other person. We note that the prosecutrix has only written that the appellant was compelling her to have sex with a third person. She has not written that she was actually made to have sex with a third person. *Ashok Rai vs State*, 2010 Cri LJ 1105 (Delhi).

The question of sentence in rape cases was considered by *Krishna Iyer. J*, in *Phul Singh* v. *State of Haryana.* (1979) 4 SCC 413 : 1980 SC 249 : 1980 Cr LJ 81, in which he observed that sentencing efficacy in cases of lust-loaded criminality cannot be simplistically assumed by award of long incarceration, for often that remedy aggravates the malady. He further observed that a hyper-sexed homosapien cannot be rehabilitated by humiliating or harsh treatment. In that case it was found that the appellant was a young man of 22 years with no criminal antecedents save the offence of rape committed by him. The Hon'ble Judge thought that given correctional courses through meditational therapy and other measures, his erotic aberrations may wither away, particularly as the appellant had reasonable prospect of shaping into a balanced person. But this theory was not followed in later decisions as it was found that in spite of devices having been employed and adopted within the jail premises as to reform the offenders, there was negligible improvement in the commission of crime. The crime instead of declining, had increased and today it has assumed dangerous proportions. While one person is reformed and moves out of jail another offender is born. Consequently in two recent decisions relating to the offence of rape, one rendered by the present Chief Justice of India and the other by Mr. Justice Lahoti the sentence was enhanced in *State of Karnataka* v. *Krishnappa*, 2000 (3) JT (SC) 516 : 2000 AIR SCW 1040 while in the other case, namely *State of Rajasthan* v. *Noore Khan*, 2000 (3) JT (SC) 643, the order of acquittal passed by the High Court was set aside and substituted by an order of conviction.

In *T.K. Gopal* v. *State of Karnataka*, 2000 Cr LJ 2286 (SC) : AIR 2000 (SC) 1669 : 2000(6) JT 177 : 2000(4) Scale 373 : 2000(3) Supreme 706 : 2000(2) Crimes 245 (SC) the deceased had omitted rape on a one and a half year's girl. The incident was 9 years old. The accused was only bread earner for family. He had also shown signs of reformation. The accused's two daughters had come of age and were to be married. Having regard to the said extenuating circumstances the court held that the period of incarceration of the accused in jail was enough.

Sexual violence apart from being a dehumanising act is an unlawful instrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends herself-esteem and dignity, it degrades and humilitates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized judge is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos. *State of*

Karnataka v. *Krishnappa*, 2000 Cr LJ 1793 (SC) : AIR 2000 (SC) 1470 : 2000(4) SCC 75 : 2000(3) JT 516 : 2000(2) Scale 610 : 2000(2) Supreme 611.

(b) Minor mentally retarded girl.—Prosecutrix a minor mentally retarded girl was raped in running local train. Only because prosecutrix was mentally retarded cannot be a reason to award sentence of imprisonment for 10 years. Sentence of ten years R.I. modified to seven years R.I. *Salim Alim Shamsher Shaikh vs State of Maharashtra*, 2010 (4) CriLJ 4064 (Bom).

(c) Gang rape—Woman cannot be prosecuted for alleged commission of offence of gang rape. In the present case, complaint was lodged by the prosecutrix alleging that she was returning by Utkal Express after attending a sports meet. When she reached her destination at Sagar, accused-husband of appellant-accused met her at the railway station and told her that her father has asked him to pick her up from the railway station. Since the prosecutrix was suffering from fever, she accompanied accused to his house. He committed rape on her. When commission of rape was going on, appellant-accused his wife, reached there. The prosecutrix requested the appellant to save her. Instead of saving her, the appellant slapped her, closed the door of the house and left place of incident. On the basis of the complaint lodged, investigation was undertaken and charge-sheet was filed. While accused was charged for offences punishable under Ss. 323 and 376, I.P.C. the appellant was charged for commission of offences punishable under Ss. 323 and 376(2)(g), I.P.C. The High Court was of the view that though a woman cannot commit rape, but if a woman facilitates the act of rape, Expln. I to Sec. 376(2) comes into operation and she can be prosecuted for 'gang rape.' Held, the language of sub-section (2)(g) of Sec. 376 provides that whoever commits 'gang rape' shall be punished etc. The Explanation only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape within this sub-section (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The Explanation only indicates that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape. By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. The sine quo non for bringing in application of Sec. 34, I.P.C. that the act must be done in furtherance of the common intention to do a criminal act. The expression 'in furtherance of their common intention' as appearing in the Explanation to Sec. 376(2) relates to intention to commit rape. A woman cannot be said to have an intention to commit rape and, therefore, appellant-accused cannot be prosecuted for alleged commission of the offence punishable under Sec. 376(2)(g). *Priya Patel v. State of M.P. and Anr.*, 2006 CriLJ 3627 (SC).

(d) Reduction in sentence—Factors to be considered. The punishment prescribed for the offence punishable under Section 376 (1) of the Indian Penal Code is a four tier proviso. The statute says that the period of sentence should be minimum of 7 years, if the offence is proved. The second tier is of 10 years which means that the Court if decides to impose punishment for more than 7 years and to the extent of 10 years, then normally it should assign good and convincing reasons as to how the case falls in the category where punishment of more than minimum prescribed period needs to be

imposed. The third tier is imposition of punishment for life. In a rape case, when the Court decides to impose life imprisonment then detailed reasonings are required to be given by the learned trial Judge as to how and why the case falls in the category where life imprisonment is required to be imposed. Fourth and last tier is for imposing less period of punishment than minimum prescribed. For this Court is supposed to give adequate and special reasons.

As per the settled legal position, the slightest penetration is a rape and in the present case, it was found that the minor girl has sustained a tear and, therefore, some surgical treatments were also given to the victim. In this situation, looking to the conduct of the appellant, it is not possible for the Court to infer the appellant committed crime till last or probably the prosecution has not satisfactorily proved that the appellant committed the crime till last. This conduct of the appellant of leaving the place immediately on realization that the minor girl had sustained serious injuries, tilts the balance in favour of the appellant when it comes to determination of quantum of punishment. Therefore considering the totality of facts and circumstances of the case and socio-economic background of the parties and circumstances in which the offence has been committed by the appellant, it was possible for the trial Judge to impose punishment minimum prescribed for the offence punishable under Section 376 of the Indian Penal Code. The substantive sentence imposed by the learned trial Judge needs to be reduced to 7 years instead of 10 years, in facts and circumstances of the present case. *Shanabhai Chandubhai Vasava v. State of Gujarat*, 2006 CriLJ 3252 (Guj).

Punishment with *adequate sentence*. The offence of rape is a very serious offence and also inhuman on the part of any person committing such a sexual assault on innocent victim girls. It is needless to state that rape is not only a crime against the person or a woman but it is the crime against the entire society. Such serious and grave offender should be dealt with all seriousness and if the offence is proved, they should be punished with adequate sentence and at the same time, the Court should also guard against false and frivolous cases. *Mirthagai Ali v. State*, 2007 CriLJ 1247 (Mad).

Rape by father is an unpardonable act. It is not only a loathsome sin but also abhorrent. In this case, the accused's lustful acts have indelible scar not only physically but also emotionally on the victim. No sympathy or leniency is called for. *Siriya alias Shri Lal v. State of M. P.*, AIR 2008 SC 2314 : 2008 (8) SCR 422 (SC) : 2008 (8) SCC 72 : 2008 (7) Scale 712 (SC) : 2008 (4) Supreme 287 (SC) : 2008 (4) SLT 662 (SC) : 2008 (3) SCC (Cr) 422 : 2008 (7) Crimes 376 (SC) : 2008 (3) JCC 1617 (SC) : 2008 (3) RecentCR 144 (SC).

The legislative mandate is to impose a sentence, for the offence of rape on a girl under 12 years of age, for a term which shall not be less than 10 years, but, it may extend to life and also to fine. The proviso to Section 376(2), IPC, of course, lays down that the court may for adequate and special reasons to be mentioned in the judgement impose sentence of imprisonment of either description for a term of less than 10 years. Thus, the normal sentence in a case where rape is committed on a child below 12 years of age is not less than 10 years R.I. though in exceptional cases for special and adequate reasons sentence of less than 10 years R.I. can also be awarded. It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso particularly in such like penal provisions. The courts are obliged to respect the legislative mandate in the matter of awarding of sentence in all such cases. Recourse to the proviso can be had only for special and adequate reasons and not in a casual manner. Whether there exist any special and adequate reasons would depend upon a variety of factors and the peculiar facts and circumstances of each case. No hard and fast rule can be laid down in that behalf of universal application. *State of Karnataka* v. *Krishnappa* 2000 Cr LJ 1793 : AIR 2000 (SC) 1470 : 2000(4) SCC 75 : 2000(3) JT 516 : 2000(2) Scale 610 : 2000(2) Supreme 611.

In *State of A.P.* v. *Bodem Sundara Rao*. (1995) 6 SCC 230: 1995 AIR SCW 4435 : AIR 1996 SC 530, while dealing with a case of reduction of sentence from 10 years R.I. to 4 years R.I. by the High Court in the case of rape of a girl aged between 13 and 14 years, it was observed :

> "In recent year we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the legislature not only is an injuries to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 years old girl shakes our judicial conscience. The offence was inhumane."

Dealing with the offence of rape and its traumatic effect on a rape victim the court in *State of Punjab* v. *Gurmit Singh*, (1996) 2 SCC 384: (1996 AIR SCW 998; AIR 1996 SC 1393; 1996 Cr LJ 1728) observed (Para 20 of AIR).

> "Of late, crime against women in general and rape in particular is on the increase, it is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sacreflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates that victim's privacy and personal intergrity but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault. It is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a greater responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity."

In *State of A.P.* v. *Dolamala Raju*. 2000 Cr LJ 4014 (SC) : AIR 2000 (SC) 2854 : 2000(7) SCC 75 : 2000(9) JT 104 : 2000(5) Scale 588 : 2000(5) Supreme 558 the Apex Court again dealt with the subject of imposition of sentence lower than statutory minimum and observed as under :

> "Normal sentence u/s. 376 (2), IPC in a case where rape is committed on a child below 12 years of age, is not less than 10 yeas R.I.' an expression which is pre-emptory in nature. The Courts are obliged to respect this legislative mandate

> when the case falls under the proviso. The proviso to S. 376 (2), IPC, however lays down that in exceptional cases, "for special and adequate reasons", sentence of less than 10 years' R.I. may also be awarded in a given case. The proviso, in our opinion, would come into play only when there are 'adequate and special reasons" available in a case. Those reasons need to be disclosed in the order/judgment itself so that the appellate forum is in a position to know as to what weighed with the Court in awarding a sentence less than the minimum prescribe under the Act. We are of the considered opinion that it is an obligation of the sentencing Court to consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the gravity of the offence. The sentencing Court must hear the loud cry for justice by the society and more particularly in cases of heinous crime of rape of innocent helpless children, as in this case, of the victim of crime and respond by imposing a proper sentence."

In case of rape of a girl of 10 years by her teacher of 39 years, 4 years RI was considered to be a lenient one. AIR 1957 Ori 78 ; 1957 Cr LJ 469 ; *see* also AIR 1954 All 580 ; 1954 Cr LJ 1288 ; 1954 All LJ 256; *see* also 1981 Cr LJ 1917 ; 1980 Cr LJ 1297 ; 1979 Cr LR 490 ; 1973 Cr LJ 1446 (elderly man commits rape on a child of 7 or 8 years) ; 1976 Cr LJ 1545 ; AIR 1976 SC 1991 ; 1976 SCC (Cr) 270 ; (1980) 82 Punj LR 343 (reduction of sentence) 1977 Raj Cr C 153 ; 1983 Cr LJ 1096 ; 1977 Cr C 71; 1977 Raj Cr C 26 (reduction in question of sentence).

The offence was committed on 25-9-1991 and the accused was convicted and sentenced on 17-5-1999. However, the delay caused in the disposal of the case was entirely attributable to the accused who had absconded with a view to evade the trial and the punishment immediately after the commission of the offence and was apprehended after about 7 1/2 years, therefore, the delay in the disposal of the case could not be treated as a mitigating circumstance in the case. The age of the accused at the time of commission of the offence though alleged to be about 18 years but there was nothing authentic on the record which may show that he in fact was about 18 years of age at the time of commission of the offence. He allured a girl of tender age to accompany him on the pretext to get some help from her and took advantage of her good gesture in accompanying the accused to help him. The punishment awarded to the accused did not call for any interference. *Nandlal* v. *State of H.P.*, 2000 Cr LJ 3106 (HP).

Though the conviction of accused by trial Court for having committed rape on 19 years old girl was well founded but awarding of sentence less than minimum sentence prescribed under law was held not permissible. *State of Mizoram* v. *Lalrinkhuma*, 2005 (2) Crimes 601 (Gau) : 2005 Cr LJ 3414.

Where accused aged 27 years had committed rape on innocent minor girl of 4 years therefore sentence of 10 years RI and fine of Rs. 1000/- imposed on him warranted no interference. *Amar Nath* v. *State of UP*, 2005 Cr LJ 1379 (All) : 2005 All LJ 405 : 2005(51) All Cri C 65 : 2005(1) All Cri R 608.

The leniency was sought, in another case, on the ground that accused was only 19 years of age and did not have bad antecedents. However evidence showed that accused had caused injuries on victim's body and blood was found on place of occurrence. No leniency was shown in regard to punishment. *Kuldip Singh* v. *State*, 2003 Cr LJ 2931 (P&H) : 2003 ILR(2) P&H 73.

Where the prosecution case was fully corroborated by medical evidence, yet since the accused person aged below 22 years had remained in custody for about six years, his sentence was reduced to six years. *Gutlthir Soren* v. *State of Bihar*, 2005 (3) East Cr C 184 (Jhar).

The High Court awarded a sentence which was not only grossly inadequate but was also contrary to express provision of law. The High Court had not assigned any satisfactory reason much less adequate and special reasons for reducing the sentence to a term which was far below the prescribed minimum. The sentence awarded by the High Court was held illegal. *Staet of MP* v. *Rakesh*, 2005 Cr LJ 4527 (SC) : AIR 2005 (SC) 4319 : 2005(8) SCC 13 (4) : 2005(12) JT 422 : 2005 SCC (Cr) 1959(3) : 2005(3) JCC 1732.

Having found that the accused had committed rape of a minor, to reduce the sentence to less than 7 years on the ground that the accused was either 17 years or 19 years of age or that the accused was an illiterate villager was neither adequate nor special reason contemplated under Section 376, IPC. The sentence of 10 months imprisonment was ridiculously low. *State of MP* v. *Balu*, 2005 Cr LJ 335 : AIR 2005 (SC) 222 : 2005(1) Crimes 99 : 2004(10) JT 461 : 2005(1) SCC 108 : 2004(8) Supreme 909 : 2005 SCC (Cri) 270 ; *See also State of M.P.* v. *Bala*, 2005 Cr LJ 4371 (SC) : AIR 2005 (SC) 3567 : 2005(4) Crimes 114 : 2005(8) SCC 1 : 2005 SCC (Cri) 1947 : 2005(6) Supreme 646 ; *State of MP* v. *Makhmal Khan*, 2005 Cr LJ 4363 (SC) : AIR 2005 (SC) 3667 : 2006(1) East Cri C 24 : 2005(8) SCC 8 : 2005 SCC (Cri) 1954 : 2005(7) Supreme 1 ; *State of Mizoram* v. *Lalrinkhuma*, 2005 Cr LJ 3414 : 2005(2) Crimes 601 ; *State of MP* v. *Munna Chaube*, 2005 Cr LJ 913 (SC) : AIR 2005 (SC) 682 : 2005(1) Crimes 254 : 2005(2) JT 122 : 2005(2) SCC 710 : 2005 SCC (Cri) 559 : 2005(1) Supreme 559.

In a case of rape on a girl below 12 years of age, law requires that the punishment should not be awarded less than 10 years of RI. It is expected that the sentencing process has to be stern what it should be. The object of the Court should be to protect the society and to deter criminal by imposing appropriate sentence. *Premial* v. *State of MP*, 2005 Cr LJ 1145; *See also Rajeshbhai Gamajbhai Idayat* v. *State of Gujarat*, 2005 Cr LJ 1156 (Guj) : 2005(33) All ind Cus 910 : 2005 Cr. LR (SC Mah Guj) Guj 19 : 2005(1) Guj LH 596 : 2005(2) Guj LR 1437.

In the instant case at the time of commission of offence the convict was a minor but subsequently he became adult. Held, no purpose would be served in sending the convict back to any safety home for detention for further trial. The convict was already in custody for more than five years and it would not be proper to send him back to any home for resumption of a fresh trial. In view of the above the conviction was liable to be sustained but the sentence imposed against him was liable to be quashed. *Golan Mustafa Laskar* v. *State of W.B.*, 2005 Cr. LJ 2421 (Cal) : 2005(2) All Cri LR 350 : 2005(1) Crimes 685 : 2005 (3) East Cri C 32 : 2005(1) Cal HN 1821.

When the perpetrator of the grave crime is the father of the victim girl, the offence is more grave and the rarest of rare, which warrants a strong deterrent judicial hand. Sentence was enhanced from 5 years' RI to imprisonment for life Fine amount of Rs. 1000 was enhanced Rs. 25000/- *State of HP* v. *Asha Ram*, 2006 Cr LJ 139 (SC): *See also Sukhdev Anand* v. *State of HP*, 2006 Cr. LJ 98 (HP).

The accused was remanded in the case as far back as on 11.9.1996 and was already in custody and already served the sentence of about four years, sentence of seven years' R.I. was reduced to the period already undergone. *Ranjeet Lohra v. The State of Bihar*, 2002 Cr LJ 329 (Jharkhand).

In view of the fact that the case was instituted about ten years back and the accused person's have been under shadow of the case for a long time and in view of the facts and circumstances of the case, a sentence of 5 years, R. I. Under Section 376, IPC to all the three accused will meet the ends of Justice. *Konda* v. *State of Bihar* 2001 Cr LJ 442 (Pat.) : 2001(3) Crimes 148 : 2001(1) BLJR 401 (Pat) (Ranchi Branch).

When accused a 32 years old adult committed rape on child of 9 years. Sentence of life imprisonment proper. *Santokh Singh* v. *State*, 1996 Cr LJ 4402 (Raj).

When delay in filing complaint satisfactorily explained and prosecution evidence fully corroborated by medical evidence, S.I. for one month and R.I. for 7 years for offences under Sections 341 and 376 respe-ctively, not excessive. *Kattaiyan Rajangam* v. *State*, l997 Cr LJ 382 (Mad).

In *Ramesh* v. *State of Maharashtra*, 2001 Cr LJ 1579 (Bom.) the accused who was aged about 26 years at the time of the incident cheated the confidence of victim's mother by telling her that he was taking the victim for a pepsi drink. His act, thereafter of raping the victim, a girl of 2 ½ yeas of age was both despicable and reprehensible. It reflected a perverted mind and persons like the accused deserved no sympathy and, therefore, the accused was held not entitled to the benefit of imposition of sentence below, the minimum sentence of 10 years provided under Section 376 (2) (f), IPC.

In *Babu Yadav* v. *State of U.P.*, 2001 Cr LJ 356 (All) : 2001(1) Femi-JurisCC 54 (All), there existed no extenuating circumstances. The ravished girl was only 10 or 11 years old, at the time of incident and the accused himself was a fully grown up young man. Enmity between the families was an admitted fact and might have impelled him to undermine and damage the honour of the poor girl and the family. The lust for sex had made him a maniac. His lust coupled with enmity made this assault a well thought out design. The girl was visiting his house to play with his adolescent niece unmindful of that enmity and its consequences that ultimately visited her. In the light of the above no leniency in sentence could be extended to the accused.

The prosecutrix aged 50 years, was raped by accused who was serving in military Engineering service. It was contended that since the prosecutrix an her husband both expired, a lenient view may be taken n the matter of awarding sentence. It was held that none of those factors entitled the accused any leniency and had not bearing on the offence under section 376, IPC, which is an offence against the society and the state and that if a person who had been serving in disciplined service, committed such offence it reflected on the discipline of such service. *Doongar Singh v. State of Rajasthan*, 2000 Cr LJ 1646 (Raj) : 2000(3) RecCri R 534 : 2000(2) Cur Cri R 608 (Raj).

The accused a *Maulavi* teaching Holy Quran committed rape on a minor girl aged 9 years. Though he did not deserve sympathy, considering the matter from another angle that the accused by this time has already undergone a sentence of about five and half years and considering the remission given in view of the celebration of Golden Jubilee year of Independence, accused was likely to be released on his completion of about seven years of sentence. The prosecutrix for no fault of her had became victim at the hands of the accused and in view of the stigma attached to her for all time of come, it is felt that this is a case where she is required to be adequately compensate. Thus, considering all the aspects of the case, the substantive sentence of imprisonment of ten years imposed by the trial court is reduced to the one of minimum sentence of seven years, provided the appellant deposited in the trial court an amount of Rs. 50,000/- by way of compensation to be paid to the prosecutrix within four weeks from today and failing which the substantive sentence imposed by the trial court of ten years. R.I. and a fine of Rs. 10,000/- in default to undergo further R.I. for three months shall stand confirmed. *Mohammad Zuber Noormohamed Changwadia* v. *State of Gujarat*, 1999 Cr LJ 3419 (Goa).

If there are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the prescribed minimum on the appellant, to show mercy in a case like this would be travesty of justice. The plea that because of long time has elapsed subsequent to the date of offence and the possibility that the prosecutrix as also the accused may have got married and settled in life during the pendency of these proceedings cannot be countenanced. The sentencing Court must bear the loud cry for justice by the society and more particularly, in case of heinous crime of rape of innocent helpless children as in this case of the victim of crime and respond by imposing a proper sentence. The young age of the accused in itself does not constitute a special and adequate reason for reduction of period of sentence. *Jhalli v. State of M.P.* 2001 Cr LJ 4606 (M.P.).

As Parliament has disfavoured the sentence to plummet below the minimum limit prescribed Parliament used the expression shall not be less than which is peremptory in tone. The court has normally no discretion even to award a sentence less than the said minimum. Nonetheless Parliament was not oblivious of certain very exceptional situations and hence, to meet such extremely rare contingencies it made a departure from the said strict rule by conferring a discretion on the court subject to two conditions. One is that there should be adequate and special reasons and the other is that such reasons should be mentioned in the judgement. The expression "adequate and special reasons" indicates that it is not enough to have special reasons nor adequate reasons disjunctively. There should be a conjunction of both for enabling the court to invoke the discretion. Reasons which are general or common in many cases cannot be regarded as special reasons. No catalogue can be prescribed for adequacy of reasons nor instances can be cited regarding special reasons, as they may differ from case to case. *Kamal Kishore* v. *State of HP* 2000 Cr LJ 2292 (SC) : AIR 2000 (SC) 1920 : 2000(4) SCC 502 : 2000(5) JT 202 : 2000(4) Scale 52 : 2000(3) Supreme 762.

In *Kamal Kishore's* case (Supra) the following resons were advanced for extending benefit of the proviso to section 376(2) IPC. "Shishna Devi (PW-2) has since been married to another person and she is now mother of children and is well settled in life. The accused was aged 23 when the offence was committed and now he is 34, but he remains unmarried. He says that on two occasions his marriage had reached the stage of engagement but both had to be dropped off before reaching the stage of marriage due to the social stigma and disrepute which surrounded him." The court observed that the said circumstances pleaded by accused were not social reasons for tiding over the legislative mandate for imposing the minimum sentence and the enhanced sentence was enhanced for the offence under section 376, IPC to imprisonment for 7 years. The court also observed that the long time lag which elapsed subsequent to the date of offence and the fact that the prosecutrix got married and was well settled in life and that she was now mother of children may be factors for consideration by the executive or constitutional authorities if they had to decide whether remission of the sentence could be allowed to the accused.

When victim was aged above 14 but below 16, minimum sentence of 7 years imprisonment under Section 376(1), IPC *Proper. M. Ramachandran* v. *State of Kerala*, 1996 Cr LJ 3566 (Ker).

The accused committed rape on victim girl of five years of age whose evidence was quite reliable and trustworthy. It was held that such accused was not even morally entitled to any leniency and he should be given hammer hand treatment. *Ishwarbhai Ranchoddas Parmar* v. *State*, 2003 Cr LJ 4715 (Bom) : 2003(4) Cur Cr R 407 : 2003 All MR (CRI) 1230.

The accused had raped woman in advance stage of pregnancy but High Court reduced the sentence to the period already undergone on the ground that he was coolie, agriculturist young man of twenty two years old. It was held that it was not only unjustified but highly disproportionate sentence as reasons given cannot be described as adequate special reasons for reducing sentence below prescribed minimum. *State of Karnataka* v. *Puttaraya*, 2004 Cr LJ 579 (SC) : AIR 2004 SC 433 : 2003 AIR SCW 6429 : 2003(4) Crimes 548 : 2003(10) Scale 325 : 2003(8) Supreme 364.

Where the accused who was a teacher committed rape on minor victim girl by taking advantage of absence of any adult female member on victim's family, the accused was awarded ten years' RI and fine of Rs. 2000/- *Ainuluddin Ahmad* v. *State*, 2004 Cr LJ 1171 (Gau) : 2004(3) Crimes 211.

Where there was no evidence to prove commission of offence of rape and the accused had no criminal history, he was a young man of 30 years and had remained in jail for 2-1/2 years, sentence of 10 years RI was reduced to one already undergone. *Bajranga* v. *State of Rajasthan*, 2005 Cr LJ (NOC) 200 (Raj) : 2005 Cri LR (Raj) Rai 1229 : 2005(2) Raj LR 651 : 2005(3) WLC 274.

The minor girl was raped by the accused and evidence of prosecutrix transpired confidence as it was corroborated by medical evidence. On facts and circumstances of case ten year RI awarded to accused was considered not improper. *Shamsher Bahadur* v. *State*, 2003 Cr. LJ 4797 (Uttra).

The accused had faced trial for a period of almost 2-1/2 years. In appeal filed by the accused though the accused was released on bail for a period of 13 years, the sword of conviction still remained hanging on his head. Having regard to the fact that the incident had taken place way back in the year 1987 and as such a period of 17 years had lapse. The Court reduced the sentence awarded to the trial Court to 5 years RI. *Devalla Raghavulu* v. *State of AP*, 2005 Cr LJ 1041 (AP) : 2005(2) Andh LT (Cri) AP 9 : 2005 (2) Rec Cri R 344.

Where a coolie on whom whole family was dependent and had a daughter of marriageable age committed rape on a dumb, mentally retarded and minor girl, sentence of 10 years RI was reduced to 5 years already undergone. *Devalla Raghavulu* v. *State of AP*, 2005 Cr. LJ 1041 (AP) :2005(2) Andh LT (Cri) AP 9 : 2005(2) Rec Cri R 344.

It is true that the proviso to section 376 (2) IPC provides that for adequate and special reasons. To be reflected in Judgment. The discretion vested on the Court by proviso to Section 376 (2) IPC, to impose a sentence below the minimum should be sparing exercised. It is only when the court after the utmost circumspection finds that there are compelling circumstances warranting the reduction of the sentence below the statutory minimum should reduce it. The words "adequate and speeula special" used in proviso to section 376 (2), IPC connote sufficient and compelling reasons . It is impossible to enumerate such reasons for any list can only be illustrative and not exhaustive. Some such reasons can be tender age of the accused or consent of the girl or both. But it should always be borne in mind that the reasons should exceptional and extraordinary because if this is not so the proviso would override the legislative intent contained in section 376 (2), IPC, provision provides that the sentence shall not be less than ten years. *Ramesh* v. *State of Maharashtra*, 2001 Cr LJ 1579 (Bom).

Where the accused was aged 16 years at the time of occurrence his sentence of imprisonment could not be sustained and he could not even be sent to an approved school since many years had been added to his age by the time of final judgment. The court expressed that it was an unfortuate case where a minor girl of 10 years of age was mercilessly raped by the accused but under law he could neither be sent to jail nor an approved school. *Bire* v. *State of U.P.*, 2000 Cr LJ 87 (All) : 2000(1) JI 834 (836).

The vaginal secretion and semen like stains on thighs of prosecutrix support her version of rape. The court below was correct in convicting the appellants. However looking to fact that no definite opinion about rape was given by the doctor the chemical examiner's report is not filed and proved by prosecution and the matter relates to year 1989 and that appellants have already undergone imprisonment of about 5 years the conviction is upheld but they are directed to be released on the sentence already undergone. *Bhagat Singh* v. *State of M.P.*, 1994 Cr LR (MP) 165 (N) (MP).

Evidence of prosecutrix corroborated by medical evidence and other convincing evidence—Plea of accused that she was consenting party was held non-believable—Merely because she was so simple as to repose confidence in accused persons and stayed with them in hotel, it cannot be said that she was consenting party.—Conviction upheld but sentence reduced to 3 years, RI as accused were very young persons and already suffered disrepute and mental agony. *Raju* v. *State of Karnataka*, 1994 SCC (Cri) 538 ; (1994) 1 SCC 453 (SC) : AIR 1994 SC 222 ; 1994 JIC 620 ; 1994 Cr LJ 248 ; (1994) 2 BLJR 1059.

Where accused was convicted under Sections 366, 366-A and 376, IPC, to respondent No. 1 and under Section 376, IPC, to respondent No. 2—In appeal High Court acquitted them—State appeals against acquittal by High Court.—The occurrence took place in 1982 the victim after elopement warned to one of the accused No. 2. So her consent can well be presumed even for sexual acts prior to marriage. Hence acquittal of accused No. 2 is not bad. As regards accused No. 1 interest of justice would be met it sentence of imprisonment for his offence under Section 376, IPC. *State of A.P.* v. *Narasimha*, (1994) 31 All Cr C 609; (1994) 2 Crimes 263; (1994) 4 SCC 453 (SC).

Accused was convicted of the offence of rape on child girl of very tender age of about 12 years. *Held*, that sentencing the accused only for 3 years just amounted to sending him for picnic. Sentence of imprisonment should be imposed with severity. 1987 Cr LJ 557 (MP).

Where the charge was of rape of girl aged 4 years—Leniency shown in sentence was not sustainable.—The provision for rigorous punishment that have been specially prescribed by legislature particularly after the amendment of Section 376, require to be seriously applied with a degree of mescle as it is expected to act as a social deterrent and an eye opener to those who have similar inclination. *State of Maharashtra* v. *Umesh* Krishna *Pawar*, (1994) 1 Bom CR 575 ; 1994 Cr LJ 774.

In a case, accused, 25 years old, committed rape on 10 years old helpless girl, it was held sentence of 10 years. RI, is not harsh. 1987 Cr LR (Raj) 797.

Held, maximum sentence awardable being 10 years, cannot be raised to 14 years, which is not legal. 1986 Cr LJ 975 (Del).

Where an accused held to have committed rape on her 7 years daughter—Sentence was to be awarded. It was held that in awarding heavier punishment for cases where the victim is a minor girl, the legislature had indicated its abhorrence for such acts and in instant case the rapist is the father of the victim it would qualify for realm of sexual perversion. In this class of cases the offender deserved heavy and deterrent punishment. *Abdul Wahid Bahadur Ali Shaikh* v. *State of Maharashtra*, (1994) 2 Bom CR 339.

Where there was rape of a minor girl—Determination of age—By medical evidence showed her to nine to fourteen years—Applicants hand cut down by villagers—Ten years imprisonment—It was not to be fully justified—Sentence reduced to 7 years, and fine reduced to Rs. 1,000. *Babu Lal* v. *State of Rajasthan.*, 1995 Cr LR 121 (Raj).

Rape of minor girl aged about 12 to 15 years studying in 6th class— Accused aged 19 years being related to prosecutrix and living in adjoining house—Rape committed on several occasions—She did not disclose it earlier under threat to be killed—She conceived with pregnancy of 7-8 months when her parents lodged FIR—Prosecution evidence corroborated by medical evidence. Her minority was finally established.—Conviction was upheld. Sentence of imprisonment reduced to period already undergone taking lenient seeing his young age. *Raj Pal* v. *State of H.P.*, (1995) 2 Sim LC 57 (HP).

Appellant charged for offence under Section 376, IPC—Witnesses not supporting the prosecution case. Certain witnesses decorated hostile—There was no explanation for inordinate delay in filing complaint. Prosecutrix's testimony regarding rape not corroborated either by medical evidence or by independent witness. Conviction for offence under Section 376, set aside but conviction for offence under Section 363, stood confirmed. Sentence reduced. *Ganesh* v. *State of Rajasthan*, 1995 Cr LR 441 (Raj).

The question was whether there should be any difference in sentence awarded to principal offender and abettor. It was held that the court should not make any distinction in quantum of sentence to be awarded to principal offender that awarded to offender who abetted the commission of offence. *Ashok Nivruti Desai* v. *State of Maharashtra*, 1995 Cr LJ 826 (Bom) : 1995(1) Bom Cr 288 : 1995(1) Mah LR 312 : 1995(3) CCR 10 : 1995 Cr R 356 (Bom).

Delay in filing the FIR was satisfactorily explained. Sexual intercourse was admittedly committed by the accused on the prosecutrix. The Doctor's evidence was reliable. There was no evidence on consent having been given him so to do. The accused was arrested on being pointed out the flat. While the I.O. explained why the associates of the accused could not be arrested, there is no reason also to disbelieve the prosecutrix. Conviction by the trial court was maintained but sentence was reduced to 4 years from seven years. (1986) 2 Crimes 417 (Del).

'R' held guilty for offence under Section 376, IPC, and sentenced to RI for 7 years and accused's found guilty for offence under Section 366/34, IPC, and sentenced to RI for 3 years—The same was challenged in appeal. The prosecutrix was of matured age at the time of the said incident. She made statement before marriage officer and agreed for her marriage with appellant. The proviso to Section 376(1) enable the court to award less than 7 years imprisonment in special circumstances. Hence sentence is reduced to period already undergone. Sentence of fine also waived. *Rajbir* v. *State*, (1994) 2 CC Cases 437 (Del).

Accused forcibly took young girl of 13 years of age and committed rape. Therefore sentence of 3 years RI is not excessive. *Pariyasami*, In re : 1995 Cr LJ 1203 (Mad).

Where there was proven rape of a minor girl—Hence convicted by sentence of 10 years—Reduced to period already undergone *i.e.*, 8 years. *Gorelal* v. *State of M.P.*, 1995 Cr LR 59 (MP).

Accused persons aged 28 years and 45 years having four minor children—No previous conviction—They repenting for crime.—Hence sentence reduced from 10 years to 5 years imprisonment. *Suraj Mal* v. *State*, (1995) 1 RCD 156 (Raj).

When an offence of rape was on 7-8 years old girl child—Rape committed at house of accused being known person—Accused fully grown up man. Innocent girl appeared as witness who testified rape on her—Medical report corroborated it—No prior enmity was found—Guilt fully established from evidence and circumstances—Heinous crime.—It was held that conviction and sentence of 10 years RI upheld. *Sayeed* v. *State of U.P.*, 1994 ACC (H) 1 (All).

Held, that the prosecutrix and a witness also went to Bilaspur on 8.7.1986 and lodged the FIR at Police Station, Bilaspur, in the presence of her husband and one another. It has also come in the evidence of PW-10 that the *Panchayat* was called in the village on 7.7.1986 in which the accused was also called, but he did not turn up. It appears that the in-laws of the prosecutrix wanted to close the matter amicably in their own village but the conduct of the accused was such that he did not bother to make himself present before the *Panchayat*. The prosecutrix and her in-laws are simple and illiterate villagers and they cannot be expected to know the consciousness of the importance of prompt lodging of the FIR and the relevant factors that the husband of the prosecutrix was not present at his house but was working at a distant place at Barmana and further the honour of the prosecutrix was also at stake and without the consent of the husband the matter could not be decided by her or members of her family. However, in the instant case, delay in recording FIR cannot be said to be so inordinate as to spell out an impairable dent in the case of the prosecution in the circumstances of the case. *Roshan Lal* v. *State of Himachal Pradesh*, (1994) 1 SLJ 747 at pp. 751, 752 (HP).

Sentence of 5 years imprisonment—Unless supported by special and adequate reasons.—It was held to be improperly insufficient. *State of Gujarat* v. *Jaysukh*, (1995) 2 GLH 524 (Guj).

Rape of a minor girl—Conviction of the accused was sentenced. It was finally held that no leniency should be shown to the accused. *Rakha Ram* v. *State of Haryana*, (1995) 2 SLJ 1163 (P & H).

When accused was convicted and sentenced to 6 years rigorous Imprisonment—Revision petition against sentence passed by Court below.—The sentence passed against the appellant is lenient and should not be reduced. Hence no interference is called for reducing sentence. *Salikram* v. *State of M.P.*, 1994 Cr LR (MP) 68 (N) (MP).

Where there was alleged strangulation after committing rape—Conviction and sentence of death for offence under Section 302, IPC and life imprisonment for offence under Section 376, IPC.—Revision petition challenging of the same was filed.—The accused strangulated victim after committing rape and was apprehended while trying to run away, witnesses heard shrieks of the girl just before that. Offence is duly made out. However, offence committed at spur of moment. Hence not a case calling for death penalty. Ends of justice shall be met by awarding the sentence of life-imprisonment under Section 302, IPC also as in regard to offence under Section 376, IPC. *Vinod* v. *State*, 1994 Cr LJ 2360 (All).

The same was filed both the direct and medical evidence showed that infant victim girl was attempted to be raped. Hence conviction order cannot be interfered with. But since the petitioner has been in jail for 5 years and four months the sentence is reduced to period already undergone. *Satbir* alias *Chand* v. *State of Haryana*, (1995) 1 CC Cases 409 (P & H).

Accused was aged 16 years and committed offence in fit of passion. Occurrence being of long back. Hence, sentence of 10 years RI reduced to 4 years RI. The sentence of fine was maintained. *Kanhaiya Lal* v. *State of Rajasthan*, (1995) 2 WLC 286 (Raj).

Where incident took place nine years back and notice for enhancement of sentence issued 7 years back.—It was not proper to enhance sentence. *Jhingal* v. *State of M.P.*, 1995 Cr LR (MP) 121.

There is no evidence or any preplan to commit the crimes on a chance meeting, test appears to have overtaken their confidence. Therefore, the proviso to Section 376 (2), IPC can be pressed into service and 7 years RI would be adequate. *Fanibhusan Behara* v. *State of Orissa*, (1995) 1 East LJ 244 (Ori).

Victim being minor girl of 9 years was examined by trial court but she was not understanding questions and give answers—Her non-examination is not fatal—She was also mentally retarded—Guilt of accused established. As incident took place about 9 years back, sentence was not enhanced. *Pala* v. *State of Haryana*, (1995) 2 CC Cases 477 (P&H).

Where there was rape of a minor girl and had no mitigating circumstances—High Court is not justified in awarding a lesser sentence than the prescribed minimum without assigning any reason. *State of A.P.* v. *Bodem Sundara Rao*, (1995) 6 SCC 230 : AIR 1996 (SC) 530 : 1995(7) JT 90 : 1995(5) Scale 554.

Where the accused committed a rape upon a mentally retarded lady who was helpless because she was unable to understand as to what was wrong and what was right, it was held that, the accused deserved no leniency. *Vaher Singh Ramjibhai v. State of Gujarat*, 2001 Cr LJ 4485 (Guj).

If a person commits rape with his own daughter, such a person cannot be regarded as a normal man. He is psychologically sadistic person and some psychological treatment should be given to him during the period of detention, but such type of treatment is given in India or not, it is not clear. To prevent such type of offences psychological treatment is must to such persons and if such type of facility is not available in India, it should be provided in jail. In the instant case sentence of 7 years' RI was held sufficient. *Pooran Ram* v. *State of Rajasthan*, 2001 Cr LJ 91 (Raj); *See* also Suresh v. State, 2006 Cr LJ 282 (Delhi); *Jay Nath* v. *State of Maharashtra*, 2006 Cr LJ 202 (Bom.).

Imposition of sentence less than prescribed minimum. Both in cases of sub-Secs. (1) and (2) of Sec. 376 the Court has the discretion to impose a sentence of imprisonment less than the prescribed minimum for 'adequate and special reasons'. If the Court does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the prescribed minimum. In order to exercise the discretion of reducing the sentence fanciful reasons would not permit the Court to impose a sentence less than the prescribed minimum. What is adequate and special would depend upon several factors and no strait-jacket formula can be indicated. What is applicable to trial Courts regarding recording reasons for a departure from minimum sentence is equally applicable to the High Court. Where the only reason indicated by the High Court is that the accused belonged to rural areas, was an illiterate labourer and belonged to scheduled tribe, it can by no stretch of imagination be considered either adequate or special. The requirement in law is cumulative. The order of the High Court reducing sentence to period already undergone, therefore, is indefensible.

Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e. g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and públic interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system. *State of M. P. v. Basodi.*, AIR 2009 SC 3081 : 2009 (6) SCR 1166 (SC) : 2009 (12) SCC 318 : 2009 (6) JT 92 (SC) : 2009 (6) Scale 353 (SC) : 2009 (3) Supreme 501 (SC) : 2009 CrLJ 4284 (SC) : 2009 (2) Crimes 273 (SC).

Long pendency of matter. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic a view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system. *Ankush Maruti Shinde vs. State of Maharashtra*, AIR 2009 SC 2609 : 2009 (6) SCC 667 : 2009 (6) JT 358 : 2009 (7) SCR 182 : 2009 (6) Scale 388 : 2009 (3) Supreme 760 : 2009 (4) SLT 470;; See also *Bikram Dorjee vs. State of West*

Bengal, AIR 2009 SC 2539 : 2009 (2) Crimes 354 (SC) : 2009 (7) JT 325 : 2009 (6) Scale 325 : 2009 (6) SCR 884 : 2009 (3) Supreme 772.

Death sentence — Rarest of rare cases. The murders were not only cruel, brutal but were diabolic. The High Court has held that those who were guilty of rape and murder deserve death sentence, while those who were convicted for murder only were to be awarded life sentence. The High Court noted that the whole incident is extremely revolting, it shocks the collective conscience of the community and the aggravating circumstances have outweighed the mitigating circumstances in the case of accused persons; but held that in the case of others it was to be altered to life sentence. The High Court itself noticed that five members of a family were brutally murdered, they were not known to the accused and there was no animosity towards them. Four of the witnesses were of tender age, they were defenseless and the attack was without any provocation. Some of them were so young that they could not resist any attack by the accused. A minor girl of about fifteen years was dragged in the open field, gang raped and done to death. There can be no doubt that the case at hand falls under the rarest of rare category. There was no reason to adopt a different yardstick. In fact, main accused assaulted PW. 1 and took the money from the deceased.

Above being the position, the appeal filed by the accused persons deserves dismissal, which we direct and the State's appeal deserves to be allowed. A2, A3 and A5 are also awarded death sentence. In essence all the six accused persons deserve death sentence. *Ankush Maruti Shinde vs. State of Maharashtra*, AIR 2009 SC 2609 : 2009 (6) SCC 667 : 2009 (6) JT 358 : 2009 (7) SCR 182 : 2009 (6) Scale 388 : 2009 (3) Supreme 760 : 2009 (4) SLT 470.

10. Conviction.—When there was infirmities about place of incidence and identification of accused. About place of incidence not very material as consistent evidence of victim fully corroborated by medical evidence and her sister's evidence and on question of identification of accused also not very material as accused appellant was known before hand to family of victim and other neighbours.—Prosecution case was established and appeal against conviction dismissed. *Camilo Rodrigues* v. *State of Goa*, (1995) 1 CCR 160 (Bom).

A case of this nature should be viewed having regard to the materials brought on record in their entirety. We have noticed hereinbefore the prosecution case. Indisputably, the prosecutrix was examined medically after a long time. The explanation offered by PW-5 in this behalf, in our opinion, is clear and sufficient. Not only the father of the prosecutrix was not in the village, he had to be sent for and came back to the village only on the next day. Evidently, for good reasons, they did not want to lodge a First Information Report immediately. A panchayat was convened and only when it did not yield any fruitful result, the First Information Report was lodged.

The evidence of the doctor appears to be wholly insufficient. Even she could not complete the medical examination. Despite passage of a long time, an injury on the private parts of the prosecutrix was found. The doctor at least testified that there had been an attempt to commit rape. While saying so, she found the hymen absent which having regard to the medical jurisprudence is of some significance.

Fault in the judgment of the High Court could have been found out if the prosecutrix was a major. Having regard to the nature of medical evidence as also the authorities noticed hereinbefore the conclusion arrived at by the High Court, in our considered opinion, cannot be said to be perverse. Furthermore, for the purpose of satisfaction of the ingredients of rape, it is not necessary that there should be complete penetration. See *Aman Kumar and another v. State of Haryana.*, (2004) 4 SCC 379 : 2004 AIR SCW 827. Satyapal v. State of Haryana, AIR 2009 SC 2190 : 2009 (5) SCR 577 (SC) : 2009 (6) SCC 635 : 2009 (5) JT 291 (SC) : 2009 (5) Scale 431 (SC) : 2009 (3) Supreme 33 (SC) : 2009 (4) SLT 41 (SC) : 2009 (2) Crimes 96 (SC).

Accused, along with two other accused, brought the victim girl from her residence in a car and then she was made to stay along with them in lodge. When the prosecution has established the fact that accused brought the victim girl to the said lodging and stayed with her in the said lodging, then the burden came to be shifted on the accused, of explaining as to what happened thereafter in the said room or, of showing that nothing happened as deposed by prosecutrix. By remaining silent, this accused has not discharged this burden.

The facts constituting forcible sexual intercourse on the victim girl said to have been committed by the accused in the said lodging were within the special knowledge of accused and the victim girl. The victim girl has stated on oath that after she was brought there, accused and also other two persons committed forcible sexual intercourse on her one after another against her will and despite her request that they should not do so. This accused, though has denied the entire evidence of victim girl, has not brought anything in her cross-examination-in-chief to disbelieve her evidence in examination-in-chief as to he committing forcible sexual intercourse on her while she was made to stay in the said lodging.

If the relevant allegations in the complaint and also the evidence of prosecutrix are carefully scrutinised, it could be seen that her evidence falls in line with the allegations in the complaint. Incident of accused and other two other accused taking the prosecutrix from her residence to the said lodging and making her to stay with them in the said lodging is consistent with the allegations in the complaint. Further, as could be seen from the evidence of victim girl, she has given all the minor details of the acts of forcible sexual intercourse committed on her by the accused while she was made to stay in the said lodging. In the absence of any explanation by the accused as to what happened between himself and victim girl after he took her into the room in the said lodging, the positive evidence of victim girl given on oath before the Court which is quite consistent with her allegations in her complaint as to the factum of forcible sexual intercourse committed by him on her being trustworthy, deserves acceptance and the same has been rightly accepted and relied upon by the Trial Court. Besides this nothing is brought on record by the accused through the evidence of either victim girl or any other witness to show that the prosecutrix falsely implicated him at the cost of her reputation. *N. Vijaya alias Ameen vs State of Karnataka*, 2010 Cri LJ 1050 (Karn).

Even without the examination of doctor, the evidence of prosecutrix stands fully corroborated by the evidence of Sub-Inspector of the Police Station who had virtually caught the appellant red-handed. Thus, even if doctor had not been examined it would not throw or completely discard the prosecution story. The evidence of prosecution witnesses is fully trustworthy and there is no reason to doubt genuineness thereof.

In the present case, there is consistency in the evidence of prosecutrix, which stands corroborated by the evidence of Sub-Inspector. He had no axe to grind against the appellant. In this case, the version of the prosecutrix right from lodging of the FIR, till her examination by the doctor and till she deposed in Court, had been absolutely consistent. Not only this, to corroborate further, the evidence of Sub-Inspector is also on record who had caught the appellant red-handed which fully establishes that it was the appellant who had committed offence of rape.

Thus, looking to the matter from all angles, we are of the opinion that there is no merit or substance in this appeal. The same is accordingly hereby dismissed. *Wahid Khan vs. State of Madhya Pradesh*, AIR 2010 SC 1 : 2009 (4) Crimes 265 (SC) : 2009 (14) JT 510 : 2009 (15) SCR 1207 : 2009 (14) Scale 220 : 2009 (7) Supreme 584 : 2009 (9) SLT 107.

Presence of accused persons at spot of rape admitted—Evidence of prosecutrix trustworthy and corroborative of evidence of other witnesses— There was held no false implication and absence of smegma and injury on person of prosecutrix inmaterial—Proof of completed act of rape by each accused not necessary.—Hence conviction was fully justified. *Panibhusan Behera* v. *State of Orissa*, 1995 Cr LJ 1561 (Ori).

Where rape was on seven or eight years old girl—Accused fully grown up man—Both known to each other—Offence committed at house of accused— Statement of girl corroborated prosecution case and evidence and circumstances establishing guilt—Medical report corroborated it—No prior enmity was proved—Guilt was establishing. *Held*, conviction and sentence was fully justified. *Sayeed* v. *State of U.P.*, (1994) 31 ACC 1 (All).

The accused took a school girl to a secluded place and after raping her strangulated her to death. The post-mortem report confirmed the commission of the sexual assault on the deceased prior to her death and the fact was admitted by the defence. Conviction for murder and rape was upheld but sentence was reduced to life imprisonment. *Amit* v. *State of Maharashtra*, 2003 Cr LJ 3873 : AIR 2003 (SC) 3131 : 2003(3) Crimes 318 : 2003(8) SCC 93 : 2003 SCC (Cri) 1959 : 2003(6) Scale 244.

The accused dragged the victim to a nearby bush and committed rape on her while she alongwith her sister was going to take bath in the river and no signs of sexual intercourse were found as prosecutrix had taken bath and cleaned her clothes in river after rape was committed, it was held that the testimony of prosecutrix and her sister was reliable and accused was liable to be convicted. *Shyama Sunder Kabat* v. *State*, 2003 Cr LJ 1354 (Orissa).

A girl of 4 years of age entered the mill and the accused raped her. There was no reason for falsely implicating the accused and his conviction was upheld. The Court said. "In a case of rape alleged to have been committed on a child aged about 4 to 5 years, a duty is cast on the Court to have utmost sensitivity and it is necessary to appreciate the evidence in its totality, keeping in view of the background of the entire case, and not in isolation. *Syed Pasha* v. *State of Karnataka*, 2004 Cr LJ 4223 (Kant).

Where the incident was reported late due to family circumstances but victim narrated all the events in details in lengthy cross-examination, it was held that the conviction was proper. *Gajipisetty Madhu* v. State, 2004 Cr LJ 3978 (AP) : 2004(2) ALD (CRL) 452.

Where the girl was taken to field where she was raped and totally nacked victim was found in field next morning, it was held that conviction was proper. *State* v. *Mohan Shankarrao Janrao*, 2004 Cr LJ 3998 (Bom) : 2004 All MR (Cri) 2636 : 2004(2) BOMCR (Cri) 906 : 2004(4) CUR Cri R 169.

In the instant case, the accused allegedly sexually assaulted the victim. The evidence of victim was corroborated by medical evidence and evidence of her mother and other witnesses. Mere fact that the medical report did not show any injuries on the male again of accused, it was held that it was not accuracy that there should always be marks of injuries on male organ in such cases and that the conviction of the accused was proper. *State of Mizoram* v. *Zaduhilana*, 2005 Cr LJ 3756 (Gau) : 2005(3) Crimes 358 (Gau.).

When FIR lodged after two hours of incident. Rape incident corroborated by medical evidence—Version of prosecutrix inspires confidence—Guilt was fully established—Conviction of accused was upheld. *Kailash* v. *State of M.P.*, 1994 Cr LR 318 (MP).

Where there was conviction for offence under Section 376, IPC, appeal against the same was filed—Prosecutrix being 8 years old and her evidence corroborated by medical evidence. Findings were well merited—The conviction order does not warrants interference. *Amar Singh* v. *State of M.P.*, (1995) 4 Crimes 354 (MP).

The solitary evidence of suit 'B' is sufficient for conviction in this case after a critical analysis of record supported with a prompt FIR and equally corroborating medical report. Conviction upheld. *Jograj* v. *State of U.P.*, 1995 UP Cr R 38 (All).

Victim being minor girl was mentally deficient—Delay in filing FIR was explained—Medical evidence establishes incidence of rape. Accused failed to prove his absence from place of incidence—His plea of enmity not proved— Girl present in court but not examined—Accused also not pressed for her examination it was held that her non-production not fatal to prosecution— Accused having committed heinous offence of rape on helpless girl, his conviction and sentence upheld. *Shamsher Tappi* v. *State of U.P.*, 1995 Cr LJ 2328 (All).

Prosecution successfully bringing home guilt of the appellant under Section 376 read with Section 511, IPC—Appellant committing offence of house-breaking at night by entering into room. Commission of offence under Section 457 established—Hence appellant was convicted under Section 457 and under Section 376 read with Section 511. *Lingaraj Pillai* v. *State of Orissa*, (1995) 2 Crimes 612 (Ori).

Appeal against conviction. Around midnight both the accused went to house of prosecutrix, called out her husband and compelled prosecutrix to follow them to the jungle. She was forcibly taken away and accused forcibly committed rape on her. Trial Court convicted accused relying on evidence of prosecutrix and her husband. In appeal, High Court upheld conviction without discussing evidence.

Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind. The absence of reasons has rendered the High Court's judgment not sustainable.

We are dismayed at the casual manner in which the criminal appeal has been disposed of. In the circumstances, we set aside the impugned judgment and remit the matter to the High Court for fresh consideration in accordance with law. As the matter is pending since long we request the High Court to explore the possibility of early disposal of Criminal Appeal No. 693 of 205. *Prasad vs. State of Karnataka*, AIR 2009 SC 1911 : 2009 CrLJ 1761 : 2009 (1) Crimes 359 : 2009 (3) SCC 174 : 2009 (2) Scale 524 : 2009 (1) Supreme 815.

Conviction of the accused can be sustained on the solitary statement of the rape victim. More so, when her statement stands corroborated by the medical report and promptly lodged FIR. *Jograj* v. *State of U.P.*, 1995 JIC 72 (Alld).

Where there was prosecutrix statement corroborated by medical evidence which can sustain the conviction. *Mahendra Singh* v. *State of M.P.*, 1995 Cr LR 62 (MP).

Conviction order passed—Appeal against the same was filed. Victim claimed to be child her age was not medically examined—Conviction order not fully justified—Sentence was set aside. *Pala* v. *State*, 1994 JIC 899 (Alld).

Where victim was 7/8 years old girl—Victim was medically examined— Sign of rape was found—But girl was not cross-examined on this basis acquittal order cannot be passed. *State of Himachal Pradesh* v. *Madan Mohan*, (1994) 3 Crimes 111 (H.P.).

Injuries on prosecutrix showing use of force—Prosecution case was fully established. Marginal variance in medical evidence regarding timing of incident not fatal—Statement of prosecutrix trustworthy—Conviction was upheld. *Palaram* v. *State of Rajasthan*, 1994 RCC 427 (II) (Raj).

In a case, the victim was kidnapped, raped and murdered. The dead body was recovered from a pond and accused was arrested. The accused failed to explain as to why his clothes were stained with semen. Apart from this, the conduct of the accused showed that he was proving to do such act. It was held that his conviction under Sections 363, 376/302 was proper. *Surendra Pal Shivbalak Pal* v. *State of Gujarat*, 2004 Cr LJ 4662 (SC): 2004(7) Supreme 107 : 2004(8) Scale 145 : 2004(5) SLT 840 : 2004(3) JCC 1486 : 2004(4) Crimes 110 (SC).

The prosecutrix was physically lifted by accused and brought to the garden. The evidence of prosecutrix was truthful and plea of false implication was not tenable as there was no material to show that prosecutrix had any enmity with accused. The conviction of accused was held proper but sentence was reduced to three years RI and fine as accused were only earning members of their families. *Tangirala Venkateswarlu* v. *State*, 2003 Cr LJ 4034 (AP) : 2003 (2) ALD (CRL) 261 : 2003(2) Andh LT (Cri) AP 158.

Where the vaginal discharge and blood was present on clothes worn by victim and accused's clothes when chemically examined indicated the fact that the rape was committed. The accused has convicted. *S. Jai Singh* v. *State*, 2004 Cr LJ 3598 (Mad) : 2003 Mad LJ (Cri) 837.

The accused forcibly lifted the girl from the front of her house and committed sexual assault threatening her at point of knife. Age of victim was between 12 to 14 years as per evidence of doctor and ossification test. The evidence of victim girl was reliable and could not be disproved in lengthy cross-examination. It was held that finding guilt of accused based on cogent evidence was proper. *Kul Bahadur* v. *State*, 2003 Cr LJ (NOC) 293 (Orissa).

The victim while sleeping with her husband and other relatives at bus stand was picked up by a police constable on the pretext of interrogation and raped in a hotel room. The victim and the witnesses were unable to identify the accused constable but the appellant police official was caught from a hotel room which was booked by him for Rs. 100/-. The accused could not explain his whereabouts at the time of incidence. The testimony of victim and her husband was straight forward and they had immediately after commission of offence name the appellant. His conviction of rape and sentence awarded were held proper and made confessional statement before magistrate when brought from police custody. The statement was recorded in printed form and his signatures were obtained where he was poor illiterate person. The Court held that order of conviction was liable to be set aside. The rustic village girl of tender age was raped and developed pregnancy due to repeated rapes, the conviction was upheld. *Visveswaran* v. *State*, 2003 Cr LJ 2548 (SC) : AIR 2003(SC) 2471 : 2003(3) Crimes 32 : 2003 SCC (Cri) 1270 : 2003(4) JT 367 : 2003(4) Scale 344.

When a girl below 12 years of age was raped and she narrated the incident clearly and consistently, it was held that no further corroboration was necessary and accused was guilty of offence. *Sanjay Bag* v. *State*, 2004 Cr LJ 4714 (Orissa) : 2004(4) Crimes 285 : 2004(22) OCR 189 : 2004(2) Orissa LR 360.

Where the offence of rape by appellant District Malaria Officer on victim a lady Supervisor of same department—Victim being highly educated lady with status and prestige—Late filing of report by her being natural—Doctor who examined victim lady not free from influence of appellant who himself was also doctor and non-examination of witnesses who were subordinate officers of appellant cannot have any adverse effect on prosecution case. Uncorroborated version of prosecutrix can be held basis for conviction of appellant. Appeal was hence dismissed. *Dr. Sudhansu Sekhar Sahoo* v. *State of Orissa*, (1994) 1 Crimes 44 ; (1994) 1 ALT (Cri) 7 (Ori).

Offence of rape on victim girl of 5 years age—Conviction by trial court—But acquittal by High Court as eye-witness found not reliable—Appeal by State under Article 136—Medical evidence found hymen of girl completely torn—Found with fresh bleeding and sole eye-witness also corroborated sexual assault. Acquittal order set aside and conviction by trial court under Section 376, is restored. *State of U.P.* v. *Babul Nath*, (1994) 3 Crimes 230 (SC) : 1994(5) JT 104 : 1994(3) Scale 734 : 1994(3) CCR 706 (SC).

Where there was rape of school teacher and delay in FIR was fully explained—Full corroboration of evidence of prosecutrix mother, father and brother—They all being independent, non-partisan, competent and qualified witnesses—False implication of accused was ruled out—Conviction was upheld. *Affaai* v. *State*, (1994) 2 Crimes 36 (SN) (Cal) (DB).

Conviction under Section 376, IPC and sentenced to rigorous imprisonment for 10 years and a fine of Rs. 4,000/-. Revision petition was challenged of.—The statement of prosecutrix is consistent with statement of her brother and also corroborated with statement of other witness. The medical testimony also supports prosecution version. Hence the prosecution has been able to prove its case beyond reasonable doubt. Hence conviction confirmed. *Kali Charan* v. *State (Delhi Administration)*, (1994) 55 DLT 642

When accused was apprehended on spot committing rape of a minor girl of 4 years and factum of rape proved by medical evidence then conviction of accused held just and proper. *Amar Nath* v. *State of UP*, 2005 Cr LJ 1379 (All) : 2005 All LJ 405 : 2005(51) All Cri C 65 : 2005(1) All Cri R 608.

The accused kidnapped the victim girl and took her to different places, where she was subjected to sexual intercourse. The conviction of accused was held proper as accused himself had gone to the police station for handing over the prosecutrix to police. *Upendra Singh* v. *State*, 2003 Cr LJ 1390 (Jhar) : AIR 2003 Jhar HCR 312 : 2003(1) JCR JHA 245.

Where evidence of prosecutrix, a minor girl of 11 years old found cogent and trustworthy and corroborated by medical evidence and by evidence of her mother then conviction of accused held just and proper. *Rasik Khan Asgarkhan Pathan* v. *State of Gujarat*, 2005 CR LJ 1284 (Guj) : 2005(30) All Ind Cas 837 : 2005(1) Guj LR 913 : 2004(3) Guj LH 601.

In a MP case, where the girl was taken in an auto-riksha forcibly by wilding knife and she was beaten when she started crying during the course of rape, conviction was held proper. *Rajesh Gupta* v. *State*, 2004 Cr LJ (NOC) 19 (MP).

In a Madras case, the accused immediately after death of grandmother of victim, took her to a temple, forcibly married her, kept in his house and then raped her. Evidence of prosecutrix was corroborated by doctor's report and fact of marriage was proved by photographs which were taken immediately after the marriage. It was held that under Section 366, 366A, 343 and 376 offence against accused was proved. *Narasimhan* v. *State*, 2003 Cr LJ (NOC) 226 (Mad).

Where incident took place in broad day light and prosecutrix identified accused on the basis of tattoo mark on right hand of accused therefore accused rightly convicted under Section 376, IPC. *Harish Ram* v. *State of Uttaranchal*, 2005 Cr LJ 1596 (Uttar).

Where the victim while returning from sangeet ceremony was taken to a hut where she was raped and doctor's report said that the intercourse was committed for the first time and by force, the conviction for rape was held proper. *Pratap* v. *State*, 2003 Cr LJ 2421 (Raj) : 2002(3) Raj LR 511 : 2003(4) Rec Cri R 20 : 2003(1) WLC 675.

The accused kidnapped a minor married girl, confined her in a room and then raped her. Statement of victim gave clear picture of occurrence proved beyond doubt that it was accused who had kidnapped her. Conviction of accused based on this much evidence was held proper. *Chandra Shekhar Pandey* v. *State of Bihar*, 2004 Cr LJ (NOC) 2 (Jhar) : AIR 2004 Jhar HCR 266 : 2003(3) East Cri C 344.

The girl of 16 years of age was raped by the accused and victim girl had given a graphic narration of things that had taken place and it was corroborated by medical evidence. The conviction fo accused was held proper. *Vellingiri* v. *State*, 2004 Cr LJ 738 (Mad).

The accused maternal uncle of prosecutrix took her to another village for providing a job to her thereafter committed rape on her. The testimony of prosecutrix was trustworthy and reliable and conviction as well as sentence was confirmed. *Maguni Ranjan* v. *State*, 2003 Cr LJ 530 (Orissa) : 2002(4) Crimes 101 : 2002(94) Cut LT 455 : 2002(2) Orissa LR 142.

The accused seven in number raped the prosecutrix but there was total absence of corroboration to her testimony and absence of injury or vulva and vagina also belied case her rape. The conviction was held not proper. *Chora Ban Singh* v. *State*, 2004 Cr LJ 569 (Jhar) : AIR 2004 Jhar HCR 292 : 2004(1) JCJR 29.

Where testimony of prosecutrix, a married woman inspiring confidence and was corroborated by evidence of her minor son then conviction of accused held just and proper. *Shanabhai Madharbhai Koli Patel* v. *State of Gujarat*, 2004 Cr LJ 268 (Guj) : 2004(1) Guj LH 408.

The age of victim was assessed at 15 years by Court and her version was found reliable as it was corroborated by testimony of her sister. The prosecutrix was a small child of 5 to 7 years of age and statement given by her was inspiring the confidence as doctor's report showed that blood was oozing from vagina of victim child and absence of semen on clothes and person of victim was considered not necessary to prove the rape. Conviction of accused was upheld. *Gopal Kishan* v. *State*, 2003 Cr LJ 2851 (P&H) : 2003(2) Marai LJ 339 : 2003(2) Rec Cri R 253 ; *Somra Oraon* v. *State*, 2003 Cr LJ 3093 (Jhar) : AIR 2003 Jhar HCR 850 : 2003(2) JCR Jha 648.

In a Gujarat case, a married woman was allegedly dragged by accused in the field and raped when she was going to her home alone. Hearing her shouts a woman informed her minor son who ran to the place of incident but accused ran away. The evidence of prosecutrix was corroborated by her minor son's evidence which inspired confidence. It was held that non-examination of residents of houses situated nearby the place of incident was not fatal and conviction was proper. *Shanabhai Madhurbhai Kali Patel* v. *State*, 2004 Cr LJ 268 (Guj) : 2004(1) Guj LH 408.

In absence of Serologists report conviction for rape can be made.—If the testimony of the prosecutrix was found reliable the appellants can be convicted for an offence under Section 376, IPC even in the absence of Serologists' report. *Tirath Singh* v. *State of M.P.*, 1994 Cr LR (MP) 157 (N).

Prosecutrix testimony not indicating absence of consent—Doubts with regards to sexual competence of the accused and absence of marks of the external injury on the body of the prosecutrix—Conviction was held to be not sustainable. *Gyarsa* v. *State of M.P.*, 1995 MPLJ 1041 (MP).

Allegation of rape by prosecutrix against father-in-law—No evidence-in support produced—Demand of dowry was fully established.—Conviction for under Dowry Act, justified. But service will not effect. *Radha* v. *Khajan Singh*, 1994 Cr LR (Raj) 482.

Conviction should not be set aside on the fanciful plea of the accused defence that the accused was an aged person of 55 years old. *Ganga Dayal Singh* v. *State of Bihar*, 1995 SCC (Cr) 154 (SC) : AIR 1994 (SC) 859 : 1994 Cr LJ 951.

Trial for the offence of rape—Absence of bleeding or injury on the private parts of the prosecutrix—Passage not admitting two fingers easily and no semen found—In these circumstances the testimony of the prosecutrix required corroboration for sustaining the conviction. *Balia* v. *State of Orissa*, (1994) 1 CCR 70 (Ori) ; (1994) 2 East Cr C 282.

Prosecutrix a poor labourer and entirely new to the surrounding— Appellant violated her passion and semen stains on petticot and vagina lended support to the prosecutrix's version—There was no reason to falsely implicate the appellant.—hence relying upon the prosecutrix's version and testimony conviction upheld. *Kamel Singh* v. *State of M.P.*, (1995) 3 Crimes 527 (MP).

One exculpatory and other inculpatory—Later report corroborated the evidence—Conviction was held fully Justified—No interference can be made. *Bijaya Kumar Sahu* v. *State of Orissa,* (1994) 2 Crimes 746 (Ori).

The statement of prosecutrix was corroborated by evidence of other witnesses. Prosecution version was also supported by medical evidence. Plea of false implication not tenable. Conviction under Section 376 proper. *Kali Charan* v. *State,* 1995 Cr LJ 663 (Del).

Medical evidence not satisfactory regarding penetration and attempt to have sexual intercourse. *Dhoti* of the accused blood-stained. No explanation thereof. Accused's blood on the underwear and frock of the child—That too unexplained.—*Held,* trial courts conviction upheld. *Jagdish Prasad* v. *State,* (1995) 58 DLT 740 (Del) (DB).

In the case of going rape no injury was found on the body of victim—Even on private parts—Incident on a soft ground—Clothes found torn—Abrasion on cheek—FIR was delayed—Proper explanation was given conviction was held fully justified—Would not be proper to set aside conviction. *Bhanwaria* v. *State of Rajasthan,* 1994 Cr LJ 3742 (Raj).

When alleged rape committed on prosecutrix aged about 16 years with her consent, no offence of rape proved, but no however, in view of promise of marriage with her, accused convicted for offence of cheating, *Maran Chandra Paul* v. *State of Tripura,* 1997 Cr LJ 715 (Gau).

In a MP case, the accused persons caught hold of a school teacher while she was going to her work place and on the point of knife forcibly committed rape on her but FIR was lodged 10 days after the incident. Held prosecutrix was so much frightened that she first tried for her transfer and once she secured it she made a report. It could not be said that the report was delayed. The evidence of prosecutrix was found truthful and conviction was upheld. *Malkhan Singh* v. *State,* 2003 Cr LJ 1790 (MP) : 2003(2) Jab LJ 151 : 2002(4) MP LJ 466.

It was alleged that the accused had forcibly taken prosecutrix, a minor girl, from the custody of her parents and committed rape on her. Evidence of parents of prosecutrix, school certificate and medical evidence showed that the prosecutrix was minor at the time of incident. Oral testimony of prosecutrix proved that the accused had raped her. Conviction of accused was held proper. *Chhotu Harijan* v. *State,* 2005 Cr LJ 3926 (Raj).

The accused allegedly asked a minor girl to accompany him on the pretext of giving plum (ber) took her to the place of occurrence and committed rape on her. The testimony of the prosecutrix was found reliable and supported by evidence of her parents and the testimony of doctor who examined the victim. It was held that prosecution evidence could not be disbelieved merely because no injury or swelling or blood or semen was found on the penis of accused and that the conviction was proper. *Shyoji Ram* v. *State of Rajasthan,* 2005 Cr LJ 4763 (Raj) : 2005(3) Raj LR 620 : 2005(4) WLC 50.

In case of rape on minor girl of 15 years, corroboration is not a *sine qua non* for conviction if evidence of victim does not suffer from any basic infirmity. *Peter Fernandes* v. *State,* 1997 (1) Crimes 539 : 1997 Cr LJ 954 (Bom); *See* also *Chiddu v. State of*

Utranchal, 2005 CrLJ 4251 (Utra); *Shri Zosnaghana v. State of Mizoram*, 2005 Cr LJ 1057 (Gau); *State of Rajasthan v Rajendra Singh*, 2006 Cr. LJ 1361; *Ranglal v. State of Rajasthan*, 2006 Cr LJ 1453; *Hari Shankar Tewari v. State of Tripura*, 2005 Cr LJ 3323 (Gau.); *Arun v. State of Maharashtra*, 2005 Cr LJ 1044.

11. Evidence and proof.—Where charge of rape upon married woman by three accused—Conviction was challenged in appeal. There was no injury on her person or on private part of accused which ought to have been had there been resistance. The report of chemical examiner did not show sign of semen on clothes. The doctors did not opine specifically rape on prosecutrix. Her testimony also did not find corroboration. Conviction not sustainable. *Swam Singh* v. *State of Punjab*, (1995) 3 Crimes 775 (P&H).

Failure to record evidence of prosecutrix — Effect —Prosecutrix a minor mentally retarded girl was raped in running local train. Eye-witnesses traveling in same bogie clearly showing that victim was ravished by accused and medically proved. Presence of semen stains on clothes of accused and victim corroborated evidence of eye-witnesses as well as medical, clothes were seized within short time of incident. Evidence of prosecutrix could not be recorded as she was mentally sick and was unable to express herself would not be fatal for prosecution. Held, on basis of other evidence conviction of accused is proper. *Salim Alim Shamsher Shaikh vs State of Maharashtra*, 2010 (4) CriLJ 4064 (Bom).

Another circumstance relied upon by the prosecution is that the underwear of the appellant was stained with blood and to the witness indicates that the appellant was entertaing a notion that witness would be in a position to help him because the witness was going to the Police Station daily and policemen were also visiting him. In the cross-examination also, the witness maintained that the appellant had met him in the court premises and neither the appellant nor Mumtaz was in the lockup nor inside the court room and that the appellant had made the confession near the shops. The witness explained to the court as to why he had gone to the court and according to him he had gone to the court premises to meet legal adviser of the Bank for getting his brother's NOC prepared. The wirtness further mentioned before the Court that the appellant and Mumtaz had met him. The suggestion made be the defence that it was wrong to say that the appellant had made any confessional statement was emphatically denied by him. It may be mentioned that this witness in the cross-examination had stated that the appellant was not on talking or visiting terms with him before and, therefore, it was argued that there was no reason for the appellant to confide in this witness. *Aftab Ahmad Anasari vs. State of Uttaranchal*, AIR 2010 SC 773 (Uttar).

Sufficient evidence. Rape and murder of a girl aged 2 years. The evidence of PW 5 and PW-6 reveals that appellant had been seen around the complainant's house on the previous day and as he was not a resident of this area, he had been quickly singled out. These witnesses further stated the appellant had been seen in the vicinity again after the rape and murder and he had accordingly been apprehended and handed over to the police and two chains worn by deceased had been taken from his pockets. PW-13 also identified the chains in Court. It is true that in the cross-examination of these two witnesses, several improvements *vis-a-vis* their statements under Sec. 161 of Criminal Procedure Code had been pointed out by the defence Counsel, but the fact that the appellant had been present in the vicinity of the house and had been arrested. soon after the incident has been admitted even by the defence.

Another significant piece of evidence is the statement of PW-7 who testified to the fact that about 2:30 a.m. on the night of the murder he had gone out of the house to urinate and had seen the appellant outside and on being questioned, the appellant had threatened him with dire consequences with the result that he had not informed anybody till the third day after the police had come to the village to verify the facts. He too stated to the fact that two chains had been recovered from the pocket of the appellant. It is true that several improvements have been made by the three primary witnesses but there is absolutely no reason as to why they would involve the appellant in a false case as admittedly he was a stranger to the locality and they bore him no ill will.

We have also gone through the evidence of PW-12 relating to the recovery of the frock pursuant to a disclosure statement made by the appellant under Sec. 27 of the Evidence Act. Nothing could be spelt out from the cross-examination of this witness except that the recovery had not been made from a closed place, though he explained that there was very little movement of human beings in that area as no one was residing close by. This witness also identified the frock that had been recovered. It is equally significant that the strands of fibre recovered from the place of incident had been matched with the material of the frock and were found to be from the same source.

It is true that in a criminal matter the onus of proof lies almost exclusively on the prosecution. As already mentioned above, however, the appellant has not been able to give any explanation in his statement under Sec. 313 of Criminal Procedure Code as to what he had been doing in that locality. On the contrary he admitted his presence by stating that he had been caught by the neighbours on suspicion of the murder and beaten up, and had suffered several injuries in the process. The medical evidence on the contrary reveals that these injuries could also have been sustained while raping and killing the young child.

The evidence that the appellant was a paedophile with extremely violent propensities also stands proved on record in that he had been convicted and sentenced for an offence punishable under Sec. 354 in the year 1998 and later for offences punishable under Secs. 363, 376, 379, 302 and 201 of the IPC for the rape and murder of a young child and had been awarded a sentence of imprisonment for life under Sec. 302, and several other terms of imprisonment with respect to the other Secs., though, an appeal in this connection was pending as on date. It is also extremely relevant that the appellant, had, in addition, been tried for the murders of several other children but had been acquitted on the 28.07.2005 with the benefit of doubt. The present incident happened three days later. We accordingly dismiss the appeals but modify the sentence of death to one for the rest of his life in terms of the judgment in *Shraddananda's* case. *Sebastian vs. State of Kerala*, 2010 (1) SCC 58 : 2009 (4) Crimes 121 (SC) : 2009 (13) JT 136 : 2009 (13) Scale 210 : 2009 (7) Supreme 8 : 2009 (8) SLT 96.

Burden of proof. Accused, along with two other accused, brought the victim girl from her residence in a car and then she was made to stay along with them in lodge. When the prosecution has established the fact that accused brought the victim girl to the said lodging and stayed with her in the said lodging, then the burden came to be shifted on the accused, of explaining as to what happened thereafter in the said room or. of showing that nothing happened as deposed by prosecutrix. By remaining silent, this accused has not discharged this burden.

The facts constituting forcible sexual intercourse on the victim girl said to have been committed by the accused in the said lodging were within the special knowledge of accused and the victim girl. The victim girl has stated on oath that after she was brought there, accused and also other two persons committed forcible sexual intercourse on her one after another against her will and despite her request that they should not do so. This accused, though has denied the entire evidence of victim girl, has not brought anything in her cross-examination-in-chief to disbelieve her evidence in examination-in-chief as to he committing forcible sexual intercourse on her while she was made to stay in the said lodging.

If the relevant allegations in the complaint and also the evidence of prosecutrix are carefully scrutinised, it could be seen that her evidence falls in line with the allegations in the complaint. Incident of accused and other two other accused taking the prosecutrix from her residence to the said lodging and making her to stay with them in the said lodging is consistent with the allegations in the complaint. Further, as could be seen from the evidence of victim girl, she has given all the minor details of the acts of forcible sexual intercourse committed on her by the accused while she was made to stay in the said lodging. In the absence of any explanation by the accused as to what happened between himself and victim girl after he took her into the room in the said lodging, the positive evidence of victim girl given on oath before the Court which is quite consistent with her allegations in her complaint as to the factum of forcible sexual intercourse committed by him on her being trustworthy, deserves acceptance and the same has been rightly accepted and relied upon by the Trial Court. Besides this nothing is brought on record by the accused through the evidence of either victim girl or any other witness to show that the prosecutrix falsely implicated him at the cost of her reputation. *N. Vijaya alias Ameen vs State of Karnataka*, 2010 Cri LJ 1050 (Karn).

Identification Parade — Prosecutrix did not know the *name of* the accused — Victim had correctly identified accused in *T.I. Parade*. It is to be noted that the prosecutrix did not know the name of the accused and, therefore, there was necessity for Test Identification Parade. The evidence of the prosecutrix is clear and cogent. In the instant case the accused is not personally known to the victim and therefore stating his name in the FIR did not arise. However, she has categorically stated that the rape was committed on her by the truck driver. After the arrest of the accused he was put in TI Parade and the victim had correctly identified him. That being so, the judgments of the trial Court and the High Court do not suffer from any infirmity to warrant interference. *Mohan Chand v. State of Uttarakhand.*, AIR 2009 SC 1896. : 2009 (1) SCR 498 (SC) : 2009 (4) SCC 63 : 2009 (1) JT 616 (SC) : 2009 (2) Scale 38 (SC) : 2009 (1) Supreme 429 (SC) : 2009 CrLJ 1755 (SC).

Appreciation of evidence. A case of this nature should be viewed having regard to the materials brought on record in their entirety. We have noticed hereinbefore the prosecution case. Indisputably, the prosecutrix was examined medically after a long time. The explanation offered by PW-5 in this behalf, in our opinion, is clear and sufficient. Not only the father of the prosecutrix was not in the village, he had to be sent for and came back to the village only on the next day. Evidently, for good reasons, they did not want to lodge a First Information Report immediately. A panchayat was convened and only when it did not yield any fruitful result, the First Information Report was lodged.

The evidence of the doctor appears to be wholly insufficient. Even she could not complete the medical examination. Despite passage of a long time, an injury on the private parts of the prosecutrix was found. The doctor at least testified that there had been an attempt to commit rape. While saying so, she found the hymen absent which having regard to the medical jurisprudence is of some significance.

The prosecution case must be considered having regard to the evidence of PW-5. She detected the accused while committing the offence. It was not complete. Appellant is said to have fled away, hearing her voice.

This Court can take judicial notice of the fact that ordinarily the family of the victim would not intend to get a stigma attached to the victim. Delay in lodging the First Information Report in a case of this nature is a normal phenomenon. Both the Courts below apart from relying on a part of the testimony of the prosecutrix found the evidence of PW-5 to be absolutely reliable. The medical evidence itself being a part of the evidence is required to be appreciated in the context of ocular evidence and other circumstances surrounding thereto.

There was some time gap between the occurrence and the examination of the witnesses. Some lapse of memory on the part of the child witness, therefore, is possible. We are, therefore, of the opinion that the impugned judgment does not warrant any interference by this Court. *Satyapal vs. State of Haryana*, AIR 2009 SC 2190 : 2009 (6) SCC 635 : 2009 (2) Crimes 96 (SC) : 2009 (5) JT 291 : 2009 (5) Scale 431 : 2009 (5) SCR 577 : 2009 (3) Supreme 33 : 2009 (4) SLT 41.

Circumstantial evidence — Chain of circumstances. In the instant case, the deceased went missing when she was playing near her house. Her naked dead body was found lying on public way in front of her neighbours house. She was found to be subjected to rape and died a homicidal death. The appellant accused was seen fleeing away from near the place where the dead body of the deceased was lying. Blood stained frock and blood stained underwear of the deceased concealed in the house of sister of the appellant were recovered pursuant to voluntary disclosure statement made by the appellant while in police custody. Underwear of the appellant seized during the course of investigation was found to be stained with blood and semen. The appellant evidence relating to extra judicial confession made by accused to Ex. Pradhan of village found to be reliable

Held, the cumulative effect of the above mentioned facts taken together is conclusive in establishing the guilt of the appellant. The chain of circumstantial evidence is complete and does not leave any reasonable ground for conclusion consistent with the innocence of the appellant. The chain of circumstances is such as to show that within all human probability the rape and murder of the deceased were committed by the appellant and none else and he had also caused disappearance of evidence of those offences. Further incriminating circumstances proved were put to appellant while recording his statement under Sec. 313 of Criminal Procedure Code. In his further statement, recorded under Sec. 313, the appellant has merely denied the same. Therefore, such denial on the part of the appellant and failure to explain the circumstances proved will have to be treated as an additional link in the chain of circumstances to bring home the charge against the appellant. The circumstances proved establish the guilt of the appellant beyond reasonable doubt. Therefore.

conviction of accused not liable to be interfered with. *Aftab Ahmad Anasari vs. State of Uttaranchal*, AIR 2010 SC 773.

Where there was conviction for offence under Section 376 (1) IPC and sentenced him to 7 years RI. Which was challenged in appeal. The medical evidence does not prove commission of rape. Medical expert was deliberately not examined by prosecution. Further evidence of prosecutrix and PW 'C' does not inspire confidence. Hence prosecution has failed to prove offence under Section 376, IPC. *Ram Bux* v. *State of Rajasthan*, 1994 Cr LR (Raj) 566.

From evidence on record, the following circumstances have surfaced :—

1. The deceased was missing from 3/3.30 p.m. of 11.12.2002;
2. She was last seen with the appellant in the counter of his studio, which was adjacent to his residence;
3. She was wearing a pair of silver bangles (churi) and jangia (panty);
4. Earlier also, she used to visit the said tenanted premises and meet the appellant, whom she called 'Kaku' (uncle), who was well-known to the deceased;
5. The accused procured a carton from the witness, in the morning the day the said deceased disappeared;
6. The dead body of the deceased was found folded in the said carton;
7. In the said carton, along with the dead body, a piece of check cloth (Lungi) and a part of the newspaper (Dainik Sambad), dated 16.09.2002, was found;
8. The bangles (Churis), which the deceased used to wear, were not available with the dead body;
9. Similar/identical portion of the cloth, which was found with the dead body, was also recovered from the studio of the accused by the police, on being produced by him, in presence of witnesses;
10. The other part of the said newspaper was recovered from the studio of the accused on being produced by him, before the police, in presence of witnesses;
11. The bangles (churis), which were used by the deceased immediately prior to her disappearance and which were not available with her dead body, came to be recovered from the studio of the accused on being produced by him, before the police, in presence of witnesses. The said seized bangles were identified to be the bangles used by the deceased;
12. The deceased sustained injury on her vagina, causing destruction of hymen and making an opening into the abdominal cavity, through which loops of small intestine protruded out. This injury, in the opinion of the Medical Officer, was caused due to forceful penetration of adult,erect penis;
13. All the injuries were ante-mortem and there was no post-mortem injury;
14. There was some nail marks on the cheeck of the deceased due to smothering;
15. The death, in the opinion of the Medical Officer, who performed, the autopsy, was caused due to combined effect of asphyxia caused by smothering and

shock as a result of penetration of the penis causing the injuries, above mentioned;

16. Post-mortem examination was done at 1.15 p.m. on 13.01.2003. The deceased was missing from 3/3.30 p.m. of 11.12.2002. The approximate time of death, with variation by few hours, as per the medical evidence, was 54 to 60 hours. From 3 p.m. of 11.12.2002 to 1 p.m. of 13.12.2002, there was a time gap of around 46 hours. As there cannot be any definite opinion regarding the exact time of death, the said medical opinion indicates that the victim died around 3/3.30 p.m. or immediately thereafter i.e. after she was seen with the appellant in his studio.

In the case of *Sarad Birdhichand Sarda vs. State of Maharashtra,* AIR 1984 SC 1622, the Supreme Court, while discussing a few decisions on the nature, character and essential proof required in a criminal case, which rests on circumstantial evidence and also referring to the most fundamental and basic decision of the Apex Court in *Hanumant vs. State of Madhya Pradesh,* AIR 1952 SC 343 = 1953 Cri LJ 129 = 1952 SCR 1091, laid down the following golden principles, which were termed as Panchashil :

(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must' or 'should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahebrao Bobade vs. State of Maharashtra,* AIR 1973 SC 2622 = 1973 Cri LJ 1783 = 1973 (2) SCC 793, where the following observations were made :

"certainly, it is primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(ii) The fact so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(iii) The circumstances should be of a conclusive nature and tendency.

(iv) They should exclude every possible, hypothesis except the one to be proved and,

(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused".

The circumstances, as revealed from the evidence on records, must form a complete chain pointing to the guilt of the accused to the exclusion of any other hypothesis. Keeping in mind the said principles of law, laid down by the Apex Court, we deem it appropriate to examine if the circumstances emerging from the evidence on record constitute a complete chain leading to the conclusion not consistent with the innocence of the accused.

In the light of specific medical evidence regarding rape and in view of the evidence that the accused was a full grown adult person, his non-examination by medical officer and non-forensic examination of the wearing apparels of the deceased were not fatal. The said Medical Officer ruled out that forceful penetration on a 7 years minor would always cause injury to the penis. He also made it clear that spermatozoa can be detected only in respect of living female within 48 hours and that as the dead body had already started decomposition he made to report regarding presence of spermatozoa. There is also clear medical evidence to show that there was penetration of male genital organ into the vagina of the deceased. Therefore non-forensic examination of the wearing garments of the deceased and non-medical examination of the apparels was not fatal to the prosecution. Hence, we do not find force in the contention of the learned defence Counsel on this point.

Regarding the last seen theory also, there is the unimpeachable evidence of witnesses. There is nothing to hold that the said witnesses had any reason or grudge to falsely depose against the accused. From their evidence, it appear that the said witnesses had their shops in front of the studio of the appellant and that the said studio was visible from their respective shops. They are found to be natural witnesses. No contradiction could be established to be lie their evidence. Hence, we find sufficient positive evidence that the accused and the deceased were seen together by. There is nothing on record to show that after the deceased was seen with the accused, she was found with any other person. Hence, we do not find substance in the contention that the evidence, regarding last seen theory, was false and concocted.

It is the natural instinct of a person to try to save himself, as such, in the present case also, the accused, after committing the death of the deceased, in the alleged manner, tried to dispose of the dead body by putting the same in the carton with a view to remove the evidence against him.

This case does not fall within the category of "the rarest of the rare case". Therefore, in our view, it is not a case, where extreme penalty of death should be imposed. We have no hesitation in holding that imposition of punishment of rigorous imprisonment for life would be sufficient to meet the ends of justice. Accordingly, the death penalty is commuted to rigorous imprisonment for life. The appellant, therefore, instead of being awarded the death penalty, is hereby sentenced to undergo imprisonment for life for the offence under Section 302, IPC. *Samir Bhowmik vs. State of Tripura*, 2010 (3) Cri LJ 3018 (Gau).

The allegations made in the First Information Report are not evidence. She might have named four persons, namely, accused Nos. 1 to 4 in the FIR, but, as indicated hereinbefore, she named only accused Nos. 1 to 3 in her deposition. Only accused No.1, Babu, has been named by PW7 and none other. She, therefore, knew only the four persons. She had not named accused Nos.5 and 6 either in the FIR or in her deposition.

They had been arrested on the basis of the statements made by their co-accused. They had not been put to Test Identification Parade. The prosecutrix, in her deposition before the learned Trial Judge, neither named nor identified accused Nos. 4 to 6. On what basis, therefore, their guilt is said to have been established is not known. Both, the learned Trial Judge as also the High Court, in their judgments did not deal with this aspect of the matter.

In a situation of this nature, a Test Identification Parade was required to be held at least for the purpose of identification of accused Nos. 5 and 6. Some weight should have been given for arriving at a finding as regards the guilt of accused Nos.5 and 6. as they had not been identified in the court.

We, therefore, are of the opinion that in absence of any Test Identification Parade having been held or they having been identified in Court, the accused Nos.4 to 6 cannot be held guilty of commission of the said offence. They are, in our opinion, have wrongly been convicted. *Viswanathan and Ors. v. State, Rep. by Inspector of Police. Tamil Nadu.* AIR 2008 SC 2222 : 2008 (6) SCR 1222 (SC) : 2008 (5) SCC 354 : 2008 (5) JT 629 (SC) : 2008 (6) Scale 462 (SC) : 2008 (4) SLT 795 (SC) : 208 (6) SRJ 41 (SC) : 2008 (2) SCC (Cr) 593 : 2008 (2) Recent CR 888 (SC).

When the charge was of having committed rape on prosecutrix—Both the appellants have been convicted under Section 376 and sentenced to Rigorous Imprisonment for 5 years. The uncorroborated testimony of prosecutrix when the same is otherwise discredited by letting circumstances cannot be accepted to sustain conviction. Hence impugned judgment and order set aside. *Thakara Besra* v. *State*, (1994) 2 Crimes 596 (Ori).

The prosecutrix alleges injuries on her private parts but medical evidence is silent. All these things show that prosecutrix was trying to make the appellants escape goats. She was trying to absolve herself from said possible blame, scolding consequential calamities. *Ashok Kumar* v. *State of M.P*, 1994 Cr LR (MP) 257 (N).

Prosecution case was supported by the prosecution. Her *Salwar* and *Dhoti* as well as *angochha* of the accused was recovered in the presence of page 4. He had been caught red-handed. Medical report is of no help to the appellant and sentenced to 7 years R.I. and fine of Rs. 4,000. The evidence of DW 1 or that of his own is credible where corroboration are reliable. *Held*, guilt was brought home to the appellant. (1986) 2 Crimes 37 (Del).

The testimony of the prosecutrix corroboration is not the *sine qua non* for a conviction in a rape case. It has been further held that on principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to greater weight absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence could not be expected in sex offences, having regard to the very nature of the offence. It would be adding insult to injury to insist on corroboration. If the evidence of the victim does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of credence, as a general rule there is no reason to insist on corroboration except from the medical evidence. *Roshan Lal* v. *State of Himachal Pradesh*, (1994) 1 SLJ 747 at p. 753 (HP).

In a case there was discrepancy between complainant and complainants' evidence. The complainant in his evidence stated that the victim had told about incident to her aunt who told it to the complainant but in the complaint it was stated that the complainants' father came to know absent the incident from victim. The Court heid that such discrepancy was not material and that it may raise about aunts' knowledge. *State of Karnataka* v. *Revaniah*, 2005 Cr LJ 2676 (Kant) : AIR 2005 Kant HCR 1255 : 2005(4) Crimes 268 : 2005(4) Cur Cri R 466 : 2005(3) Rec Cri R 862 : 2005(4) Kant LJ 404.

The accused were charged with the offence of rape on the prosecutrix. Plea that medical report did not indicate number of persons who committed rape was without any substance. Prosecutrix's evidence that rape was committed on her by all accused was not inconsistent with the medical report. *Held*, that there was justification in High Court's finding that medical examination and the evidence showed involvement of more than one persons in the act of rape. Contention of prosecution therefore, could not be accepted. 1987 Cr LJ 971 (SC) : AIR 1987 SC 1080.

The prosecutrix in the instant case was above the age of consent in terms of Section 25, IPC. *Held*, the acquittal of the accused was neither wrong nor illegal. Appeal dismissed. In a case whether or not consent was given, the circumstances have to be considered along with other factors so conclude the factum of rape. (1986) 2 Crimes 639 (Orissa).

Where evidence of victim aged 9 years was corroborated with medical evidence and FIR lodged immediately, conviction of accused was held liable to be sustained. *Mishrilal* v. *State of MP*, 2005 Cr LJ NOC 39 (MP) : 2005 Cri LR (SC&MP) MPJ 10.

Where testimony of prosecutrix was not trustworthy nor corroborated by medical evidence or any other evidence, the conviction of accused was held not sustainable. *Kishan Lal* v. *State of Rajasthan*, 2005 Cr LJ 1519 (Raj) : 2005 Cri LR (Raj) Rai 19 : 2005(2) Raj Cri C 545 : 2005(2) Raj LR 748 : 2005(2) Rec Cri R 686 : 2005(2) WLC 200.

In an Orissa case also it was held that where testimony of prosecutrix, involving accused in alleged offence of rape is not corroborated by medical evidence and chemical examination report, the accused entitled to benefit of doubt. *Sonia Jani* v. *State*, 2004 Cr LJ 226 (Ori) : 2003(2) Crimes 449 : 2003 (25) OCR 433 : 2003(1) Orissa LR 569.

Where testimony of victim prosecutrix got corroboration from her mother, sister and grandmother, absence of injuries on male organ of accused is not fatal and conviction of accused is just and proper. *Dinesh* v. *State of Rajasthan*, 2005 Cr LJ 1452 (Raj) : 2005 All MR (Cri) 193 : 2005(30) OCR 317 : 2004(1) Orissa LR 127 : 2005(2) Rec CriR 677.

When testimony of prosecutrix inspires confidence, its corroboration is not necessary and it cannot be discarded on trivial grounds. *Shanabhai Madhavbhai Koli Patel* v. *State of Gujarat*, 2004 Cr LJ 268 (Guj) : 2004(1) Guj LH 408.

Where there was ample contradictions in testimony of prosecution witnesses and number of missing links in prosecution case, accused was entitled to benefit of doubt. *Appasaheb Maruti Shedge* v. *State of Maharashtra*, 2005 Cr LJ 1503 (Bom) : 2005 All MR (Cri) 575.

The accused allegedly raped the prosecutrix while she was returning from field. FIR was lodged by her after six days. There were number of contradictions in the evidence of prosecutrix. Even her husband had not supported her version. Most of the prosecution witnesses had turned hostile. It was held that the prosecution had failed to prove its case beyond reasonable doubt and, therefore, the conviction was liable to be set aside. *Kiran Yadav* v. *State of Bihar*, 2004 Cr LJ 1711 : AIR 2004 Jhar HCR 967 : 2004(1) East Cri C 629.

When testimony of victim/prosecutrix was not corroborated by medical evidence, the finding that rape was not established warrants no interference. *State of Karnataka*

v. *Mopilla P.P. Soopi*, 2004 Cr LJ 44 (SC) : AIR 2004 (SC) 85 : 2003(4) Crimes 191 : 2003(8) SCC 202 : 2003 SCC (Cri) 1977 : 2003(6) Supreme 968.

The prosecution witness had seen the accused dragging the prosecutrix to the place of occurrence and her interference in the matter could not help the prosecutrix. The prosecutrix told her kith and kin about the incident next day when she gained her consciousness. It was held that in all important probabilities factors echoed in favour of testimony of prosecutrix could not be disbelieved and discarded. Conviction under Section 376 by placing of reliance on testimony of prosecutrix was proper. *Sano Murmu* v. *State*, 2003 Cr LJ 2365 (Orissa) : 2003(3) Crimes 357 : 2003(95) Cut LJ 465 : 2003(24) OCR 852.

Corroboration of evidence of victim/prosecutrix is not necessary to record conviction. *Bhupinder Sharma* v. *State of HP*, 2004 Cr LJ 1 (SC) : AIR 2003 (SC) 4684 : 2003(8) SCC 551 : 2004 SCC (Cri) 31 : 2003(8) Scale 735.

In a Punjab and Haryana case, a minor girl of 8 years was raped. The medical evidence showed injuries on body of victim. Though no injury was found on male organ of accused who was major, doctors categorically stated that possibility of rape could no be ruled out. Conviction of accused was held proper. *Sunder Singh* v. *State of Haryana*, 2004 Cr LJ 3083 (P&H) : 2004(2) Rec Cri R 764.

The witnesses stated that the deceased was last seen in company of accused but their evidence was not creditable as there was past enmity between accused and witnesses. Apart from this there was not complete chain not suggest that accused and deceased were last seen together. It was held that the guilt of accused was not proved beyond doubt and he was acquitted. *Joseph Oraon* v. *State*, 2004 Cr LJ 4405 (Jhar) : AIR 2004 Jhar HCR 2640 : 2004(2) JCJR 53.

In a M.P. case, where the accused was alleged to have caught hold of prosecutrix in broad day-light, caused injuries to her and committed rape on her. Testimony of prosecutrix was not considered reliable. Prosecutrix did not complain to anybody during this period though she met with several persons including ladies. The victim and accused had given an application for registration of their marriage. It was held that the victim was a major lady and was a consenting party and, therefore, conviction of accused persons was not proper. *Lakhan Singh* v. *State of MP*, 2004 Cr LJ 2473 (MP) : 2004(2) Jab LJ 136 : 2004(2) MPHT 146 : 2004(2) MPLJ 132.

The evidence of victim was contradictory on all material facts. At one place she said that she received injuries on her back, elbow and ribs due to assault by the accused but the doctor did not find any injury on her person. Similarly she stated at one place that on her alarm PW1 and PW2 arrived at the place of occurrence and the witnesses saw the appellant fleeing away but in her cross-examination she said that by the time the witnesses had arrived at the place of occurrence, the accused had already fled away. Similarly she made statement that she narrated the story of rape on her to her mother-in-law and to her husband but curiously enough, the mother-in-law was not examined and her husband had been tendered. It was held that the testimony was not found reliable and the conviction was liable to be set aside. *S.K. Chunia* v. *State of Bihar*, 2005 Cr LJ 4238 (Jharkhand) : AIR 2005 Jhar HCR 1944 : 2005(2) BLJR 1547 : 2005(3) East Cri C 235 : 2005(3) JCR Jha 247 : 2005(4) LJR 541.

Non-examination of doctor who examined prosecutrix and non-production of doctors report was held not fatal to prosecution of evidence if evidence of prosecutrix and other witnesses was reliable. *State of MP* v. *Dayal Sahu*, 2005 Cr LJ 4375 (SC) : AIR 2005 (SC) 3570 : 2005(4) Crimes 92 : 2005(8) SCC 122 : 2005(6) Supreme 583 : 2005 SCC (Cri) 1988 : 2006 SC Cri R 131.

In the case of kidnapping and rape the version of prosecution that victim was subjected to sexual intercourse found support from medical evidence and report of Central Forensic Science Laboratory. There was injury to victim's hymen and there was bleeding from it. Accused was found capable of performing sexual act. The most important corroboration to the version of prosecution was from the recovery of victim when accused and victim were going together and accused was arrested then and there. No force in the appeal was found so far as conviction of accused was concerned. 1987 Cr LJ 224 (Del).

The statement of the prosecutrix did not find corroboration from the medical evidence. No injury was found on the outer part of the body or inside the private part According to FIR, the prosecutrix did receive injury on her right leg while she was ravished and raped by the accused at the time of incident. But in her statement before the Court she did not mention any such injury having been received at the time of incident. It was held that the statement could not be relied upon. *Mohabbat* v. *State of UP*, 2005 Cr LJ 3238 : 2005 all LJ 2219 : 2005(52) All Cri C 635 : 2005(2) All Cri R 1799 : 2005(32) All Ind Cas 526.

The witnesses who were related to the prosecutrix admitted that they could not see any snatching of silver chain or golding earrings by the accused while he was running from the spot, one of the witnesses said that at the time when he reached on the spot, the accused had already run away and he could not notice the accused either on the spot or while he was running away from there. The said statement of the witness indicated that he had not seen the actual act of commission of rape. It was held that testimony of eye-witness could not be relied upon. *Mohabbat* v. *State of UP*, 2005 Cr LJ 3238 (All) : 2005 all LJ 2219 : 2005(52) All Cri C 635 : 2005(2) All Cri R 1799 : 2005(32) All Ind Cas 526.

Conviction on the basis of uncorroborated testimony of the victim of offence is sustainable. (1988) 1 Crimes 75 (Ker).

Accused convicted under Sections 366 and 376 for the offence of committing rape on prosecutrix. Observed that evidence of a victim of a sex offence was entitled to great weight, absence of corroboration notwithstanding. While corroboration in the form of eye-witness account of independent witnesses might often be forthcoming in physical assault cases, such evidence could not be expected in sex offences. As a general rule there was no rule to insist on corroboration except from the medical evidence. *Held*, that appellant kidnapped the prosecutrix who was below 18 years of age and subjected her to rape against her will consequently appeal to be dismissed and conviction and sentence to be maintained. 1987 Cr LJ 1986 (MP).

When accused made attempts to penetrate his organ into private part of girl after fingering charges under Sections 376, 377 and 511 are established. *Kartar Singh* v. *State*, 1993 Cr LJ 1483 (Del).

Evidence was that the prosecutrix did not call out any body for help. Medical report was of no help to her. Her blood-stained saree was not produced in Court. *Held*, acquittal was not unreasonable or perverse. (1986) 2 Crimes 151 (Ori).

The medical report clearly shows that hymen was totally intact and, it was lightly closed. No mark of injury on any part of the body was found. Hence story of rape was totally false. *Dhanraj* v. *State of U.P.*, 1995 (32) ACC 127 (All).

A well-corroborated testimony of the child prosecutrix can sustain a conviction. *Bhawani Gil* alias *Deo Karan* v. *State of Rajasthan*, (1995) 1 Crimes 559 (Raj).

The evidence of eye-witnesses corroborated by medical evidence. The delay in lodging complaint explained. Hence conviction under Sections 341 and 374 was proper. *Periyasami* In re, 1995 Cr LJ 1203 (Mad).

Where there was rape trial and accused was correctly identified in identification parade—Conviction was on the basis of prosecutrix evidence—It was held proper. *Ram Pal* v. *State of Haryana*, 1995 SCC (Cr) 136 (SC) : 1994 Supp(3) SCC 656.

The evidence of the prosecutrix was self-contradictory and not corroborated. It is highly improbable that accused/two cousins would commit rape on prosecutrix in each other's presence or their uncle. No implicit reliance can be placed on testimony of prosecutrix who is woman of easy virtues and seems to consenting. Conviction set aside. *Daler Singh* v. *State of Haryana*, 1995 Cr LJ 614 (P & H).

Held that the allegation of rape was not believed as there was no injury found due to dragging and there was no injury on her private part or elsewhere. Her allegations are likely to be false and do not inspire confidence and are also not corroborated hence conviction set aside. *Mangi Ram* alias *Mangi Lal* v. *State of Rajasthan*, 1995 Cr LR 264 (Raj).

Slight bleeding at introits with vulval tear—Victims mouth gagged— Corroborated by medical report—Offence proved beyond doubt—Plea of consent was rejected. *Panna Lall* v. *State*, (1994) 54 Del LT 426.

Medical evidence corroborating testimony of prosecutrix—Hymen of prosecutrix ruptured recently and bleeding—Injuries on her private parts noticed—Committal of rape in hotel room—Accused being stranger to prosecutrix— Offence was fully established against both two accused persons.—Conviction was fully justified. *Raju Krishna* v. *State of Karnataka*, (1994) 1 Crimes 156 (SC).

Evidence of victim shall be treated as the evidence of any other person. *State of Karnataka* v. *H.B. Davidas*, (1994) 2 Kar LJ 46 (DB).

Medical examination of the prosecutrix was done. It was held that accused should be tested in the circumstances in which the prosecutrix was examined. *Mercier Bento Morenas* v. *State of Goa*, (1995) 4 Crimes 532 (Bom).

Prosecutrix was the only evidence only in cases of doubt it requires corroboration. *Jagannivasan* v. *State of Kerala*, (1995) 9 OCR 480 (SC).

Where prosecutrix was 40 years old—Witness was her own son—FIR was delayed—Evidence of prosecutrix can not be discarded merely on the ground that no other public independent witness had come into picture—Conviction was upheld. *Rehmal* v. *State of M.P.*, (1994) 1 Crimes 533 (MP).

Where the charge was of attempt of rape and incident of assault or outrage of women's modesty—Conviction under Sections 170, 376 read with Section 511—Which was challenged in appeal. It was held that appellant was seen holding the prosecutrix an inmate of mental hospital and pulling towards comer and embracing her with dress raised above knee. There was no determined effort to forcefully maintain sexual intercourse. Medical evidence also do not point out any physical effort or violence which appellant might have made. Hence, conviction quashed. However, he was liable to be convicted u/Sec. 354, IPC. *Shivaji Tukaram Kurie* v. *State*, (1994) 2 Crimes 516 (Bom).

Where the evidence of prosecutrix is fully corroborated by other evidence on record, there is nothing to disbelieve her statement because corroboration is not *sine qua non* for a conviction in rape case. *Bal Kishan* v. *State of Haryana*, (1995) 3 CC Cases 119 (P&H).

The FIR was lodged after a month. The doctor who medically examined the prosecutrix was not examined by prosecution. The Doctor did not give any definite opinion regarding recent sexual intercourse. No semen was detected from vaginal swab and vaginal smear. Due to these mitigating circumstances sentence for offence under Section 376, IPC reduced from 7 years to period already undergone by the accused. Appeal partly allowed. *Saddique Mohd.* v. *State*, 1994 RCC 488.

The testimony of prosecutrix cannot be disbelieved on the ground that there was no injury or her private parts and the hymen was not found ruptured. The non-rupture of hymen or absence of injury on victim private parts does not necessarily belie the version of rape. *Pappu and Balwant* v. *State of Rajasthan*, 2000 Cr LJ 1256 (Raj).

In the recent case of *Ranjit Hazarika* v. *State of Assam*, (1998) 8 SCC 635, their Lordships have observed as follows :

> "Neither the non ruputure of the hymen nor the absence of injuries on her private parts therefore belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake."

When offence was committed in dark night—There was appreciation of evidence—Accused recognised in dark night by his voice, stature and feature was conviction on its basis.—It was held that such recognition of accused is very feeble type of evidence and misleading. Not safe to convict accused solely on basis of such evidence of recognition. *Mazid Ali* v. *State of Assam*, (1994) 1 Gau LR 196.

Medical evidence and ocular evidence corroborating each other hence accused cannot escape liability merely because the prosecutrix did not offer any resistance. *Narayanamma (Km.)* v. *State of Karnataka*, (1995) 1 CCR 53 (SC) : 1994(5) JT 436 : 1994(5) SCC 728 : 1994(3) Scale 879 : 1994(3) Crimes 286.

Failure of 90 to get accused examined was held of no significance when the accused had absconded and was available for examination only the months after the incident. Since he was a married man and had two children. There was no need to get him medically examined to ascertain the capacity to sexually perform. *State of Karnatakata v. Revannaiah*, 2005 Cr LJ 2676 (Kart.) : AIR 2005 Kant HCR 1255 : 2005(3) All Cri LR 739 : 2005(4) Crimes 268.

The prosecutrix clearly stated that both accused committed rape on her one by one. She further stated that both accused had bite her cheeks and she had also stated that there was injury on her private part and blood was also coming out of it and thereafter she told the whole story to her parents who corroborated the statement of prosecutrix in all material particulars. The prosecutrix was cross examined at length but nothing had come out which affected her testimony. Not only this, the statement of prosecutrix witnesses was further corroborated by medical evidence. There was a clear cut evidence, both medical as well as oral, that rape had been committed on prosecutrix. *Moti Chand* v. *State of Rajasthan* 2001 Cr LJ 1916 (Raj) (1923, 1924) : 2001(1) WLC 524 (Raj).

Evidence of prosecutrix not corroborated by medical evidence or any independent witnesses—No hue and cry raised by prosecutrix and her explanation in this respect not believable—The report of chemical examination not produced—When raised adverse inference against prosecution case— There was also an unexplained delay in filing FIR—The conviction therefore was not justified. *Koja Ram* v. *State of Rajasthan*, 1995 Cr LJ 1575 (Raj).

When evidence of prosecutrix is reliable and corroborated by evidence of her younger sister who was eye-witness to occurrence, prosecution case proved beyond reasonable doubt. *Bhupinder Singh* v. *State of H.P.*, 1997 Cr LJ 339 (HP).

It came out from the report of the chemical analyst that on all the articles seized by the police, the same group of semen was found. Even the vaginal swab indicated the presence of semen. The report of the chemical analysis and also the medical examination report supported the case of the prosecutrix. The injuries found on the person of the accused also tallied with the time when the commission of rape was alleged. The prosecutrix was found weeping by her neighbour immediately after the incident and the accused was also found leaving the place at that time. The prosecutrix also complained to the said neighbour about the rape committed on her. In view of such evidences, there was no reason to hold that the case against the respondent had not been established. The acquittal was set aside and it was held that "the incident had taken place long time back and the respodent was then only 19 years old. He is now married and settled in life. In the aforesaid circumstances, he deserves to be leniently dealt with in the matter of sentence. As we are of the view that the accused had betrayed the trust reposed on him by a young girl of 13 years and had committed the heinous crime by ravishing a minor girl forcibly by holding out threats, we do not think that he deserves any leniency in the matter of sentence. *State of Haryana* v. *Jang Bahadur*, 1999 Cr LJ 5028 (SC) : 1998 SCC (Cr) 693.

Conviction of accused cannot be based on evidence of prosecutrix totally discredited in cross-examination when confronted with her police statements. *Peter Fernandes* v. *State*, 1997 Cr LJ 954: 1997 (1) Crimes 539 (Bom).

In offence of rape while quashing of charge High Court was not justified to seek independent corroboration at that stage and to discharge accused in absence thereof. *State of Maharashtra* v. *Priya Sharan Maharaj*, 1997 (1) Crimes 275 (SC) : AIR 1997 (SC) 2041 : 1997(4) SCC 393 : 1997(1) JT 84.

If a forcible rape has been committed there would have been injuries on the body of the prosecutrix. Though the prosecutrix has sated that she sustained injuries on her back when she was forcibly made to lie on the ground. This statement is not corroborated by the medical evidence. She has further stated that the accused in all took 15 minutes to commit the rape. She has stated that blood came out of her vagina when the accused committed rape which stained her clothes, but no blood fell on the ground. This story also is not supported by the report of the FSL. Therefore, the story of forcible rape has to be ruled out. Again it may be mentioned that in the examination-in-chief the prosecutrix has not supported the prosecution but in the cross-examination by the learned public prosecutor, she has stated what she had narrated to the police. The above evidence shows that there was no emission of semen at the time of alleged occurrence and that the prosecutrix had not bled at that time. It may be that the accused might have taken the prosecutrix to the *gohara* for the purpose of committing sexual intercourse with her consent but might have not been able to commit intercourse because of the above two witnesses reaching there or by any other reason. whatever the case may be, it cannot be said that the sexual intercourse was committed by the accused though he might have gone to the *Gohara* for committing such an act. The consent of the minor will not be helpfull to the accused if it is proved that there was penetration. However, when the evidence of penetration is found to be doubtful, the discussion of age would become academic. *Om Prakash* v. *State of Haryana*, 1999 Cr LJ 94 (P&H).

The medical evidence is ultimately merely a corroborative piece of evidence. By way of ordinary prudence, the court may insist upon the medical evidence to convict the accused of sexual offence. But it is not a hard and fast rule to accpet the version deposed by the prosecutrix. That even in the absence of medical evidence; if the evidence of prosecutrix is found to be otherwise dependable; the conviction could be founded on the sole testimony of the prosecutrix (1996) 2 Guj LR 200). It may also be noted that; in the matter of *Harpal Singh* v. *State of H.P.*, AIR 1981 SC 361; (1981 Cr LJ 1) the Apex Court has held that the absence of injury on the private parts of the prosecutrix should not rule out her being subjected to rape. The said proposition of law is also followed by the High Court of Bombay in the matter of *State of Maharashtra* v. *Savala Sagu Kokare*, 1997 Cr LJ 786.

In the matter of *Sate of Maharashtra* v. *V. K. Jain*, (1990) I SCC 550: 1990 Cr LJ 889, while appreciating the evidence of the prosecutrix. The Apex Court has observed *vide* para 16 of the said matter as under :

> ".....Ordinarily, the evidence of prosecutrix must carry the same weight as is attached to an injured person, who is a victim of violence; unless there are special circumstances; which call for greater caution, in which case it would be safe to act on her testimony; if there is independent evidence lending assurance to her accusations...."

Furthermore; the Apex Court has also observed in the above stated matter that evidence of prosecutrix should be judged in the back-drop of the particular fact-situation in which, she was placed. Absence of resistance by the prosecutrix is required to be viewed in the context of the sense of owe attached to the authority and her helplessness. Generally, an Indian woman would not make false allegations of rape against any person, so as to attach stigma to her character and disrepute to her family. *Dilip* v. *State of Gujarat* 1999 Cr LJ 704 (Guj).

12. Duty of Court.—The Court, while convicting and sentencing the accused under Section 376, IPC, should avoid to mention of the victim in judgment. *Rasik Khan Asgar Khan* v. *State of Gujarat*, 2005 Cr LJ 1284 : 2005(30) Guj LH 601 : 2005(1) Guj LR 913 : 2005(2) Rec Cri R 694.

Trial in cases of Rape—Duty of Courts. Rape is not merely a physical assault – it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. *Raju vs. State of Madhya Pradesh*, AIR 2009 SC 858 : 2008 (15) SCC 133 : 2008 (12) JT 457 : 2008 (16) SCR 1078 : 2008 (15) Scale 375 : 2009 (2) SLT 41.

13. Interrogation of victim.—Interrogation of victims, orphan girls of an Ashram in women police station to erase fear psychosis is not breach of Section 160, Cr PC as it was only for their safety and to serve interest of justice. *Kamalanatha* v. *State of T.N.*, 2005 (3) East Cr C 78 (SC) : AIR 2005 (SC) 2132 : 2005(5) SCC 194 : 2005(5) SCC 194 : 2005(4) JT 170 : 2005(4) Supreme 501 : 2005 SCC (Cr) 1121 : 2005(3) Crimes 24 (SC).

14. Rape and Murder — Evidence.—In the present case where the deceased girl aged 3 years was complained to be missing. Her dead body was found by a young girl in the sugarcane crop. Two little boys informed grandmother of deceased and the family that on 23rd October 1995, while they were burning crackers on the road, they had seen the accused carrying a bag on his shoulder and they had noticed blood dripping from the bag. She, therefore, went to the police station and lodged First Information Report. The High Court disbelieved the evidene of these two child witnesses but the Apex Court observed and held as under : "Even otherwise, their evidence is supported by a number of other circumstances which have been proved by the prosecution. These two child witnesses had seen the respondent going beyond the canal. The dead body was found beyond the canal. They had seen the respondent carrying a jute bag. Next to the dead body a jute bag had been found. It was stained with human blood of group 'B'. In the house of respondent the ground had been found to be freshly covered with cow dung. On the wall of the house, on a newspaper and a quite found in the house, there were blood stains. The blood stains on the newspaper were of group 'B'. At the instance of the respondent his full pant and underwear were recovered from the sugarcane field where he had buried them. They also contained the blood of group 'B'. All these circumstances clearly and unerringly pointed to the guilt of the respondent. These circumstances strongly lend support to the evidence of the two child witnesses. The High Court has wrongly ignored and/or brushed aside these circumstances." *State of*

Maharashtra v. Bharat Fakira Dhiwar 2002 Cr LJ 218 (SC) : AIR 2002 (SC) 16 : 2002(1) Crimes 164 (SC).

Doubtful evidence — Rape and murder. What has been stated above relating to the law on circumstantial evidence, only question to be examined is whether the presence of the injuries on the accused can be held to be sufficient to hold appellant guilty. The trial Court held that the accused was examined on 24.03.1993 by the doctor PW. 3 who found abrasions on the thighs and hip joints of the accused, as the injuries must have been received in a scuffle. This circumstance found supported from the finding of chappals and other articles. It was held that recovery of utensil and chappals of the deceased does not lead to the guilt of the accused but that circumstances show the involvement of the accused who was found to have injuries on the persons corresponding with the injuries on the deceased. The High Court noted as follows :

> "In our considered view, a very strong circumstance which connects the appellant with the commission of offence is the presence of injuries on his person especially thigh and hip joints."
>
> "This certainly is a very strong circumstance which by itself can be said to be conclusive in its nature pointing towards the guilt of the accused."
>
> "The recovery of chappals, Dolu (steel container) and certain other articles from the fields of the appellant speak volumes of the fact of a strong corroborative circumstance against the appellant."
>
> "The aforesaid strong circumstances can very well be taken in to account for upholding the conviction of the appellant."

Circumstances on which the trial Court and the High Court had relied to hold the accused guilty by no stretch of imagination can be determinative of the fact that accused was responsible for the commission of rape. Even if it is accepted that the chappals and the utensils were found in the fields of the appellant, the dead body was found by another place *i.e.* in the field of Sheo Ram.

Above being the position that the judgment of the trial Court affirmed by the High Court cannot be maintained and are set aside. The appeal is allowed. The appellant who is in custody shall be released forthwith unless required to be in custody in connection with any other case. *Baldev Singh vs. State of Haryana*, AIR 2009 SC 963 : 2008 CrLJ 948 : 2008 (14) SCC 768 : 2009 (2) SLT 243 : 2008 (15) Scale 366 : 2008 (16) SCR 826.

Circumstantial evidence — Chain of circumstances. In the instant case, the deceased went missing when she was playing near her house. Her naked dead body was found lying on public way in front of her neighbours house. She was found to be subjected to rape and died a homicidal death. The appellant accused was seen fleeing away from near the place where the dead body of the deceased was lying. Blood stained frock and blood stained underwear of the deceased concealed in the house of sister of the appellant were recovered pursuant to voluntary disclosure statement made by the appellant while in police custody. Underwear of the appellant seized during the course of investigation was found to be stained with blood and semen. The appellant evidence relating to extra judicial confession made by accused to Ex. Pradhan of village found to be reliable

Held, the cumulative effect of the above mentioned facts taken together is conclusive in establishing the guilt of the appellant. The chain of circumstantial evidence is complete and does not leave any reasonable ground for conclusion consistent with the innocence of the appellant. The chain of circumstances is such as to show that within all human probability the rape and murder of the deceased were committed by the appellant and none else and he had also caused disappearance of evidence of those offences. Further incriminating circumstances proved were put to appellant while recording his statement under Sec. 313 of Criminal Procedure Code. In his further statement, recorded under Sec. 313, the appellant has merely denied the same. Therefore, such denial on the part of the appellant and failure to explain the circumstances proved will have to be treated as an additional link in the chain of circumstances to bring home the charge against the appellant. The circumstances proved establish the guilt of the appellant beyond reasonable doubt. Therefore, conviction of accused not liable to be interfered with. *Aftab Ahmad Anasari vs. State of Uttaranchal*, AIR 2010 SC 773.

In the instant case, the deceased went missing in the evening of February 5, 1998 when she was playing near her house. Her naked dead body was found at about on Feb. 8, 1998 lying on public way in front of her neighbours house. She was found to be subjected to rape and died a homicidal death. The appellant accused was seen fleeing away from near the place where the dead body of the deceased was lying at about 4.30 a.m. on Feb 8, 1998. Blood stained frock and blood stained underwear of the deceased concealed in the house of sister of the appellant were recovered pursuant to voluntary disclosure statement made by the appellant while in police custody. Underwear of the appellant seized during the course of investigation was found to be stained with blood and semen. The appellant evidence relating to extra judicial confession made by accused to Ex pradhan of village found to be reliable.

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The prosecutrix, who was gang raped, gave statement to her mother that she was forcibly dragged inside a room by two accused persons and they also committed rape on her. The mother stated that the accused poured kerosene on the victim and set her on fire but in her cross-examination she stated that there was no kerosene oil in the room in which the accused dragged her daughter. Factum of rape on date, time and place alleged by the prosecution was established. But there was nothing to show that the mother tried to save her daughter. The condition of deceased was precarious but she was not taken to the hospital which was only at a distance of one furlong, though a number of persons were present in the house. The Court held that the circumstances lend support to the defence case that there was great probability of the deceased committing suicide. Conviction of accused under Section 302 and 34 was set aside and conviction under Section 376 was maintained. *Santosh Kumar v. State of U.P.* 2002 Cr LJ 301 (All) : 2001 All LJ 2581.

In *Sham Lal v. State of M.P.* the entire prosecution case hinged on circumstantial evidence consisting of following circumstances : (a) That the deceased was last seen with the accused who had taken her to his own house/Bada to help in collecting cow-dung cakes called kanda. (b) That on enquiry the accused gave false explanation that the deceased had gone to school. (c) That the trousers belonging to the accused was found on the body of the deceased. (d) That the blood-stained salwar of the deceased was recovered from the field of the accused in the wake of disclosure made by him in police custody; and (e) That presence of blood and human spermatozoa was confirmed on the clothes and public hair of the accused. The circumstance (a) appeared to be after thought. The circumstance (b) that the trousers belonging to the accused was found on the body of the deceased was not proved. Recovery of Salwar also led to no conclusion inasmuch as the same was recovered from an open Bada and on the basis of said recovery it cannot be said with certainty that it was the accused and he alone who knew about it. Again it appeared to be highly unnatural that the accused would leave his own trousers on the body of the deceased and take away her salwar and keep it in his own Bada. As regards stains of human blood on the shirt of the accused and stain of semen on his pubic hair, the Court held so far as the blood stains on the shirt are concerned, it may be stated that origin of the said blood and its group could not be ascertained. Mere presence of blood leads us nowhere as the evidence of blood group alone is conclusive to connect blood stains with the accused. As held in *Kansa Behera* AIR 1987 SC 1507 : 1987 Cr LJ 1857, no reliance can be placed on such circumstance. As regards the stains of semen on the pubic hair, we find that appellant Shyamlal is a young man of 18 years age. The semen stains on the private parts of a young man can exist because of variety of reasons and would not necessary connect him with the offence of rape.

The prosecution to support its case mainly relied on the oral dying declaration made by the deceased. The defence of the appellant was that the deceased and he were friends and they had love affair among them. The deceased came to his house on that fateful day. Some unknown person came and assaulted and suffered injuries. According to him deceased died on the spot itself. The brother of the deceased was not tolerant of the love affair between him and the deceased and that a false case was foisted against him after due deliberation and consultation. In the absence of explanation as to the serious nature of injuries sustained by the appellant giving rise to serious doubt as to the very genesis of the incident, the said portion of the statement appears to have been inserted after deliberation and consultation. This insertion probabilises the defence version that the appellant and the deceased were in love. The very fact that the deceased was totally naked and underclothes of both the deceased and the appellant were found in the same room probabilises the theory of intercourse by consent and negatives the story of rape. PW 5 did not tolerate his sister having sex with accused. *Ronal Kiprono Ramakant v. State of Haryana* 2001 Cr LJ 3942.

15. Evidence of deaf and dumb or mentally retarded prosecutrix.—In a case when rape was committed on a deaf and dumb child, the Court held that "a deaf and dumb person may utter something and if he utters something, it does not mean that he was not deaf and dumb. There are so many cases where deaf and dumb person speaks some words or makes other person understand by making gesture. Thus, if child prosecutrix has uttered something in Court, it does not mean that she was not deaf and dumb. Therefore, the testimony of the child prosecurtix which gets corroboration from other sources is reliable". *Bhagwania v. State of Rajasthan* 2001 Cr LJ 3719 (Raj.)

The instant case was an unfortunate case, where a helpless dumb child had been involved in such an act. The medical evidence clearly supported the version of the prosecution. It was true that except signs and gestures, victim was unable to explain further and the Court after taking necessary assistance was able to understand the evidence of dumb witness, well supported by the evidence of the prosecution witnesses and other witnesses. It was held that though victim was only a dumb witness, in view of the evidence available on record, the prosecution was able to establish the guilt of the accused beyond all reasonable doubt. *Devalla Raghavulu* v. *State of AP*, 2005 Cr LJ 1041 (AP) : 2005(2) Andh LT (Cri) AP 9 : 2005(2) Rec Cri R 344.

On a reading of Sections 4 and 5 of Oaths Act, the interpreter as well as the witness both have to be administered oath before the Court proceeds to record evidence of dumb-witness. The Court while resending the evidence of dumb witness must record both signs as well as the interpretation of the interpreter and then only it becomes admissible under the Indian Evidence Act. *D.A. Jakati* v. *State of Karnataka*, 2005 Cr LJ 2687 (Kant) : AIR 2005 Kant HCR 1289 : 2005(4) Crimes 382 : 2005(3) Rec Cri R 290 : 2005(2) KCCR 139.

16. Proof of Rape.—The cases involving sexual molestation and assault require a different approach - a sensitive approach and not an approach which a court may adopt in dealing with a normal offence under penal laws. It was also sought to be suggested that there were some disputes between the accused and the father of the prosecutrix over exchange of some land and that is the reason for their implicating the accused. There is nothing reliable on the records to substantiate that aspect. No such suggestion was even put in the cross examination of the father of the prosecutrix. On the facts in hand, it could not be said that the revenge on account of alleged dispute regarding exchange of land would be taken by the father of the prosecutrix by foisting on the accused a false case of rape involving this young daughter particularly in the setting of a village environment. *State of Rajasthan v. Om Prakash* 2002 Cr LJ 2951 SC : AIR 2002 (SC) 2235 : 2002(3) Crimes 386.

Hymen of the prosecutrix was intact. Perusal of the record would show that FIR was lodged by the prosecutrix herself on the date of the incident at the police station soon after the incident. When she was sent for medical examination, she again narrated rape on her by the appellant before the medical officer which finds place in her medical report. Thus, the testimony of the prosecutrix stands corroborated by her FIR and contents of medical report.

Cumulative reading of the aforesaid would prove beyond shadow of doubt that it was the appellant who had committed offence of rape on minor girl and had completely ravished her.

However, in the case in hand, even without the examination of doctor, the evidence of prosecutrix stands fully corroborated by the evidence of Sub-inspector of the police station who had virtually caught the appellant red-handed. Thus, even if doctor had not been examined it would not throw or completely discard the prosecution story. The evidence of prosecution witnesses is fully trustworthy and there is no reason to doubt genuineness thereof.

It was also contended by learned counsel for the appellant that since hymen of the prosecutrix was found to be intact, therefore, it cannot be said that an offence of rape was committed on her by the appellant. This contention cannot be accepted as offence of rape has been defined in Sec. 375 of the IPC. *Wahid Khan vs State of Madhya Pradesh*, AIR 2010 SC 1 : 2009 AIR SCW 7410 : 2010 CrLJ 517 (SC).

Allegation of rape of a girl of 8 years. Doctor found abrasion on the glans penis of the accused but no injury to prepuce. The doctor found that clothes of the victim were stained with blood and mud. She preserved the clothes and handed over the same to the police duly sealed. Blood stains were present on the inner side of thigh supra pubic region and perineum. Labia majora was swollen and stained with blood. There was laceration of right labia majora. This laceration was continued downward with the laceration of posterior commissure and perineum. The margin of the wound was swollen, tender and red on touch. Hymen was lacerated at 6' clock position. Edges of the wound were tender and read on touch. On pressing the abdomen a soft reddish clot came out of the vagina. *Bhupinder alias Mohinder Singh v. State of Haryana*, 2002 Cr LJ 1286 (P&H) : 2001(4) All Cri LR 460.

Where prosecutrix was subjected to forcible sexual intercourse and commission of rape was proved by medical evidence and the doctor stated that vagina was tender and from the report of chemical analyst, the smear taken from the vagina found to contain semen and spermatozoa which was also detected on her petticoat, it was clear that offense of rape was made out, conviction upheld. *Shaik Mehtab v. State of Andhra Pradesh*, 2002 Cr LJ 1421(A.P.) : 2001(2) Andh LT (Cri) AP 324.

Where it was not a case of abduction and kidnapping of Nitu by the accused, it is rather a case of Nitu's eloping with the accused, if were not a case of her willingly eloping with the accused, she could have raised hue and cry when she was being taken in a rickshaw to bus stand, Gurgaon. She could have raised hue and cry when she was being taken from Gurgaon to Delhi by bus. She could have raised hue and cry when she was being taken from Gurgaon to Delhi by bus. She could have raised hue and cry when she was being kept in a room at Delhi when other rooms adjoining to that room were in occupation of the people who were residing there. She could have raised hue and cry when she was being kept in a room at Delhi when other rooms adjoining to that room were in occupation of the people who were residing there. She could have raised hue and cry at Bus Stand, Delhi when the accused were proposing to take her to Rai Bareilly. *Chand and Another v. state of Haryana* 2002 Cr LJ 752 (P&H) : 2002(1) All Cri LR 397.

17. Statement of Prosecutrix.—*(a) Proof of Rape and Murder.*—It is true that no sign of rape was found by the doctor conducting post-mortem of the deceased but the statement of Km. Anita deceased given to her mother shows that she was forcibly dragged inside a room by two accused persons and they also committed rape on her.

The manner in which rape was committed on her there could be no apparent sign of rape. However, Dr. S. K. Rai (P.W.4), who conducted post-mortem on the dead body of the deceased has mentioned that hymen had old tear scars and vagina allowed 2 fingers. Dr. Rai has clarified in his cross examination that admitting of two fingers into vagina and tearing of hymern would have been for other reasons such as illness or use of insertion of pad etc. Post mortem report indicates that on account of burn injuries and the condition in which the body was produced before the Doctor it was not possible to detect apparent signs of rape. *Santosh Kumar and etc. v. State of U.P.* 2002 Cr LJ 301 (Allah.) : 2001 All LJ 2581 : 2001(43) All Cri C 888.

Accused took prosecutrix to a school on pretext of giving toffee and raped her. Prosecutrix being a young girl aged 8-9 years at time of incident it is extremely unlikely that she would make false allegation of rape against accused who was residing in same locality. Plea of false implication on account of quarrel with parents of prosecutrix over parking of vegetable carts.

It is by now settled proposition of law by a catena of decisions of the Hon'ble Supreme Court, including *Rafiq vs. State of U.P*, 1980 CriLJ 1344 = AIR 1981 SC 559 and *Bhoginbhai Hirjibhai vs. State of Gujarat* AIR 1983 SC 753 = 1983 CriLJ 1096, *State vs. Chandra Prakash*, AIR 1990 SC 658 = 1990 CriLJ 889, and also the decision in the case of *Radhu vs. State of MP*, AIR 2007 SC (Supp) 847 relied upon by the learned counsel for the appellant herself that conviction in a case of rape can be based solely upon the uncorroborated evidence of the prosecutrix, which should not be rejected on the basis of minor discrepancies and contradictions, unless there are such facts and circumstances present in a particular case which would persuade the Court to look for corroboration for her testimony. In the present case, there are no such circumstances as would justify looking for the corroboration of the testimony of the prosecutrix. The Court cannot treat the testimony of the prosecutrix in a rape at par with that of an accomplice in a crime which requires corroboration and no infirmity is attached to the testimony if a victim of such a heinous crime. In fact, it would only be adding insult to the injury if the Court insists on corroboration of her testimony, even in the absence of circumstances which would warrant adoption of such a course of action.

In any case, even if the Court does look for corroboration of the testimony of the prosecutrix, the same is available in abundance in the present case. The testimony of the prosecutrix, finds full corroboration not only from the injuries, including torn vagina found on her person when she was examined in the hospital but also from the statement made by her first to her parents and then to the doctor soon after this incident took place. The previous statements of the prosecutrix are admissible in evidence under Section 157 of the Evidence Act and this proposition of law was recognized by the Hon'ble Supreme Court in *Madan Lal vs. State of J & K*, AIR 1998 SC 386 = 1998 CriLJ 667, where the statement made by the prosecutrix to her mother soon after the incident was accepted as a corroboration of her testimony in the Court.

The appellant had raped the prosecutrix taking advantage of her tender age and taking her to a secluded school which had no watchman and, therefore, he has rightly been convicted under Section 376(f) of Indian Penal Code the age of the prosecutrix at the time of commission of offence being less than 12 years. *Hari Om vs. State (NCT)*. 2010 (2) CrLJ 1281 (Delhi).

Where victim girl was between 18 to 19 years, and according to her she left the house at her own will on the pretext that she was going to her friends home and the accused took him from one place to other and she never raised objection, however she stated that she was raped against her will, was sufficient for conviction of the accused. It was contended that the victim was the consenting party and she was major as well as the doctor did not find any sign of rape and as such the offence under Section 376 of the Indian Penal Code is not made out. It is also argued that the victim girl was under menstrurating period and so the question of rape does not arise. It is also the question of rape does not arise. It is also argued that the brother-in-law and one Bapi had gone to Calcutta to trace out the girl, so there was no possibility for the appellant to commit rape on her. The submission of the learned counsel have got no substance in view of the fact that the victim girl very consistently and emphatically stated about committing rape forcibly which finds support from the evidence collected as the victim was kept confined in the room for such a long period. *Ranjeet Lohra v. The State of Bihar*, 2002 Cr LJ 329. (Jhar.) : AIR 2002 Jhar HCR 33.

Where Eight year old girl was raped and throttled to death which was proved by medical evidence and there were semen stains on private parts of the accused absence of injury mark on the private part of the accused will be of no consequence. Prosecution case is afflicted infirmity which the court below seems to have ignored or attached no due importance thereto, Dr. Patidar (PW 25) besides performing autopsy of the body of the deceased had also examined appellant accused Shyamlal. He has clearly opined that accused appellant is a fully developed man capable of committing sexual intercourse. However, he did not find any mark of injury on his private part. Rape in question was committed on a girl aged 8 years who was virgin and whose hymen was intact. Normally, when such a girl is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man. No such injury was, however, detected by the Doctor on the male organ of the appellant. "Absence of such injuries." observed the Supreme Court in Rahim Beg (AIR 1973 SC 343, "on the male organ of the accused would thus point to his innocence." The FSL Report revealed no stains of blood or semen on the stray on which the alleged rape was committed, therefore guilt of the accused was not established beyond reasonable doubt. *Shyamlal v. State of M.P.* 2002 Cr LJ 344 (MP).

(b) Circumstantial Evidence.—The accused, a labourer alleged to have committed rape on a 3 year old girl whose father was employed for some construction. It was also supported by medical evidence. It is well-established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person's conviction, if it is of such a character that the same is wholly inconsistent with innocence of the accused and is consistent only with his guilt. The incriminating circumstances for being used against the accused must be such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. In a case of circumstantial evidence, the whole endeavour and effort of the court should be to find out whether the crime was committed by the accused and the circumstances proved from themselves into a complete chain unerringly pointing to the guilt of the accused. If the circumstances proved against the accused in a case are consistent either with the innocence of the accused or with his, guilt, he is entitled to the benefit of doubt. *Subhash v. State of Haryana.* 2002 Cr LJ 398 (P & H).

Circumstantial evidence—Last seen evidence.—In last seen theory, an element of identification is an important and strong factor. If either of the party i.e., culprit or the victim was not identified by a witness of lastly seen saying that they were in the company of each other, the circumstance of last seen fails because in that case it would not be established by the prosecution that who accompanied whom. If in a case based on last seen together, the identity of the culprit or the victim is doubtful or is not established beyond reasonable doubt, the circumstance shall not be held to be proved and the conviction based on such circumstance cannot be sustained. In the present case, the prosecution has failed to prove that it was the deceased who was accompanying the accused on his bicycle on the fateful day. Therefore, the guilt of accused was not proved beyond all reasonable doubt and he was entitled to get benefit of doubt. *Sheo Kumar v. State of Chhattisgar*, 2009 CriLJ 3165 (Chha).

In the instant case, the deceased went missing when she was playing near her house. Her naked dead body was found lying on public way in front of her neighbours house. She was found to be subjected to rape and died a homicidal death. The appellant accused was seen fleeing away from near the place where the dead body of the deceased was lying. Blood stained frock and blood stained underwear of the deceased concealed in the house of sister of the appellant were recovered pursuant to voluntary disclosure statement made by the appellant while in police custody. Underwear of the appellant seized during the course of investigation was found to be stained with blood and semen. The appellant evidence relating to extra judicial confession made by accused to Ex. Pradhan of village found to be reliable

Held, the cumulative effect of the above mentioned facts taken together is conclusive in establishing the guilt of the appellant. The chain of circumstantial evidence is complete and does not leave any reasonable ground for conclusion consistent with the innocence of the appellant. The chain of circumstances is such as to show that within all human probability the rape and murder of the deceased were committed by the appellant and none else and he had also caused disappearance of evidence of those offences. Further incriminating circumstances proved were put to appellant while recording his statement under Section 313 of Criminal Procedure Code. In his further statement, recorded under Section 313, the appellant has merely denied the same. Therefore, such denial on the part of the appellant and failure to explain the circumstances proved will have to be treated as an additional link in the chain of circumstances to bring home the charge against the appellant. The circumstances proved establish the guilt of the appellant beyond reasonable doubt. Therefore, conviction of accused not liable to be interfered with. *Aftab Ahmad Anasari vs. State of Uttaranchal*, AIR 2010 SC 773.

In the instant case, the deceased went missing in the evening of February 5, 1998 when she was playing near her house. Her naked dead body was found at about on Feb. 8, 1998 lying on public way in front of her neighbours house. She was found to be subjected to rape and died a homicidal death. The appellant accused was seen fleeing away from near the place where the dead body of the deceased was lying at about 4.30 a.m. on Feb 8, 1998. Blood stained frock and blood stained underwear of the deceased concealed in the house of sister of the appellant were recovered pursuant to voluntary disclosure statement made by the appellant while in police custody. Underwear of the appellant seized during the course of investigation was found to be stained with blood and semen. The appellant evidence relating to extra judicial confession made by accused to Ex pradhan of village found to be reliable.

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From evidence on record, the following circumstances have surfaced :—

1. The deceased was missing from 3/3.30 p.m. of 11.12.2002;
2. She was last seen with the appellant in the counter of his studio, which was adjacent to his residence;

3. She was wearing a pair of silver bangles (churi) and jangia (panty);
4. Earlier also, she used to visit the said tenanted premises and meet the appellant, whom she called 'Kaku' (uncle), who was well-known to the deceased;
5. The accused procured a carton from the witness, in the morning the day the said deceased disappeared;
6. The dead body of the deceased was found folded in the said carton;
7. In the said carton, along with the dead body, a piece of check cloth (Lungi) and a part of the newspaper (Dainik Sambad), dated 16.09.2002, was found;
8. The bangles (Churis), which the deceased used to wear, were not available with the dead body;
9. Similar/identical portion of the cloth, which was found with the dead body, was also recovered from the studio of the accused by the police, on being produced by him, in presence of witnesses;
10. The other part of the said newspaper was recovered from the studio of the accused on being produced by him, before the police, in presence of witnesses;
11. The bangles (churis), which were used by the deceased immediately prior to her disappearance and which were not available with her dead body, came to be recovered from the studio of the accused on being produced by him, before the police, in presence of witnesses. The said seized bangles were identified to be the bangles used by the deceased;
12. The deceased sustained injury on her vagina, causing destruction of hymen and making an opening into the abdominal cavity, through which loops of small intestine protruded out. This injury, in the opinion of the Medical Officer, was caused due to forceful penetration of adult erect penis;
13. All the injuries were ante-mortem and there was no post-mortem injury;
14. There was some nail marks on the cheeck of the deceased due to smothering;
15. The death, in the opinion of the Medical Officer, who performed, the autopsy, was caused due to combined effect of asphyxia caused by smothering and shock as a result of penetration of the penis causing the injuries, above mentioned;
16. Post-mortem examination was done at 1.15 p.m. on 13.01.2003. The deceased was missing from 3/3.30 p.m. of 11.12.2002. The approximate time of death, with variation by few hours, as per the medical evidence, was 54 to 60 hours. From 3 p.m. of 11.12.2002 to 1 p.m. of 13.12.2002, there was a time gap of around 46 hours. As there cannot be any definite opinion regarding the exact time of death, the said medical opinion indicates that the victim died around 3/3.30 p.m. or immediately thereafter i.e. after she was seen with the appellant in his studio.

In the case of *Sarad Birdhichand Sarda vs. State of Maharashtra*, AIR 1984 SC 1622, the Supreme Court, while discussing a few decisions on the nature, character and essential proof required in a criminal case, which rests on circumstantial evidence and also referring to the most fundamental and basic decision of the Apex Court in *Hanumant vs. State of Madhya Pradesh*, AIR 1952 SC 343 = 1953 Cri LJ 129 = 1952 SCR 1091, laid down the following golden principles, which were termed as Panchashil :

(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must' or 'should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahebrao Bobade vs. State of Maharashtra*, AIR 1973 SC 2622 = 1973 Cri LJ 1783 = 1973 (2) SCC 793, where the following observations were made :

"certainly, it is primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(ii) The fact so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(iii) The circumstances should be of a conclusive nature and tendency.

(iv) They should exclude every possible, hypothesis except the one to be proved and,

(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused".

The circumstances, as revealed from the evidence on records, must form a complete chain pointing to the guilt of the accused to the exclusion of any other hypothesis. Keeping in mind the said principles of law, laid down by the Apex Court, we deem it appropriate to examine if the circumstances emerging from the evidence on record constitute a complete chain leading to the conclusion not consistent with the innocence of the accused.

In the light of specific medical evidence regarding rape and in view of the evidence that the accused was a full grown adult person, his non-examination by medical officer and non-forensic examination of the wearing apparels of the deceased were not fatal. The said Medical Officer ruled out that forceful penetration on a 7 years minor would always cause injury to the penis. He also made it clear that spermatozoa can be detected only in respect of living female within 48 hours and that as the dead body had already started decomposition he made to report regarding presence of spermatozoa. There is also clear medical evidence to show that there was penetration of male genital organ into the vagina of the deceased. Therefore non-forensic examination of the wearing garments of the deceased and non-medical examination of the apparels was not fatal to the prosecution. Hence, we do not find force in the contention of the learned defence Counsel on this point.

Regarding the last seen theory also, there is the unimpeachable evidence of witnesses. There is nothing to hold that the said witnesses had any reason or grudge to falsely depose against the accused. From their evidence, it appear that the said witnesses had their shops in front of the studio of the appellant and that the said studio was visible from their respective shops. They are found to be natural witnesses. No contradiction could be established to be lie their evidence. Hence, we find sufficient positive evidence that the accused and the deceased were seen together by. There is nothing on record to show that after the deceased was seen with the accused, she was found with any other person. Hence, we do not find substance in the contention that the evidence, regarding last seen theory, was false and concocted.

It is the natural instinct of a person to try to save himself, as such, in the present case also, the accused, after committing the death of the deceased, in the alleged manner, tried to dispose of the dead body by putting the same in the carton with a view to remove the evidence against him.

This case does not fall within the category of "the rarest of the rare case". Therefore, in our view, it is not a case, where extreme penalty of death should be imposed. We have no hesitation in holding that imposition of punishment of rigorous imprisonment for life would be sufficient to meet the ends of justice. Accordingly, the death penalty is commuted to rigorous imprisonment for life. The appellant, therefore, instead of being awarded the death penalty, is hereby sentenced to undergo imprisonment for life for the offence under Section 302, IPC. *Samir Bhowmik vs. State of Tripura*, 2010 (3) Cri LJ 3018 (Gau).

(c) Proof of Gang Rape.—Allegation that victim was girl of 16 years, and was lured abducted and subjected to gang rap age of the girl proved not below 16 years, there was no violence or injury mark on the body and private parts of prosecutrix. Therefore it was case of sexual intercourse by consent.

It is also really surprising, as it appears from the own evidence that she never disclosed to Sushanta with whom she stayed for 15/ 16 days about her forcible rape by Haradhan who according to prosecutrix raped her twice. Firstly, when she initially went with Sushanta from Mela on being asked to follow her at dagger point, Haradhan joined Sushanta and after talk with him as Sushanta went a little away, Haradhan committed rape on her and again for second time he forcibly raped her in the house of Shillong Mog, P.W. 9, during the absence of Sushanta that also for a considerable time, according to the prosecutrix, but it would have been accepted as quite natural if she would have mentioned about such forcible rape on her by Haradhan to Sushanta. The story narrated by the prosecutrix clearly depicts that she did not put any resistance to such action rather she enjoyed such coitus. *Shri Sushanta alias Tutun Chakraborty alias Bhattacharjee etc. v. State of Tripura*, 2002 Cr LJ 195 (Guj.) : 2002(1) Gau LR 400.

Once it is found that version of the prosecutrix is worth reliance, then it goes without saying that the offence of rape is duly proved. *Balaji Laxman Itkar and Anr. v. State of Maharashtra*, 2008 CriLJ 3224 (Bom).

Accused persons compelled prosecutrix to enter inside structure called Khooni Darwaja and robbed her and thereafter appellant accused raped her by stripping her and continuously threatened her with knife. Testimony of prosecutrix, truthful and reliable.

The injuries on the body of accused MLC have not been explained by accused and the said injuries also suggest that accused had knelt on a hard surface and had pressed his knees. This would have happened if accused either exercised by shifting his weight on his knees or indulged in sexual intercourse with a girl lying below. The injury on the right cheek of accused has not been explained by him.

The report shows that the DNA fingerprint isolated from the blood sample of accused matched the fingerprints isolated from the sanitary pad.

This Court need to note no further *qua* his involvement in the crime of criminally intimidating prosecutrix using a knife to rob her and thereafter raping her. *Amit vs. State*, 2010 (3) Cri LJ 3154 (Del).

The question of identification is, to our mind, the determining factor in this case. In the FIR the prosecutrix has named four of the accused as having committed rape on her, they being Nandoo, Bindu, Pintoo and Raju. PW. 8, who was unsure, as to the identity of the accused, however, stated that she knew Nandoo, Pyaru, Pawan, Pintoo and Raju but conceded that she had not known any of the accused at the time of the incident but after the police had enquired about the names of the boys in her presence, she had come to know who they were. It is also significant that the Court had recorded a note that even after she had named the five accused she had been able to identify only Pawan and she had not been able to identify any of the other accused. She also stated that some of the boys had been arrested on the day of the incident and that she had been called to visit the police station several times to identify them and that the police had often threatened her and her daughter that if they did not come to the police station they would file a case against them. In the last paragraph of her examination-in-chief PW. 8 clearly stated that she was not in a position to identify the boys at the time of incident or even in Court. It is significant that the prosecutrix, her mother and all the accused were residents of Ruabandha and as per the prosecutrix's evidence she was aware of the identity of only a few of them whom she had named in the FIR. It is also significant that in her examination-in-chief the prosecutrix stated that at the time when she had been taken away on the Luna she did not know the names of the accused who were taking her away and that she was not personally acquainted with any of the boys at the time of incident and did not know their names and was not in a position to recognize them. In paragraph 46 of the evidence, this is what she had to say :

> "Police personnel had taken me to Police Station at about 2.30 O'clock in the night. Immediately after lodging the report there, they came at the place of occurrence taking me there and had got identified the accused persons having taken them out of their houses. Then the police personnel had taken the accused persons also at the Police Station. In that night nine boys had been brought having arrested. Remaining five boys had been brought by the police on the second day. I had identified those also in the Police Station.
>
> After arrest of nine-ten boys, they had taken near the house where incident had taken place and they had asked to identify the remaining boys. Then I had identified 4-5 boys from that crowd. I had gone to the Police Station having sit in Daga with all those boys. Witness now states that 2-3 boys had been arrested from the houses, remaining 6-7 boys had been arrested from Dance site, remaining 4-5 boys had been brought having arrested on the second day.
>
> I had not gone to the houses of the boys for identification. Police personals had called them in the hotel and I used to identify them there."

We are of the opinion that in the light of the categorical statements of the two main prosecution witnesses, the identification of the accused is extremely doubtful. *Raju vs. State of Madhya Pradesh*, AIR 2009 SC 858 : 2008 (15) SCC 133 : 2008 (12) JT 457 : 2008 (16) SCR 1078 : 2008 (15) Scale 375 : 2009 (2) SLT 41.

Accused persons allegedly took victim away and committed rape on her. The evidence of victim to the aforementioned extent is cogent and convincing and has been corroborated by her brother who not only is a witness of the events which took place immediately prior to the actual occurrence of rape but also a witness to the scene of occurrence where he found his sister lying naked in an unconscious state.

The material objects were found to have semen stains. The accused were also tested as regards proof of potency and the doctors who examined them categorically came to the conclusion that they were not incapable of committing sexual intercourse. There may be some inconsistency as pointed by Mr. Viswanathan with regard to recovery of the clothes or sending the same for chemical examination, but our findings on the aforementioned grounds, in our opinion, are sufficient to prove the common intention on the part of accused. *Viswanathan and Ors. v. State, Rep. by Inspector of Police, Tamil Nadu*, AIR 2008 SC 2222 : 2008 (6) SCR 1222 (SC) : 2008 (5) SCC 354 : 2008 (5) JT 629 (SC) : 2008 (6) Scale 462 (SC) : 2008 (4) SLT 795 (SC) : 208 (6) SRJ 41 (SC) : 2008 (2) SCC (Cr) 593 : 2008 (2) Recent CR 888 (SC).

The learned State Counsel has, however, placed special emphasis on the fact that the underwear handed over by the accused to the Investigating Officer were found by the chemical examiner to be stained with semen which corroborated the prosecution story. In the light of the fact that we have found the identification of the accused to be doubtful, the recovery of the underwear becomes meaningless. But we have nevertheless chosen to examine this submission as well. In this connection, we have gone through the evidence of Durga Prasad Shukla PW. 10, the Investigating Officer. We notice that the underwear of some of the accused had been produced by them on 29.12.1986 whereas the remaining accused had likewise produced their underwear on 02.01.1987. We find it some what difficult to believe that the accused had themselves provided the evidence of having committed rape soon after the incident, and even more surprising, that some of them had done so three days after the incident. The recovery of the stained underwear is a factor which, by itself, cannot support a case of rape against the accused. *Raju vs. State of Madhya Pradesh*, AIR 2009 SC 858 : 2008 (15) SCC 133 : 2008 (12) JT 457 : 2008 (16) SCR 1078 : 2008 (15) Scale 375 : 2009 (2) SLT 41.

Common intention. A bare reading of Section 375 makes the position clear that rape can be committed only by a man. The section itself provides as to when a man can be said to have committed rape. Section 376(2) makes certain categories of serious cases of rape as enumerated therein attract more severe punishment. One of them relates to "gang rape". The language of Sub-section (2)(g) provides that "whoever commits gang rape" shall be punished *etc*. The Explanation only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape within this Sub-section (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The Explanation only indicates that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape. By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. "Common intention" is dealt with in Section 34 IPC and provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. "Common intention" denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character, but must be actuated by the same common intention, which is different from same intention or similar intention. The *sine qua non* for bringing in application of Section 34 IPC that the act must be done in furtherance of the common intention to do a criminal act. The expression "in furtherance of their common intention" as appearing in the Explanation to Section 376(2) relates to intention to commit rape. A woman cannot be said to have an intention to commit rape. Therefore, the Counsel for the appellant is right in her submission that the appellant cannot be prosecuted for alleged commission of the offence punishable under Section 376(2)(g). *State of Rajasthan vs. Hemraj*, AIR 2009 SC 2644 : 2009 (12) SCC 403 : 2009 (2) Crimes 332 (SC) : 2009 (6) JT 87 : 2009 (6) SCR 1123 : 2009 (6) Scale 586 : 2009 (3) Supreme 698.

Accused persons raped a girl aged 14 years. After going through the entire prosecution case, Court finds that the evidences of witnesses have fully supported the prosecution case that in the night of occurrence when the victim had gone out of her house for easing and coming back to her house she was caught hold by the accused. Bablu Singh alias Surya Deo Singh of Rehla committed rape upon her by force. Doctor has also found that the victim girl was a minor aged about 14 years and there was sign of rape. She had external injury on her hand and back which she had alleged was caused when by force the accused threw her on the ground and committed forceful rape, then she received injuries on her back and hand. The doctor also found injury on her private part, which was caused by forceful penetration by erected penis.

The Investigating Officer has also supported the prosecution case and as such, in my opinion, the learned trial Court rightly convicted the appellant, Bablu Singh alias Surya Deo Singh of Rehla.

However, as far as the appeal filed by co-accused is concerned, the informant has only alleged that he was present with the main accused, there is no allegation that he also instigated co-accused to commit rape upon the victim girl, nor he touched her or even attempted to commit any offence against her as per her statement when the main accused after closing her mouth dragged her to the field behind the wall of Mahabir Sao. He did not go behind him rather he stayed in the lane. There is no allegation that even after the occurrence when was giving threat to the victim girl, he simply went away. In that view of the matter, there is no allegation of either committing rape or helping the main accused in committing rape only because he was standing in the lane. The victim, thought that he was guarding the occurrence. *Bablu Singh alias Surya Deo Singh and Anr. vs. State of Jharkhand*, 2010 (1) Cri LJ 622 (Jhar).

18. Plea of alibi.—Where *alibi* pleaded by accused, supported by evidence of defence witnesses was not considered by trial Court while convicting accused on the basis of suspicion, on proved facts the High Court rightly set aside conviction of accused. *State* v. *Shyam Raj*, 2004 CrLJ 377 (SC) : 2003(4) Crimes 410 : 2003(8) JT 287 : 2003(11) SCC 207 : 2004 SC CriR 1205 : 2004 SCC (Cri) 79 : 2003(7) Supreme 669.

19. Probation.—Where there was appeal by state for enhancement of sentence which was also against acquittal under Sections 376 and 406. In absence of medical evidence to substantive charge of rape or any mark of resistance finding of acquittal not to be lightly interfered. Conviction under Section 498-A maintained and as factum of dowry demand not corroborative, benefit of Section 4 of Probation of Offenders Act extended. *Radha Through State* v. *Khajan Singh*, (1995) 1 CCR 104 (Raj).

20. Acquittal.—When there was carnal intercourse and rape leading to—Murder—Conviction under Section 376, IPC was challenged in appeal. The case rested only on circumstantial evidence. Except the circumstance that deceased was last seen in company of A-1 nothing more was established. Hence prosecution failed to establish the guilt of the accused for all alleged offence. Acquittal. *Pillai, Vittal* v. *State of A.P.*, (1995) 2 ALT (Cr) 23 (AP).

House trespass and rape. Brother-in-law entered house of victim lady and committed rape on her. There was some dispute with appellant and prosecutrix with regard to partition of family properties. Medical evidence does not support her version that appellant raped her. Further no sign of any injury of any kind was found on her person. Prosecution tried to exaggerate and develop story from one stage to other and further delay of 11 days in lodging FIR was not explained. Held, therefore appellant is entitled to be acquitted. *Elbish Guriya vs State of Jharkhand*, 2010 (4) CriLJ 4014 (Jhar).

Two eye-witnesses examined by the prosecution who happen to be the brother and the friend of the deceased did not support the prosecution version and resiled from their statement made during investigation. Therefore, the residual question is the acceptability of two dying declarations. The trial Court did not place any reliance on the dying declarations.

The discrepancy pointed by the trial Court is that in Exh. PD there is mention about one incident of rape on her on 28.07.1989 in a hotel at Sector 22 Chandigarh by Honey and two other accused. She does not state in the dying declaration in Ex PJ that she was raped on July 17th and stated that accused Honey had simply taken her to Rose Garden. In Exh. PJ she does not mention the date of the first incident as July 17th but states that her friend Rajni was also with her and they were taken to some unknown hotel while Honey raped her and accused Longoal raped Rajni. She also did not mention the second incident to have taken place on 28th July and stated that it was 2/3 days ago and not yesterday, when the boys took them to a hotel in Sector 22 and raped them. There are several inconsistencies and contrediations in the Exh. PD1 and PJ1.

Above being the position, when two Courts on analysis of the evidence found the respondents not guilty, there is no scope for interference in this appeal. The reasons indicated by the trial Court and affirmed by the High Court discarding the two dying declarations do not suffer from any infirmity. The appeal fails and is dismissed. *State of Punjab vs. Chatinder Pal Singh*, AIR 2009 SC 974 : 2008 (16) SCR 23 : 2008 (15) Scale 359.

Where the appellant, a police constable alleged to have committed rape on minor girl of 16 years age while in police custody—Report lodged after two days. Prosecutrix not narrating incident to her parents next day when she met them. This being most unnatural. Another by present in same room where incident occurred not examined and her statement not corroborated. Conviction of appellant not sustainable. *Baburao Ramdas Padgil* v. *State of Maharashtra*, (1995) 4 Crimes 15 (Bom) (DB).

In a case, it was alleged that the accused took the victim to a sugarcane field and ravished her and then fled away. Evidence showed that there was long standing enmity between accused and the prosecution witnesses in the case were interested witnesses. Medical evidence did not show any injury of violence on her person or any injury on her private part. The conviction of evidence was set aside. *Bodho Sah* v. *State*, 2003 Cr LJ 4215 (Jhar) : AIR 2003 Jhar HCR 1162 : 2003(2) Crimes 151 : 2003(2) JCR Jha 213 : 2003(2) JLJR 316.

Where just after alleged incident of rape, prosecutrix went to village Mukhiya to report instead of going home then in absence of any medical evidence to suggest that rape was actually committed, accused acquitted. *Banarasi Singh* v. *State of Bihar*, 2005 Cr LJ 1532 (Jhar) : AIR 2005 Jhar HCR 241 : 2004(1) East Cri C 364.

There was delay in lodging FIR and victim had not suffered any bodily injury. The victim had raised the alarm only after accused went away from her house. It was held that prosecution had failed to prove its case beyond doubt and acquittal of accused was proper. *State of Karnataka* v. *Masitta P.P. Soopi*, 2004 Cr LJ 44 (SC) : AIR 2004 (SC) 85 : 2003(4) Crimes 191 : 2003(8) SCC 202 : 2004 SC Cri R 1056 : 2003 SCC (Cri) 1977 : 2003(6) Supreme 968.

The appellant was alleged to have committed rape on prosecutrix in the night in her house. Evidence showed that both were neighbours and appellant was paralysed from both his lower limbs and could not stand or walk without support. Looking to the disabled condition of appellant it was clear that his act of intercourse with prosecutrix was a consenting act. The conviction was held not proper as prosecution had failed to prove its case beyond reasonable doubt. *Bhan Singh Lodhi* v. *State*, 2003 Cr LJ (NOC) 287 (MP) : 2003(1) Jab LJ 310 : 2003(2) MPHT 170.

The accused allegedly raped & killed his own daughter of 6 years of age, but investigation was tainted as extra-judicial confession of accused was result of manipulation and creation of investigation officer to fix criminal liability upon accused. It was held that guilt was not proved beyond doubt and conviction was not proper. *State* v. *Rewa Singh*, 2003 Cr LJ NOC 235 (P&H) : 2003(1) P&H 180.

In an Orissa case, woman was habituated to sexual intercourse. No mark of injury was found on her person. Medical and chemical examination report also did not support testimony of prosecutrix. Prosecutrix did not shout for help nor sent words to her husband immediately after incident. It was held that accused was entitled to benefit of doubt. *Sania Jani* v. *State*, 2004 Cr LJ 226 (Orissa) : 2003(2) Crimes 449 : 2003(25) OCR 433 : 2003(1) Orissa LR 569.

Where accused, who was less than 15 years of age on date of commission of rape on minor girl then his conviction upheld but sentence imposed set aside. *Golam Mustafa Laskar* v. *State of W.B.*, 2005 (3) East Cr C 32 (Cal) : 2005(2) All Cri LR 350 : 2005(1) All Cri LR 350 : 2005(1) Crimes 685 : 2005(1) Cal HN 184.

It was alleged by the prosecutrix that she was raped by the accused on threat of putting her parents to death. The accused was tenant in her house and she complained to her mother after he had left the place. The statement of prosecutrix was held unreliable and, therefore, accused was acquitted on benefit of doubt. *Devanand* v. *State (NCT of Delhi)*, 2003 Cr LJ 242 (Del) : 2003(102) DLT 708 : 2003(66) DRJ 703 : 2003(1) Rec Cri R 771.

The incident had taken place in Jawar field but none of standing crop was disturbed although whole drama lasted for one hour. Except evidence of victim no other supporting evidence was available and medical evidence of very weak nature indicated that only minor injury on leg of victim was caused and that was not connected with sexual assault. It was held that prosecution version was unreliable and acquittal of accused was proper. *State* v. *Basappa*, 2003 Cr LJ 4146 (Kant); *Dukhharan Mandal* v. *State*, 2003 Cr LJ 4248 (Jhar) : AIR 2003 Jhar HCR 1264 : 2003(3) East Cri C 269.

The accused allegedly raped an aged lady while she was returning to her sasural with her child. He confessed his crime when two lathi blows were given to him. It was held that confession would be said to have been obtained under threat of assault and pressure and accused was entitled to acquittal as no woman of matured age could easily be overpowered and raped without any protest. *Malindo Marandi* v. *State*, 2003 Cr LJ 4431 (Jhar) : AIR 2003 Jhar HCR 1264.

Except prosecution statement that she was raped forcibly against her will no other corroborative evidence was available. There was no sign of injury on person of prosecutrix and three was 3 or 4 days unexplained delay in filing of FIR and no seizure of garments was effected. It was held that no conviction could be based on unreliable solitary statement of prosecution. *Jogi Dass* v. *State*, 2004 Cr LJ 1926 (Raj).

Where there was conviction under Section 376 and sentenced to 7 years RI and fine of Rs. 1,000/-. Appeal under Section 374, Cr.P.C. which was challenged of.—The prosecutrix stated that the accused persons was not the offender but on further questioning, she pointed him as such. She was declared hostile No identification parade was arranged. Such vacillating statement does not inspire confidence. Hence, conviction is set aside. *Kishore Singh* v. *State of Rajasthan*, 1994 Cr LR (Raj) 537.

Where the charge was of committing rape when prosecutrix was alone in the house and was convicted under Section 376, IPC and sentenced to rigorous imprisonment for 10 years. Revision petition was filed.—The prosecutrix was below 16 years. The medical evidence not supporting case of rape. The complaint was written by prosecutrix herself immediately after incident with details and particulars which suggests it was written after full deliberation. There was no evidence to prove that the accused has committed rape hence, entitled for acquittal and is acquitted. *Sundaram* alias *Balasundaran* v. *State*, 1994 Cr LJ 2490 (Mad).

The accused who was in love with prosecutrix, raped the accused due to some difference. The prosecutrix was also in love with accused. Letter written by prosecutrix to the accused showed that the prosecutrix was forced to file complaint against the accused. The accused was assaulted by the cousin before the incident and former had filed complaint against the later. There was discrepancy in statement of prosecutrix and her cousin brother and medical report did not support the prosecution case. It was held that the accused was entitled to acquittal. *Teenu Kanta Vardhan* v. *State*, 2003 Cr LJ (NOC) 175 (AP) : 2003(1) ALD (Crl) 906 : 2003(2) Andh LT (Cri) AP 490.

The prosecutrix was allegedly raped by the respondent in whose flat she was working as a domestic maid. Evidence showed that she did not lodge FIR soon after the incident nor made any hue and cry at the time or after the occurrence of the incidence. The prosecutrix also had taken bath and washed her clothes knowing it well that this would cause disappearance of evidence of rape. The acquittal of accused on these facts was held proper as conduct of prosecutrix was unnatural and her testimony being uncorroborated was unreliable. *Vimal Suresh Kamble* v. *Cheluverapinake Apal, SP*, 2003 Cr LJ 910 (SC).

The accused forcibly took the girl to the field, raped her and strangulated her to death. The witnesses were not reliable as they had not stated about basis of prosecution case in their statements. The possibility of false implication of accused was not ruled out and conviction was set aside. *Munesh* v. *State*, 2004 Cr LJ 1529 (All) : 2004 All LJ 432 : 2004(13) All Ind Cas 803.

It was alleged that the accused took to one house and forcibly raped her. Medical examination report showed no visible mark of external or internal injury. There was no evidence on record to show correctness of version of prosecutrix. It was held that the conviction of accused was not proper. *Gulab Jharia* v. *State of MP*, 2005 Cr LJ (NOC) 254 (MP) : 2005 Cir R (SC & MP) MPJ 325 : 2005(4) Cur Cri R 193 : 2005(2) MPHT 366.

There was property related dispute between husband and wife who had tried to falsely implicate the husband on charge of raping his own daughter. It was seen that wife with collusion of daughter wanted to compel accused husband to part with money he had received by selling certain portion of his estate. The acquittal of accused was held proper. *State* v. *PA Bidappa*, 2004 Cr LJ (NOC) 37 (Kant) : AIR 2003 Karn HCR 52 : 2003(4) KCCR 2888.

It was alleged by the prosecutrix that the accused gagged her mouth with a towel and raped her. In the cross-examination the doctor stated that the prosecutrix was habituated for sexual intercourse. There were no marks of violence in or around the external genitals or redness around the external genitals. There were no injuries on thigh, back, legs, face, chest *etc.* The Doctor did not find and physical signs of rape. There was no other evidence to corroborate version of the prosecution. The accused was held entitled to benefit of doubt. *Anmula Raji Reddy* v. *State of AP*, 2005 Cr LJ 220 (AP) : 2005(3) Cur CriR 135 : 2005(3) JKJ 351.

Held, The accused is alleged to have dragged the prosecutrix. This is only fact against him which does not find place in FIR. Hence conviction set aside. *Jhadi* v. *State of M.P.*, 1995 Cr LR 219 (MP).

Where the intention was to deceive victim girl—Accused sexually exploited victim and was caught red handed—Accused promised to marry her—But on coming to know that victim was pregnant, he failed to keep promise—Hence subsequent conduct of accused makes it clear that only to escape from punishment he promised to marry her and it exposes his *mens rea* that his promise was false to his knowledge. Conviction under Section 417 upheld though acquitted for offence under Section 376. *John Bosco* v. *State*, (1995) 2 LW (Cr) 661 (Mad).

Where the trial for offence was under Section 376, IPC—Prosecution case fraught with numerous lacunas—Trial resulting in acquittal—Appeal against acquittal was filed. It was held that no interference is permissible. *State of H.P.* v. *Parma Nand*, (1995) 1 Crimes 479 (HP).

The accused was alleged to have raped a minor girl of 12 years and made a confessional statement before the Magistrate when brought from police custody. The doctor who examined the victim girl and accused did not find any injury on private parts of both of them. The accused was a poor illiterate man his statement was recorded in printed form and signature of accused was obtained. It was held that the order of conviction was liable to be set aside. *Shri Lalhunpuia* v. *State of Mizoranm*, 2004 Cr LJ 3447 (Gau) : 2004(2) Crimes 165 : 2004(3) Gauhati LR 196 : 2004(3) Rec Cri R 205.

The statement of the prosecutrix that the accused did something to her which he ought not to have done is not sufficient for conviction for the offence of rape. Conviction not justified. *State of Karnataka* v. *Sureshbabu Puk Raj Porral*, 1994 Mad LJ (Cr) 185 (SC) : (1994) 1 SCC 468 : 1994 SCC (Cr) 435 : 1994 Cr LJ 1216 : AIR 1994 SC 966.

Delay in FIR was not fully explained—No mark of injury on prosecutrix—Underwear not removed as prosecutrix stated—Incident at shopping centre—Conviction was not fully held justified—Fit case for acquittal. *Balwan Singh* v. *State of Haryana*, (1994) 2 CC Cases 322 : (1994) 2 RCR 142 : (1994) 2 Recent Cr R 359 (P & H).

Prosecutrix stated that she had been paid rupees 50/- on earlier occasions by the accused and she also had taken tea with him but she never stated that she was forcibly raped by the accused. The father of the prosecutrix discovering that she was involved with accused after due deliberations had lodged report implicating him. It was held that prosecutrix being married, medical evidence was of no relevance and it was unsafe to rely upon the testimony of prosecutrix to convict the accused. *Mohan Lal* v. *State of Rajasthan*, 2003 Cr LJ 862 (SC) : AIR 2003 (SC) 698 : 2003(2) Crimes 501 : 2003 SCC (Cri) 1383 : 2003(2) East Cri C 144 : 2003(2) Rec Cri R 782.

Identity of accused was not established and the prosecution failed to produce record relating to the Test Identification parade. The prosecutrix failed to give features enabling identification of accused. Medical evidence was also not conclusive as to offence. Moreover, evidence of investigating officer and that of father of prosecutrix was contradictory on the point of notice of Test Identification parade. Conviction of accused was set aside. *Shailesh Dharmaji Wahane* v. *State of Maharashtra*, 2005 Cr LJ 274 (Bom) (NOC) : 2006 All MR (Cri) 103: 2005(4) Mah LT 758.

The prosecutrix while working as maid servant had stolen Rs. 7500/- from accused's house and when accused recovered money from her house she filed rape case against her. Evidence in the case was discrepant as no door was broken and no positive sign of rape was detected in medical examination. The conviction of accused was set aside. *Bhola Ram Tewari* v. *State*, 2003 Cr LJ (NOC) 175 (AP) : 2003(1) ALD (CRL) 906 : 2003(2) Andh (Cri) AP 490.

The evidence of victim does not prove the guilt of the accused, the trial court was justified in rendering the verdict of not guilty. The finding was neither perverse nor unreasonable. *State of Karnataka* v. *H.B. Devidas*, (1995) 1 ALT (Cr) 291 (Karn).

In a case the accused was charged only for offence of murder. There was no evidence to than that accused had committed rape on victim. Even charge under Section 376 was framed. It was held that the accused could not be held guilty of rape. *Jaggit Singh* v. *State of Punjab*, 2005 Cr LJ 955 (SC) : AIR 2005 (SC) 913 : 2005(1) Crimes 259 : 2005(1) Scale 368.

The doctor has deposed that the vaginal smear does not disclose presence of semen and that no definite opinion could be given about rape. Further no other injury was found on person of prosecutrix. Hence conviction under Section 376, IPC cannot be sustained. *Papuria* alias *Rajesh* v. *State,* 1995 Cr LR 258 (Raj).

Appeal against acquittal. Accused lifted victim, a minor handicapped girl on her request in getting down to ground floor and took her into his house, laid her on a cot and committed rape. There is every possibility of these witnesses to get down from the upstairs through the stair case to watch television, was unable to get down from the stairs because of physical incapacity i.e. right leg and right hand were affected with polio. At that time, the accused came there and child witnesses requested him to take her to the ground floor, but the accused after taking her by physically lifting to the ground floor, taken her inside his house and committed rape on her. There is a ring of truth in the evidence of other children coupled with the objective findings in the observation report. When child witnesses was taken inside the house, there will be curiosity for the other children to see what was happening inside the house. Admittedly, wooden door planks have not been fixed to the door frames, but only curtains were fixed. When such is the case other children peeped through the curtain by pushing the curtain slightly aside and witnessed the incident, cannot be ruled out.

Testimony of child witnesses that accused removed his lungi and laid on victim girl after lifting her skirt. Is truthful and corroborated with medical evidence. In view of the above discussion, this Court has no hesitation in holding that there was no appreciation of evidence at all by the trial Court and that the prosecution proved its case against the accused beyond all reasonable doubt of the offence punishable under Section 376, IPC. Therefore, the impugned judgment is liable to be set aside. *The Public Prosecutor, High Court of A.P., Hyderabad vs K. Venkateshwarlu,* 2010 Cri LJ 1568 (AP).

Accused took prosecutrix, passed through various erowded and public places during day time to house of co-accused persons and ruped her.

From Kasauli upto Patiala she passed through various crowded and public places during day-time. She could have easily raised hue and cry on the way attracting public attention. Importantly, as per her deposition threats were meted out by accused only till the time they reached Patiala. At least thereafter, as per her own admission that she was free to move in and out of the house, she could have contacted people in the colony or made a phone call to her parents or relatives at Kasauli, disclosing her whereabout. This was not done so. She could have conveniently slipped out of the house and returned to her house or at least gone to the local police station for help. She knew accused since long and it appears to be a case of prosecutrix having voluntarily left with him from Kasauli and be with him thereafter.

Farther prosecution fail to prove that the prosecutrix was under eighteen years of age at time of incident. Delay in registration of FIR not explained. Sole testimony of prosecutrix was not reliable and hence acquittal of accused persons is proper. *State of H.P. vs. Narender Kumer @ Hira,* 2010 (3) CriLJ 3545 (HP).

21. Benefit of doubt.—When all prosecution witnesses turned hostile—There was not a fringe of evidence against petitioners—Petitioner was given benefit of doubt.—The term 'benefit of doubt' used in impugned judgment quashed since such rider is tantamount to abuse of the process of court. *Santosh Das* v. *State of Rajasthan,* 1995 Cr LR 436 (Raj).

Where there was deliberate improvement in the prosecutrix version and possibility of making the accused a scape goat not ruled out.—Accused was held entitled to benefit of doubt. *Ashok Kumar* v. *State of M.P.*, (1995) 1 CCR 444 (MP).

There were no mark or injury on person of prosecutrix. The hymen was torn with old tear and was not redish. There was no report of chemical examiner on record regarding *shalwar* of prosecutrix. Hence accused entitled to benefit of doubt Acquittal. *Sadhu* v. *State*, 1995 (32) ACC 667 (All).

Where the conviction under Section 376 read with Section 511 for attempt to commit rape—Sole testimony of prosecutrix—Medical evidence not corroborating it—No injury marks on private part of prosecutrix's body—It tends to support defence version and presence of semen on pant of accused arrested after 12 days of incident cannot connect accused with offence.—Guilt of accused not established beyond reasonable doubt.—Hence conviction set aside. *Mohan Shivaram Yadav* v. *State of Maharashtra*, 1994 BCRC 3 (Bom).

Prosecution story that both real brothers committed rape on prosecutrix one by one appears to be improbable—There was no immediate lodging of report—No medical examination of prosecutrix's private part—Incident of rape not narrated to doctor—Prosecutrix narrated incident to mother who then narrated to father—Mother not examined—Testimony of father is of no help to prosecution. Hence it was held that veracity of prosecution story doubtful. Conviction of appellants set aside. *Nankai* v. *State of U.P.*, 1994 ACC 176.

Where there was rape trial and was delayed in FIR—Prosecutrix statement before police and court being contradictory—Medical report was not proved.—Accused was held entitled to benefit of doubt. *Samlu* v. *State of Madhya Pradesh*, (1995) 1 CCR 386 (MP).

Where conviction was based on evidence of prosecutrix—Her evidence found highly unreliable—Absence of spermatozoa and injuries on persons of both prosecutrix and accused ruling out theory of forcible intercourse— Prosecutrix being married woman and grown up—Medical evidence not corroborating rape—Accused was held to be entitled to benefit of doubt. *Ram Nivas* v. *State of Karnataka*, 1994 SCC (Cri) 503 (SC).

Benefit will go to accused in absence of corroboration to offence of rape of married woman. *Ramcharan* v. *State of M.P.*, 1993 Cr LJ 1825 (MP).

Where testimony of victim and witnesses was not probable and deceased was present at some other place on date of occurance which took place 21 years ago. acquittal of accused was upheld. *State of Rajasthan v. Bhusa Ram*, 1997 Cr LJ 1073 (Raj).

Conviction for offence under Section 376, IPC—Prosecution withholding the evidence regarding the injuries found on the person of the accused, the complaint filed by his wife and the evidence of the family members of the accused which would be highly relevant in proving or disproving their, presence in the house at the relevant time. It was held that accused not undergone fair trial, resulting in failure of justice. Further held that prosecution has failed to prove the offence of rape against the accused beyond reasonable doubt hence conviction and sentence set aside. *Gulam Mohamed Mohamed Yusuf* v. *State of Gujarat*, (1995) 2 CCR 524 (Guj.) (DB).

22. Defence injuries.—Injuries caused while resisting the offender is commonly described as defence injuries. Much importance cannot be given to the absence of defence injuries, because it is not an invariable rule that in the absence of defence injuries the prosecution must necessarily fail to establish its case. Such a plea is often raised to prove that no occurrence at all took place, and at times the plea is raised to suggest consent on the part of the victim. So far as consent is concerned this is wholly irrelevant when the girl is hardly 9 years old. The existence of defence injuries on the person of the victim may go to support the case of the prosecution, if the other evidence on record points to the truthfulness of the prosecution case. However, in its absence, the prosecution may still be able to establish by cogent evidence on record, that the offence was committed. The absence of defence injuries has to be considered out in the facts and circumstances of the case and no invariable rule can be laid down. It may be that the victim may offer resistence and in that process some injuries may be caused to her. It may also be that the victim may be so shocked that she may not be able to offer resistance. The circumstances under which the offence is committed is also relevant and in many cases the victim may be under such imminent threat to her life that she may not be able to resist and in any event, finds resistance futile. The victim may be overawed by the physical strength of the offender and thus unable to resist him.

She may not even have the moral courage at times to resist the onslaught of the offender. All these factors have to be taken into account while considering the plea of absence of defence injuries on the person of the victim. In the case of a minor, who was hardly nine years old it cannot be said that she was in a position of equal strength so as to resist the accused who was a grown up young person. She may have been so shocked that she could not offer any resistence and was perhaps unaware as to what was going to follow, *Neyaz Ahmad* v. *State of Bihar*, 1999 Cr LJ 2550 (Pat).

Absence of injuries on her private parts—Effect.—Victim is married, grown up lady blessed with two children. One more aspect that requires our consideration is as to whether the medical evidence does not support the prosecution's case? The High Court rightly expressed its indignation as to the manner in which the trial Court completely misread the vital medical evidence. Dr. A. Chakraborty, (PW-8) examined the victim on 29.04.1984. On examination he opined that the victim is habituated to sexual intercourse and, therefore, could not express his firm opinion in his report about the commission of rape at the time of medical examination. But in the evidence he clearly stated after considering the report of FSL regarding stains on victim's clothing, that there is sufficient proof of recent sexual intercourse. The vaginal swab and smear were sent to Chemical Examiner. Based on the FSL report and the report of Serologist (Exhibit 7) he found that the semen was present in the vaginal swab of the victim. Court fail to appreciate as to how and in what manner the medical evidence supports the case of the defence.

The Counsel for the appellants however, submitted that the medical examination report of the victim shows that no injuries were found on her private parts or on any part of her body. Court is required to note that victim Sita Rani Jha is a married grown up lady and blessed with two children and in such circumstances the absence of injuries on her private parts is not of much significance. The mere fact that no injuries were found on private parts of her body cannot be the ground to hold that she was not subjected to any sexual assault. The entire prosecution story cannot be disbelieved based on that singular assertion of the Counsel. In this regard another submission was made by the Counsel for the appellants that the sexual intercourse, if any, was with the consent of the victim. According to him it was consensual sexual intercourse. This proposition canvassed for the first time across the bar is absolutely untenable and unsustainable. There is not even a suggestion made to the victim that she has consented to sexual intercourse. The sequence of events clearly apparent from the evidenced of witnesses, leading to the sexual assault completely rules out the possibility of consensual sex. Court has no hesitation to reject the submission. *Utpal Das and Anr. vs. State of West Bengal*, 2010 (3) CrLJ 2867 (SC).

23. Penetration.—Indications of broken bangles and injuries on hands of victim prove resistance by her and commission of rape against her consent. Mere penetration is sufficient for offence of rape. The evidence available on record and medical evidence clinchingly support that prosecution has proved the guilt of the accused beyond all reasonable doubt. Hence, conviction and sentence passed does not call for interference. *Guntuboyina Gangulu* v. *State of A.P*, (1995) 1 ALT (Cr) 323 (AP).

Hymen was intact. The mere fact that hymen was intact, would not by itself negative the commission of rape by the accused as tearing of hymen would depend upon the extent of penetration and force used while committing sexual assault. *Ramachandrappa v. State by CPI, Hiriyur*, 2007 CriLJ 3504 (Kar).

To constitute a rape there must be penetration. Appellant did not undress himself. Held, question of his male organ penetrating into the private part of victim did not arise. Hence offence of rape not made out. *Tika Ram Chettri vs State of Sikkim*, 2010 (4) CriLJ 4025 (Sikkim).

The absence of semen would not bring this case out of purview of rape which only defined that while doing actual sexual intercourse without the consent and against the will of prosecutrix only penetration in process is required. The same was proved through medical evidence and through statement of prosecutrix herself. Mere penetration amount to rape. Hence conviction and sentence does not call for interference. *State of H.P.* v. *Vijay Kumar*, (1994) 1 Sim LC 9.

When the charge was of committing rape on 6 years old girl—Conviction was challenged in appeal. The hymen of victim girl found intact and there were no injury on vaginal passage or place near about. Hence evidence makes story of penetration highly improbable conviction unsustainable. *Sahajan Khan* v. *State of Orissa*, (1994) 2 Crimes 203 (Ori).

In case hymen is not torn injuries on private part would be only trivial and hence from fact of absence of injuries rape could not be disbelieved. *State of Maharashtra* v. *Savala Sagu Kokare*, 1997 Cr LJ 786 (Bom).

Penetration—Sufficiency of. In 'Encyclopedia of Crime and Justice' (Volume 4, Page 1356) it is stated" . . . . . even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. *State of Madhya Pradesh vs. Sheikh Shahid*, AIR 2009 SC 2951 : 2009 (12) SCC 715 : 2009 (8) JT 277 : 2009 (5) SCR 1038 : 2009 (5) Scale 679 : 2009 (3) SLT 744.

Penetration—Male organ completely, partially or slightly. A bare perusal of explanation to Section 375 clearly shows that penetration is necessary to constitute the sexual intercourse to the offence of rape. In the absence of any penetration the offence would not fall within the four corner of Section 375 of the Indian Penal Code. However, it is not necessary that the entire sexual act should be completed. Mere penetration of the male organ within the private part of the woman with or without any emission of semen is sufficient to constitute a rape. Penetration of the male organ completely, partially or slightly would be enough to constitute an offence within the meaning of Sections 375 and 376 IPC. *State of H. P. v. Amrish Kumar*, 2009 CriLJ 2126 (HP).

24. Absence of dead or mobile spermatazoa in vaginal smears and slide.—In *State of Maharashtra* v. *Chandraprakash Kewalchand Jain*, (1990) 1 SCC 550 : AIR 1990 SC 658 : 1990 Cr LJ 889 relying upon medical evidence observed that spermatozoa can be found if the woman is examined within 12 hours after intercourse thereafter they may be found between 48 and 72 hours but in dead form. If the prosecutrix washes herself by then, the "spermatozoa may not be found. In that case the court after satisfying itself regarding the presence of semen on the clothes of the prosecutrix held that the absence of semen or spermatozoa in the vaginal smear and slides, cannot cast doubt on the creditworthiness of the prosecutrix."

Modi in his Medical jurisprudence and Toxicology has noted :

"The presence of spermatozoa in the vagina after intercourse has been reported by Pollak (1943) from 30 minutes to 17 days and by Morrison (1972) 9 days in vagina and 12 days in the cervix. However, in the vagina of a dead woman, they persist for a longer period". *State of H.P.* v. *Lekh Raj* 2000 Cr LJ 44 (SC) : AIR 1999 (SC) 3916 : 2000(1) SCC 247 : 1999(9) JT 43.

The presence of spermatozoa, dead or alive, would differ from person to person and its positive persence depends upon various circumstances. Otherwise also the presence or absence of spermatozoa is ascertained for the purposes of corroboration of the statement of the prosecutrix. If the perosecutrix is believed to be truthful witness in her deposition no further corroboration may be insisted Corroboration is admittedly only a rule of prudence. *State of H.P.* v. *Lekh Raj*, 2000 Cr LJ 44 (SC) : AIR 1999 (SC) 3916 : 2000(1) SCC 247 : 1999(9) JT 43.

25. FIR.—The subject regarding delay on lodging FIR has been dealt with by the Apex court in *State of Punjab* v. *Gurmit Singh*, (1996) 2 SCC 384 : 1996 AIR SCW 998 : AIR 1996 SC 1393 : 1996 Cr LJ 1728.

"........In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The Court cannot overlook the fact that in sexual offence delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the proseutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it cool thought that a complaint of the sexual intercourse offence is generally lodged.......The conduct of the prosecutrix in this regard appears to us to be most natural. The trial court overlooked that a girl, in a traditional bound non-permissive society in India would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination center under the circumstances cannot detract from her reliability. In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others overpowered by a feeling or shame and her natural inclination would be to avoid talking it to anyone, lest the family name and honour is brought into controversy." *See State of Karnataka* v. *Hanjanna*, 2000 Cr LJ 3471 (SC) : AIR 2000 (SC) 2231 : 2000(6) SCC 188 : 2000(6) JT 529.

Accused persons forcibly took prosecutrix from one place to another and raped her firstly in hotel and then in house.

As far as charge under Section 376 of IPC is concerned, the appellants are guilty even if they had sexual intercourse with the prosecutrix with her consent as the prosecutrix was less than 16 years old at the time when she was subject to sexual intercourse.

Whatever be the circumstances in which all the three came to stay in the same room, it is difficult to believe that the appellant Mohd. Imran Khan who was carrying an affair with the prosecutrix would have allowed his co-accused Jamal Ahmad a young man to stay alone with the prosecutrix in a hotel in the night. Once it is shown that both the appellants had stayed in the same room with the prosecutrix, it is difficult to accept that only one of them had sex with her. If either of them did not want to have sex with the prosecutrix, he would not have stayed in that room during the night. In any case, had the prosecutrix been subjected to sexual intercourse only by the appellant Jamal, she would not have implicated Imran, with whom she was friendly.

Mere delay in lodging FIR not fatal on facts and circumstances of case. Accused persons guilty of offence of rape even if they had sexual intercourse with prosecutrix with her consent as prosecutrix was less than 16 years old. *Mohd. Imran Khan & etc. vs. State*, 2010 (2) CrLJ 1756 (Delhi).

Sufficient reason. When FIR by a Hindu lady is to be lodged with regard to commission of offence like rape, many questions would obviously crop up for consideration before one finally decides to lodge FIR. It is difficult to appreciate the plight of victim who has been criminally assaulted in such a manner. Obviously prosecutrix must have also gone through great turmoil and only after giving it a serious thought, must have decided to lodge the FIR. Precisely this appears to be the reason for little delayed FIR. *Sohan Singh vs. State of Bihar*, 2010 (1) SCC 68 : 2009 (4) Crimes 116 (SC) : 2009 (13) JT 161 : 2009 (15) SCR 140 : 2009 (13) Scale 207 : 2009 (7) Supreme 4 : 2009 (8) SLT 78.

An uneducated rustic persons, did not complain about rape to doctor and instead complained only that she was assaulted.

The medical certificate granted by the Doctor suggests that the Hymen was torn at 6'O clock position and the rugosity was lost and that the Prosecutrix suggested that she was assaulted by Zindar Ali SK, about 6 months back. It is to be noted that the girl was produced for medical examination only on 08.08.2003. The Sessions Court, as well as, the High Court have rightly accepted the evidence of the prosecutrix.

We have seen that the prosecutrix has very specifically spoken about the rape. It is. undoubtedly true that the First Information Report in this case was lodged late. however, it has come on record that the prosecutrix had filed a petition under Section 156(3) of the Code of Criminal Procedure on 27.02.2003, on the basis of which, the direction was issued by the Chief Judicial Magistrate, Krishnagar, Nakashipara Police Station, for calling investigation into the said allegation. We fail to understand this unusual stance of police. They high handedly advised the Prosecutrix to "settle" the matter amicably. The High Court has, in our opinion, very rightly criticized that the First Information Report should have been registered only on 19.07.2003 and the direction issued by the Chief Judicial Magistrate, Krishnagar on 10.07.2003 should not have been followed for good long more than 17 days. All this, undoubtedly, resulted in the prosecutrix being sent for the medical examination only after 6 months of the offence. Very important evidence was, therefore, lost. However, the High Court came to the finding, on the basis of the evidence of PW-7 Dr. Roy and the evidence of the prosecutrix , that prosecutrix was subjected to sexual intercourse. We do not find anything wrong with that finding.

It is tried to be suggested that the girl did not complain about rape even to the medical officer PW-7 and instead, complained only that she was "assaulted", and that PW-7 had deposed that the tear was not injury, as there was no bleeding. We cannot forget that the girl is an uneducated rustic person, who had to work to sustain the family. It cannot also be ignored that she had disclosed the facts to her parents whose version has again gone unchallenged. She had also asserted that she had told about the rape in the Village Meeting which version was supported by her parents and other witnesses. Besides, her medical examination was conducted after 6 months of the incident. We would, therefore, choose to go on the basis of the evidence of the prosecutrix.

The shabby quality of investigation was severaly criticized by the learned Counsel. There can be no dispute that the investigation in this case is not at all satisfactory. There are discrepancies galore. However, in this case, the truthful version of the prosecutrix cannot be ignored. It is trite law that the defence cannot take advantage of such bad investigation where there is clinching evidence available to the prosecution as in this case. We, therefore, confirm the finding of the High Court that the accused is guilty of the offence under Section 376 of IPC. *Zindar Ali Sheikh vs. State of West Bengal*, AIR 2009 SC 1467 : 2009 (3) SCC 761 : 2009 CrLJ 1324 : 2009 (1) Crimes 315 (SC) : 2009 (2) JT 253 (SC): 2009 (1) SCR 968 : 2009 (2) Scale 248 : 2009 (1) Supreme 617.

The delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR. *State of Himachal Pradesh vs Prem Singh*, 2009 AIR SCW 105 : 2009 CriLJ 786 (SC) : AIR 2009 SC 1010 : 2008 (15) SCR 1058 (SC) : 2009 (1) SCC 420 : 2008 (5) Scale 132 (SC) : 2009 CrLJ 786 (SC).

There was delay in lodging FIR. There was no medical evidence to prove commission of rape. The prosecutrix imposed her statement and there was contradiction in her testimony. No offence under Section 376 was made out, but offence under Section 363, IPC was proved. Hence, conviction under Section 363, IPC was confirmed but sentence was reduced to period already undergone. *Ganesh* v. *State of Rajasthan*, 1995 R Cr C 250 (Raj).

Delay in lodging FIR. If the incident of rape was true and the complainant had the support of Laxman Sarpanch, he would have gone to police station to lodge the report soon after the occurrence, but after passing more than 50 hours, the complainant is found to have lodged the report with the police, whereas the distance between the place of occurrence and the police station is only 5 kms. The prosecution has utterly failed to furnish reasonable and satisfactory explanation of more than 50 hours inordinate delay in lodging the FIR. Hence, this delay is found to be fatal to the prosecution. *Ramdhan vs. State of Rajasthan*, 2010 (3) CrLJ 2652 (Raj).

Acquittal of the accused on ground that the girl failed to mention the precise time in FIR. Acquittal was not held justified. *State of U.P.* v. *Padam Singh*, (1995) 4 CCR 694 (All).

We find no merit in the submission made for the appellants that FIR was ante timed and brought into existence so as to falsely implicate the appellants. There is no reason to disbelieve the evidence of prosecutrix and her mother that attempts were made to lodge the FIR on the next day of the occurrence of the incident but the police did not co-operate and intimated any action. The attempt on the part of the police to protect the accused from day one of the occurrence is clear and obvious.

This Court, in exercise of its jurisdiction under Article 136 of the Constitution of India, does not act as a third appellate Court. Suffice it to hold that the verdict in the instance case did not result in any miscarriage of justice. The impugned judgment is not an erroneous one. Nor the judgment is vitiated on account of any error either in appreciation of evidence or application of legal principles. *Jaswant Singh & Ors. vs. State of Punjab*, AIR 2010 SC 894.

When there is unexplained delay of 9 days in lodging complaint and victim was desirous to marry one of accused and there are various infirmities in prosecution evidence, accused can be acquitted. *Shatrughan and another* v. *State of M.P.*, 1993 Cr LJ 120 (MP).

Delayed FIR does not necessarily indicate that prosecutrix's version is false. *Kamel Singh* v. *State of M.P.*, (1995) 3 Crimes 527 (MP).

A lady was brought to police station for investigation of a case against her on when rape was committed by its officer-in-charge on 27/28, October, 1980 but its FIR lodged on 4.11.1980. Delay in so doing remained unexplained. The accused was acquitted for want of substantiation of the charge. *Held*, an acquittal order did not call for interference. (1986) 2 Crimes 577.

Inconsistency in FIR and statement under Section 161, Cr PC and inherent defect in prosecution case do not attract conviction specially when victim is married woman. *Sanya* v. *State of Orissa*, 1993 Cr LJ 2784 (Ori).

Delay in lodging FIR—Contra. In normal course of human conduct an unmarried girl who is victim of sexual offence would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate such incident. Overpowered, as she may be, by a feeling of shame her natural inclination would be to avoid talking to anyone, lest the family name and honour is brought into controversy. Thus, delay in lodging the first information report cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same on the ground of delay in lodging the first information report.

In the instant case, the girl was a minor below the age of 16 years. She was studying in Class VIII and the accused was the drawing teacher of that class. It is no doubt true that the prosecutrix did not report the incident to anyone either on the first occasion or on the second. Ultimately a stage was reached when she could not keep it a secret since her mother discovered that she was pregnant. In these circumstances, she was compelled to disclose the true facts. Having regard to the facts and circumstances of the case, delay could not be treated as fatal to prosecution case. *Dildar Singh v. State of Punjab*, 2006 CriLJ 3914 (SC).

In the instant case the accused alleged to have committed rape on a girl of 11 years of age. Victim stated that due to fear she could not disclose about alleged rape to her parents or to police but nothing could be stated as to whether such threat was persisting all throughout. Father of victim, informant stated that he came to know about the alleged incident when accused himself disclosed about it in drunken condition. Informant further stated that he demanded some amount as compensation through a messenger from the accused and on denial of accused for the same he filed FIR. Alleged messenger denied his meeting with accused. The FIR was lodged after two years from date of alleged incident. Delay was not explained properly. Investigating Officer was not examined. Age of victim girl was also doubtful. In circumstances. her deposition before police about incident, could not be relied on. Said contradictions, in prosecution story would result in acquittal of accused. *Shri Vanalalbela v. The State of Mizoram*, 2006 CriLJ 1733 (Gau).

26. Consent.— In the context of Indian Culture, a woman-victim of sexual aggression would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent. Insofar as the present case is concerned, the circumstances referred to and pointed out by the learned Counsel are neither sufficient nor do they justify discarding the evidence of the prosecutrix. There is nothing on record that creates any doubt/disbelief or a suspicion about the evidence of the prosecutrix. In a case, such as this, where the prosecutrix was misrepresented by the accused that he would show her to his cousin (a doctor) as she was suffering from some throad pain and she accompanied him but the accused took her to other places and when it became dark, took her to a lonely place and committed sexual intercourse, the prosecutrix was not expected to put any resistance lest her life would have been in danger. In the facts and circumstances, the absence of injuries on the person of the prosecutrix does not lead to an inference that she consented for sexual intercourse with the accused. The young girl became victim of lust of the accused who was more than double her age and yielded to sexual intercourse against her will. *Rajinder vs. State of Himachal Pradesh*, AIR 2009 SC 3022 : 2009 CrLJ 4133 : 2009 (3) Crimes 222 (SC) : 2009 (9) JT 9 : 2009 (9) Scale 176 : 2009 (10) SCR 248 : 2009 (5) Supreme 233 : 2009 (9) SLT 361.

Willingly consented—Assurance of marriage. In the instant case admittedly the prosecutrix was a grown up lady and she was in love with the appellant and she without informing her parents and other persons, used to meet the appellant frequently for last few years at the lonely place and cohabited with him. The only question which needs to be considered is whether she has consented to sexual intercourse after giving assurance of marriage by the appellant to her or not. From scrutinizing the evidences of the witnesses including the informant on record and the contents of the Panchayati report, it is clear that they were in love and they used to meet often. There is no such evidence that the first act of the sexual intercourse was done after giving assurance of marriage by the appellant to the prosecutrix. It usually happens in such cases, when two young persons are madly in love, they make promises several times to get themselves married whatsoever obstacle may come in their way. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they in a weak moment, succumb to the temptation of haveing sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was in love, not because he promised to marry her but because she also desired it. In these circumstances it would be very difficult to impute to the appellant's knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.

Considering all these circumstances, we find that the prosecution has miserably failed to bring home the charge under Section 376, IPC against the appellant beyond all reasonable doubts. Therefore, we allow this appeal and set aside the judgment of conviction and sentence. *Supai Hansda vs. State of Bihar, now Jharkhand*, 2010 (3) Cri LJ 3359 (Jhar).

Mistaken belief. However, in such eventuality, prosecution should have pursued the trial on the basis that it was a case of mistaken belief, and should have been pursued it accordingly.

The assertion of mistaken belief cannot be pressed and pursued barely in the form of argument. There has to be a charge to that effect. It is not the case of the prosecution and it is apparent from the charge that the prosecution has proceeded on the basis or foundation that due to mistaken belief of the prosecutrix she had consented for sexual intercourse. *Anwar Khan Iqbal Khan vs. State of Maharashtra*, 2010 (3) CriLJ 3597 (Bombay) (Nagpur).

Consent of victim below age of 16 years—Immaterial. The prosecutrix in the present case was aged below 16 years of age at the time of incident of kidnapping and rape as deposed by her. The evidence of prosecutrix contained detailed history of events of rape and kidnapping and appears natural and truthful. It inspires confidence to believe that she was kidnapped and then sexually exploited and raped by the accused while she could not have validly consented for sexual intercourse with the accused. There is sufficient credible evidence to prove that prosecutrix was much below the age of 16 years at the time of incident and thus accused could not have claimed benefit of her alleged consent for his sexual advances towards her which resulted in crime of kidnapping and rape. *Govind Shripat Maraskolhe vs. State of Maharashtra*, 2010 (3) CriLJ (NOC) 1051 (Bom).

Victim a minor girl — Consent immaterial. When out of the two victims of rape, one of them is a minor girl, plea of consent would be unsustainable. The plea of consent is too shallow to even need detailed analysis or consideration. A minor girl cannot legally give a consent which would necessarily involve understanding of the effect of such consent. It has to be a conscious and voluntary act. There is a gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow, and mere act of submission does not involve consent. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress or impaired due to deficiency cannot be considered to be consent as understood in law. For constituting consent, there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the act. In the instant case, the faculty of the victims was clouded by fear and duress. Therefore, the contention with regard to the consent is not tenable. Even assuming that the victim was previously accustomed to sexual intercourse, that is not a determinative question. On the contrary, the question which was required to be adjudicated was did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any person to rape her. *Sarafat v. State of Uttaranchal*, 2006 CriLJ 654 (Uttaranchal).

Love. Appellant took away informant's daughter on allurement of solemnizing marriage and committed rape on her. Ocular evidence by witnesses and medical evidence fully supported version of victim girl. Victim and appellant were in love does not inspire confidence. Held conviction of appellant is proper. *Maheshwar Singh Munda vs State of Jhar-khand*, 2010 (4) CriLJ 4011 (Jhar).

For the offence of rape as defined in section 375 of the Indian penal code, the sexual intercourse should have been against the will of the woman or without her consent. Consent is immaterial in certain circumstances covered by clauses thirdly to sixthy, the last one being when the woman is under 16 years of age. Based on these provisions an argument is usually advanced on behalf of the accused charged with rape that absence of proof of want of consent where the prosecutrix is not under 16 years of age takes the assault out of the purview of section 375 of the Indian Penal Code. Certainly consent is no defence if the victim has been proved to be under 6 years of age. If she be of 16 years of age or above, her consent cannot be presumed, an inference as to consent can be drawn if only based on evidence or probabilities of the case. The victim of rape stating on oath that she was forcibly subjected to sexual intercourse or that the act was done without her consent has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable. *State of Rajasthan* v. *N.K.* 2000 Cr LJ 2205 (SC): AIR 2000 (SC) 1812 : 2000(3) JT 643 : 2000(2) Scale 652.

This Apex Court find that the High Court was justified in its conclusions about the prosecutrix having accompanied the accused on her own and being a consenting party to the sexual acts. As rightly contended by learned counsel for the State, if the age of the prosecutrix was below 16 years, the consent would be of no consequence But the High Court's findings as regards the age of the prosecutrix cannot be said to be without any basis. The High Court has analysed the oral evidence and the documentary evidence to come to a conclusion that the date of birth of the prosecutrix as claimed by the prosecution has not been established. Held, there was inconsistency in evidence of prosecutrix. She appeared to have accompanied accused of her own accord and she was a consenting party to sexual acts. That being so, we find no merit in this appeal which is accordingly dismissed. *State of H. P. v. Suresh Kumar @ Chhotu*, AIR 2009 SC 1109

Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between the resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. In the instant case there was clear credible incidence that she resisted the onslaught and made all horrible efforts to prevent the accused from committing rape on her. From the oral evidence of the prosecutrix, it was proved that the accused caught her from behind and he lifted her and pushed her down and despite her attempt to cover herself with the *salwar*, the accused pulled it down. She also stated that the accused gagged her mouth when she attempted to cry a loud. The subsequent conduct of the prosecutrix also showed that she was very much resistant to the sexual on slaught on her. She came to her father immediately and told the entire incident as to how she was ravished by the accused. The evidence as a whole indicated that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. The absence of nail marks or minor injuries on the body of the accused was held to be of not much significance. As the incident occurred on 17.4.93 and the accused was examined on 20.4.93, even if there were any marks of violence on the body of the accused the same would have been obliterated. *State of H.P.* v. *Manga Ram.* 2000 Cr LJ 4027 : AIR 2000 (SC) 2798 : 2000(7) SCC 224.

High Court says that "law is well settled that it is not possible for a single man to commit sexual inter course with a healthy adult female in full possession of her senses against her will". There is not even a single decision which says so. The presumptuous conclusion is that PW. 1 was an able bodied tribal lady capable of taking care of herself. On that basis the High Court has come to this conclusion is not fathomable. To add to the confusion the High Court itself noticed that there were two contradictory stands. One was that no such incidence had taken place and this was a case of false implication, other was that the act was with consent. Such irreconcilable stand should not have found favour with the High Court. The High Court observed that except PWs. 1 and 2, there were no other eye witnesses, and therefore, prosecution version was not acceptable. To say the least, the conclusion is not only contrary to law laid down by this Court, but also shows scant regard to law declared by this Court.

We would have set aside the order of the High Court and restored that of the trial Court. But it is considered appropriate to remit the matter back to the High Court to hear the appeal afresh for disposal of the same as the accused-respondent has not appeared before the Court in spite of notice, keeping in view the correct legal principles. *State of Orissa vs. Sukru Gouda*, AIR 2009 SC 1019 : 2009 (2) SCC 118 : 2009 CrLJ 831 : 2008 (13) JT 4 : 2008 (16) Scale 189 : 2008 (17) SCR 617.

Prosecutrix being 14 years of age—Her testimony corroborated on all material particulars—Prompt lodging of FIR and prompt medical examination proved offence. It was held that prosecutrix being below age of consent accused cannot escape liability of his guilt merely because of absence of marks of injury. *Held*, acquittal order not proper. Conviction by trial Court upheld. *(Km) Narayanama* v. *State of Karnataka*, (1994) 3 Crimes 286 (SC).

A minor girl was raped by the accused when she was alone in the house and fact come to the notice when girl became pregnant and was at its advance stage. The complaint was filed with the police when accused had refused to marry with prosecutrix. This was clear case of consent but consent was of no consequence for purposes of determination of guilt of accused. However it was considered to have some bearing on the quantum of sentence which was reduced. *Bandu Charandas Dighade* v. *State*, 2003 Cr LJ 1990 (Bom). *Raj Nath* v. *State*, 2003 Cr LJ 2056 (All) : 2003 All LJ 699 (ALU).

Where there was rape trial under Section 376 (1)—Presumption as to absence of consent for rape was not applicable. Further held, it is applicable only in special classes of rape under Section 376(2) clauses (a) to (g). *Sitaram Rameshwar Kewat* v. *State of M.P.*, 1995 MPLJ 1009 (MP).

Conviction was under Section 376 IPC—Prosecutrix willingly accompanying the accused/appellant—Appellant was willing to marry her. Action of appellant does not fall within the purview of crude act of rape. Consideration of mitigating circumstances calling for attenuation in accordance with first proviso to Section 376, IPC. Sentence reduced. *Joaquim Constantinho Carvalho* v. *State*, 1995 Cr LR 215 (Bom).

In the case of rape the medical evidence showed that there were no signs of rape on the victim and that she was habituated to sexual intercourse. The victim was found to be below 16 years. *Held*, that consent of such woman was wholly immaterial and furnished no defence. 1987 Cr LJ 212 (MP).

Prosecutrix's minority not proved—Offence of rape under Section 376, IPC not made out accused's conviction and sentence liable to be quashed and set aside. *Pradeep Ambadas Shinde* v. *State* of *Maharashtra*, (1995) 2 B Cr C 272 (Bom).

The absence of injuries on the person of the prosecutrix showed that the accused had sexual intercourse with the prosecutrix with her tacit consent. The medical evidence clearly disclosed that prosecutrix did not appear to have put up any resistance to the alleged onslaught committed on her by the accused. From this the only irresistible inference could be that the prosecutrix was a consenting party. *Inder Singh v. State of Rajasthan*, 2002 CrLJ 721 (Raj) : 2002(1) RajCriC 398 : 2002(2) RecCriR 428.

The girl was taken to tea shop and raped consecutively for three times. Evidence showed that after raping her for first time accused had gone out for two hours leaving the girl at tea shop but she did not tried to run away. She stayed there overnight and was raped twice again. She had not even taken permission of hostel warden before leaving the hostel. The victim was consenting party and accused was held entitled to acquittal. *State of Karnataka* v. *Shankarappa*, 2004 Cr LJ (NOC) 43 (Kant) : AIR 2004 Kant HCR 366 : 2004(3) All Cri LR 289 : 2003(10) All ind Cur 470 : 2003(4) KAR 2820 : 2004(2) Rec Cri R 30.

The accused taking the undue advantage of loneliness of victim who was accompanying him raped her whereas both were related to each other and victim was a married woman. There were no sign of injuries on any part of body of victim and medical evidence completely negatived the application of any force on her. It was held that prosecutrix seemingly was consenting party and the accused was entitled to acquittal. *Gokul* v. *State*, 2003 Cr LJ 1100 (All) : 2003 All LJ 138 : 2003(46) All Cri C 174 : 2003(1) All Cri R 386.

The accused committed sexual intercourse with a girl below sixteen years of age with her consent. It was held that consent in the matter was of no consequence as it was no consent. The conviction of accused for offence of rape was held proper. The offence under S/C and S/T (Prevention of Atrocities) Act was not established as evidence showed that accused had not committed sexual intercourse in order to take revenge on scheduled caste woman. *Hanmant Ramhari Godake* v. *State*, 2003 Cr LJ 4368 (Bom) : 2003 Att MR (Cri) 236 : 2003(3) Andh LJ 584.

Since no injury was found on person of prosecutrix by doctor though place of incident was ditch and also no blood stains were noticed on seized clothes, it creates serious doubts in prosecution case. *Udai Prakash Ojha* v. *State of Bihar*, 2005 Cr LJ NOC 53 (Jhar) : AIR 2005 Jhar HCR 206 : 2005(4) Crimes 438 : 2004(4) JCR JHA 192 : 2004(4) JLJR 303.

Where victim/prosecutrix raised alarm only after accused went away from her house, and no injuries found on her body to indicate any forceful assault on her, offence of rape committed by accused was not established. *State of Karnataka* v. *Mapilla P.P. Soopi*, 2004 Cr LJ 44 (SC) : AIR 2004 (SC) 85 : 2003(4) Crimes 191 : 2003(8) SCC 202 : 2004 SC Cri R 1056 : 2003(6) Supreme 968.

Where birth registration certificate issued by municipal corporation was duly proved and according to which prosecutrix was minor on date of incident therefore no question of her consent arises. *Rasik Khan Asgarkhan Pathan* v. *State of Gujarat*, 2005 Cr LJ 1284 (Guj) : 2005(30) All ind Cus 837 : 2004(3) Guj LJ 913 : 2005(1) Guj LR 913 : 2005(2) Rec Cri R 694.

The prosecutrix consented to sexual intercourse with accused under misconception of facts that he was a bachelor and would marry her. Thus consent of the prosecutrix was no consent in provisions of law. It was held that discharge of accused was not proper. *Renu Yadav* v. *Madhusudan Etawadi*, 2003 Cr LJ 250 (MP).

The accused expressed love and affection and promised to marry prosecutrix in order to get her consent for cohabitation. The victim was grown up and knew that their marriage was not feasible as they belonged to different castes but she started cohabiting with accused and became pregnant. Setting aside the conviction order of High Court it was held that accused was entitled to the acquittal as consent of prosecutrix was not given under misconception of fact. *Uday* v. *State of Karnataka*, 2003 Cr LJ 1539 (SC) : AIR 2003 (SC) 1639 : 2003(2) Crimes 176 : 2003(4) SCC 46.

The evidence in a Karnataka case showed that witness while passing through the way the door was locked from inside and there was complete silence and after sometime the accused was seen leaving the place. It was held that incident had taken place by consent and accused was entitled to the acquittal. *State* v. *H.D. Veeregowda*, 2003 Cr LJ 4762 (Kant) : AIR 2003 Kant HCR 2835.

In the present case, the accused allegedly entered the house of the prosecutrix at night and raped her. Testimony of the prosecutrix did not impose confidence and was self contradictory. There was no injuries on the person of the prosecutrix and, therefore, it could not be said that the prosecutrix had struggled to save the honour. She did not raise any alarm to attract the attention of nearby resident. It was held that the present case was with the consent of prosecutrix and, therefore, conviction of accused was held proper. *Vijay Kumar* v. *State of HP*, 2006 Cr LJ 412 (HP).

The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical exmination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. In *Sheikh Zakir* v. *State of Bihar* 1983 Cr LJ 1285, AIR 1983 SC 911 absence of any injuries on the person of the prosecutrix who was the helpless victim of rape belonging to backward community, living in a remote area not knowing the need of rushing to a doctor after the occurrence of the incident, was held not enough for discrediting the statement of the prosecutrix if the other evidence was believable. In *Balwant Singh* v. *State of Punjab*, 1987 Cr LJ 971 : AIR 1987 SC 1080, the Apex Court held that every resistance need not necessarily be accompanied by some injury on the body of the victim; the prosecutrix being a girl of 19/20 years of age was not in the facts and circumstances of the case expected to offer such resistance as would cause injuries to her body. In *Karnel Singh* v. *State of M.P.* (1995) 5 SCC 518 : 1995 AIR SCW 3644 : AIR 1995 SC 2472 the prosecutrix was made to lie down on a pile of sand. The apex court held that absence of marks of external injuries on the person of the prosecutrix cannot be adopted as a formula for inferring consent on the part of the prosecutrix and holding that she was a willing party to the act of sexual intercourse. It will all depend on the facts and circumstances of each case. A judge of facts shall have to apply common sense rule while testing the reasonability of the prosecution case. The prosecutrix on account of age of infirmity or overpowered by fear or force may have been incapable of offering any resistance. She might have sustained injuries but on account of lapse of time the injuries might have healed and marks vanished.

In a case as far as the evidence of the prosecutrix herself was concerned, it was beset with numerous flaws, inconsistency bordering on the line of falsehood and concealment of truth. In fact it gave a clear impression that she was a consenting party. It was clear from her evidence that the accused and prosecutrix were known to each other from childhood their wadis were adjacent to each other. There was no resistance from prosecutrix as per the deposition given by herself when the accused allegedly tried to have intercourse with her. As per her own version, nor was there any abrasion or scratches at any part of her body nor was there any injury on her private parts. Her clothes were not torn and she was not crying when she went home after the so called forcible intercourse. All those were indication of only one circumstance that she was a consenting party. She had also gone to the extent of saying that though accused used to have intercourse with her at one and the same place, she did not change her route after the first intercourse with her by the accused, and on the second occasion even when she had seen the accused she did not shout. The defence of the accused that as he was a well to do person from a rich family and the proseuctrix and her mother wanted her to get married with the accused was found probable. The accused was held entitled to acquittal. *State of Maharashtra v. Subhash Sitaram Sangare* 2001 Cr LJ 4468 (Bom).

The victim girl in another case was carrying four months pregnancy and accused was alleged to have promised to marry her. The consent of girl was meaningless as she was minor but acquittal of accused was also justified as he was a fourteen years juvenile. *Shabuddin Sheikh* v. *State*, 2004 Cr LJ (NOC) 26 (Jhar) : 2004 AIR Jhar HCR 109 : 2004(1) JCJR 140.

The accused committed rape by giving threat to kill her and other members of her family. When sexual relations between parties continue for sometime, the victim became pregnant. The accused assured to marry her but then refused. He pleaded consent of victim. It was held that there was no consent when sexual intercourse was committed for first time by giving her threats to murder her. The Trial Court was therefore, directed to proceed with the case in accordance with law. *Pinki Kumari* v. *State*, 2003 Cr LJ 4019 (Jhar) : 2003 AIR Jhar HCR 1126 : 2003(2) East Cri C 636 : 2003(3) JCR JHA 220.

The accused in a case took the girl with the consent of her mother for medical check up but committed the rape and left her alone at the lonely place. It was held that plea of consent was not admissible as there was no reason for the accused to leave the prosecutrix at the place of occurrence all alone. Conviction of accused was held proper. *Rajender* v. *State*, 2003 Cr LJ (NOC) 143 (HP) : 2002(3) Shim LC HP 141.

Where a minor girl was taken to a particular place at a point of dagger and subjected to sexual assault and she remained there for two nights, but did not make any noise, it was held that though she was a consenting party, being minor her consent was of no use and the accused was convicted. *Baida Ram* v. *State*, 2004 Cr. LJ 1923 (Jhar) : 2005 AIR Jhar HCR 1112 : 2004(1) East Cri C 643.

In an Orissa case, the victim was an able-bodied tribal woman aged thirty five years. The eye-witness proved that he found victim lying on ground and the accused on her. The witness said nothing about the fact whether victim was struggling or making any endeavour to dislodge. It was held that guilt of accused was not proved beyond doubt and he was entitled to accused. *Sukru Gouda* v. *State*, 2004 Cr. LJ 1566 (Orissa) : 2004(2) Crimes 55 : 2004(2) East Cri C 342 : 2004(1) Orissa LR 243 : 2004(3) Rec Cri R 168.

Bad character of the girl does not mean that she was a consenting party. *Public Prosecutor* v. *Badana Ramayya*, 2004 Cr. LJ 3510 (Mad) : 2004(1) ALD (CRL) 983 : 2004(2) Andh LT (Cri) AP 452 : 2004(4) Rec Cri R 766.

When testimony of prosecutrix inspiring confidence then its corroboration not necessary and it cannot be discarded on trivial grounds. *Shanabhai Madhavbhai Koli Patel* v. *State of Gujarat*, 2004 Cr. LJ 268 (Guj) : 2004(1) Guj LH 408.

Proof of sexual intercourse with consent—Presence of marks of violence will determine whether it was with consent or without consent—No internal examination done by doctor—No sign of external violence.—Thus it was not case of intercourse without consent. *Prahilad Nath* v. *State of Assam*, (1994) Gau LR 392 : (1994) 2 East Cr C 18 (Gau).

The probability of consent was ruled out of the simple reason that on medical evidence the prosecutrix was carrying 20 weeks pregnancy. She could hordly likely to take the adventure of having sexual intercourse in the field in the village of her parents with the accused that too in broad daylight. *Lakhan Singh* v. *State of U.P.*, 1999 Cr LJ 4087 (All).

Accused not raising the plea of prosecutrix consent—Trial court acquitting the accused on ground of consent—Acquittal order, was held to be perverse and appellate court can interfere. *State of M.P.* v. *Raju*, (1994) 1 CCR 432 (MP).

The prosecutrix crossed 16 years and consent was live issue. It was impossible to believe that she was not in the game. She played her role willingly and actively. Since she was all along a willing party the appellant sails through the ordeal unscattered. *Mahabir* v. *State*, (1994) 3 CC Cases 61 : (1994) 3 Recent Cr R 46 (Del).

The victim girl in her entire deposition nowhere complained to any body about commission of offence to her by the appellants. She was with the appellant for 15/16 days on being taken from one place to other place and during these period she had enough scope and chances to disclose about her plight to any person. From her own evidence it also transpired that she did never resist the intercourse with the appellants which would amount to a consent on her part. It was also deposed by her in her cross-examination that the appellant was known to her prior to the occurrence. He visited her house some times and also wrote letters. The entire conduct of the victim girl reflected that she was a consenting party to the entire episode. Further the medical evidence also lend credence to the fact that the prosecurtix was a consenting party and the appellants had not committed forcible sexual intercourse with her. *Shri Sushanta v. State of Tripura* 2001 Cr LJ 195 (Gau).

When victim was a minor girl at time of incident, there is no question of her being a consenting party to incident. *M. Ramachandran* v. *State of Kerala*, 1996 Cr LJ 3566 (Ker).

The very fact that the deceased was totally naked and underclothes of both the deceased and the accused were found in the same room probabilities the theory of intercourse by consent and negatives the story of rape. *Ronal Kiprono Ram Kant v. State of Haryana*, 2001 Cr LJ 3942 (SC).

Prosecutrix being consenting party and above 16 years of age, offence under Section 376, IPC not made out. *Anath Bandhu Kandu* v. *State of W.B.*, 1996 Cr LJ 3449 (Cal).

When rape without consent of prosecutrix and her abduction is established by the evidence, conviction is fully justified. *Ranvir Singh* v. *State of Madhya Pradesh* 1997 (2) East Cr C 273 (SC) : 1996(11) SCC 595.

The prosecutrix by the time of her evidence in Court gave birth to a child. She stated that the accused was the father of the child. The evidence of the prosecutrix was that the accused has procured her consent by telling/assuring that he would marry her and believing on the same she had submitted to sexual intercourse with him. It was held that "even if the accused—appellant had made false promise to marry her and whereupon she had consented to sexual intercourse with him, it would not vitiate her consent for the sexual intercourse which she had given fully understanding the nature and implication of the act involved therein." The court further held that it was not a case "where the girl had an misconception about the nature of the act which she consented. In the instant case, the prosecutrix fully knew that what they were going to commit was the act of sexual intercourse fully knowing the nature and implication of such act and when she was fully aware that the person concerned was not yet her husband even if he had proposed to marry her"—The court also held that "The conduct of the accused-appellant in betraying the prosecutrix after making her pregnant and hearing the son abandoned, no doubt is highly reprehensible yet with anguish. It must be held that such conduct by itself does not become a ground for holding the accused appellant guilty of the charge of rape under Section 376, IPC *Baldhari Ohdar* v. *State of Bihar*, 2001 Cr LJ 883 (Pat), *see* also *Sirdhamoy Nath* v. *State of West Bengal*, 1999 (2) Cr LJ 4482 (Cal). *Mir Wali Mohd* v. *State of Bihar*, 1990 (2) Pat LJR 375; *Jaynti Ram Panda* v. *State of West Bengal*, 1984 Cr LJ 1535 (Pat).

The important feature of the case is that the husband of the prosecutrix after entering the house did not straightway chase the accused. He first questioned his wife as to whether she had called him, and only after her stating that she had not called him and that he had forcibly raped her, he started chasing the respondent and caught him. This gain probabilises the fact that the husband also at least some suspicion about the nefarious activities of his wife, otherwise it would be quite unnatural for a husband asking his wife, even before attempting to catch the accused, as to whether she had called him, and whether the accused had sexual intercourse with her consent. *State of Rajasthan v. Kishanlal* 2002 Cr LJ 2963 SC : 2002 Cal Cri LR 633 : 2002(2) Crimes 401.

Absence of injuries itself on her person negatived the allegation of rape. The medical evidence clearly discloses that P.W.1 Smt. Haju did not appear to have put any resistance to the alleged onslaught committed on her by the accused. From this the only irresistible inference that can be drawn is that the prosecutrix was consenting party. Thus, from every point of view, the present case is not a case of forcible intercourse with P.W. 1 Smt. Haju or against her will, but it is a case of consent between the two. Hence, statement of P.W.1 Smt. Hajui does not inspire confidence on the point that the accused appellant committed rape with her as there is no there is no other corroboration to her as there is no other corroboration to her statement. Hence, findings of learned Sessions Judge Dungarpur by which he convicted the accused appellant for offence under Section 376 I.P.C. are liable to be set aside and the accused - appellant is entitled to acquittal and appeal of the accused-appellant is liable to be allowed. *Hurji v. State of Rajasthan*, 2002 Cr LJ 472, (Raj.); *See* also *Sukhbir Kabul Singh* v. *State of Haryana*, 2005 Cr LJ 2457 (P&H) : 2005(3) AllCriLR 526 : 2005(2) Chand LT (Civ&Cri) 473 : 2005(3) Crimes 280 : 2005(2) Rec CriR 937; *Vishwas Pandurang Dhivar* v. *State of Maharashtra*, 2005 Cr LJ 2634 (Bom).

27. Testimony of Prosecutrix.—It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the Court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. *State of UP* v. *Pappu*, 2005 Cr LJ 331 (SC) : AIR 2005 (SC) 1248 : 2005(1) Crimes 37 : 2005(1) JT 153 : 2005(3) SCC 594 : 2004(8) Supreme 656.

Testimony of prosecutrix — Credibility. The law on the point is now too well settled. No doubt, it is true that doctor, who had initially conducted the medical examination of the prosecutrix, has not appeared on behalf of the prosecution to depose. But, that alone is not sufficient to discard the prosecution story. Corroboration is not the sine qua non for conviction in a rape case.

In this regard, the most celebrated observations in the case of *Rameshwar v. State of Rajasthan*, AIR 1952 SC 54 may be quoted :

> "The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...."

It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing therefrom. If she is found to be false, she would be looked by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracized by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward looking as the western countries are.

Thus, in a case of rape, testimony of a prosecutrix stands at par with that of an injured witness. It is really not necessary to insist for corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible. *Wahid Khan vs State of Madhya Pradesh*, AIR 2010 SC 1 : 2009 AIR SCW 7410 : 2010 CrLJ 517 (SC).

Normally, no girl or her parents would come forward to make humiliating statement against the honour of the girl, therefore, evidence of the prosecutrix and her parents cannot be discarded lightly. The testimony of the victim in case of sexual offence is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, Court should find no difficulty to act on the testimony of victim of sexual assault. Corroborative evidence is not an imperative component of judicial credence in every rape case. *Premlal* v. *State of MP*, 2005 Cr LJ 1145 (MP).

It is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the

Courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. *State of HP* v. *Asha Ram*, 2006 Cr LJ 139 (SC).

Testimony of prosecutrix as to commission of rape on her found to be remaining completey unchallenged. Same need not be corroborated by evidence of village meeting, where, accused allegedly admitted his guilt and decision taken that accused should marry prosecutrix. *indar Ali Sheikh vs. State of West Bengal*, AIR 2009 SC 1467 : 2009 (3) SCC 761 : 2009 CrLJ 1324 : 2009 (1) Crimes 315 (SC) : 2009 (2) JT 253 : 2009 (1) SCR 968 : 2009 (2) Scale 248 : 2009 (1) Supreme 617 : 2009 (2) JCC 861.

Look for corroboration — Not necessary except in cases of high imporbability. In the context of Indian Culture, a woman-victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. *Rajinder @ Raju v. State of H. P.*, AIR 2009 SC 3022 : 2009 (10) SCR 248 (SC) : 2009 (9) JT 9 (SC) : 2009 (9) Scale 176 (SC) : 2009 (5) Supreme 233 (SC) : 2009 (9) SLT 361 (SC) : 2009 CrLJ 4133 (SC) : 2009 (3) Crimes 222 (SC).

Necessity of corroboration. Ordinarily evidence of a prosecutrix should not be suspect and should be believed, more so as her statement has to be evaluated at par with that of an injured witness and if evidence is reliable, no corroboration is necessary. But, said observation cannot be universally and mechanically applied to facts of every case of sexual assault which comes before Court. *Raju vs. State of Madhya Pradesh*, AIR 2009 SC 858 : 2008 (15) SCC 133 : 2008 (12) JT 457 : 2008 (16) SCR 1078 : 2008 (15) Scale 375 : 2009 (2) SLT 41.

Presumption of Correctness and *absence of embellishment.* Reference has been made in *State of Punjab vs. Gurmit Singh and Ors.*, 1996 (2) SCC 384, case to the amendments in 1983 to Sections 375 and 376 of the Indian Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined. *Raju vs. State of Madhya Pradesh*, AIR 2009 SC 858 : 2008 (15) SCC 133 : 2008 (12) JT 457 : 2008 (16) SCR 1078 : 2008 (15) Scale 375 : 2009 (2) SLT 41.

Testimony of prosecutrix is not unreliable solely on the ground of mentioning incorrect date of occurrence. *Sunil Kumar* v. *State of HP*, 2005 Cr LJ 2512 (HP).

Normally corroboration of the testimony of the victim cannot be insisted upon. In the present case the accused not only satisfied his lust by having sexual cohabitation with the victim but also he assaulted her physically in presence of the witnesses and confined her wrongfully in a room of his house till she was rescued by the police. While sitting in a court of revision for the reasons recorded and law on the subject discussed as above. Concurrent findings of fact recorded by the courts below not interfered. *Kalia alias Kalakar Naik v. State of Orissa.* 2002 Cr LJ 3233. Oril H.C.

In Apex Court *Motilal v. State of Madhya Pradesh*, 2008 SCC (11) 20 : AIR 2008 SC (Supp) 882 : 2008 AIR SCW 4846 contend that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances. There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one. *Dinesh Jaiswal vs State of M.P.*, 2010 AIR SCW 1606 : AIR 2010 SC 1540.

We find that this case is rather an unusual one. The fact that the appellant was in the house of the prosecutrix is admitted on both sides. The prosecution story that the appellant a young man of 31 years had been overpowered by a much older woman is rather difficult to believe.

As per the prosecutrix she had caused these injuries to the appellant during the time of rape and thereafter that the accused had caused her three minor injuries as well whereas the case of the appellant is that he had gone to her house to recover his cow and in a quarrel that followed both had received injuries. In any case as the investigating officer had not verified the statement of the appellant some corroboration for the prosecutrix's story was ´required. As already mentioned, her son Babulal and Shivbalak, a relative, who had reached the place of incidence, were both declared hostile and did not support the prosecutrix. We find that even her husband Sampat who had accompanied her to the police station to lodge the report did not come into the witness box and the doctor was also unable to confirm the factum of rape.

In *Motilal v. State of Madhya Pradesh*, 2008 SCC (11) 20 : AIR 2008 SC (Supp) 882 : 2008 AIR SCW 4846 held that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances. There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one. *Dinesh Jaiswal vs State of M.P.*, 2010 AIR SCW 1606 : AIR 2010 SC 1540.

Disbelieved testimony of prosecutrix. Judicial decisions rendered by the Apex Court the law as regards the credibility of the testimony of prosecutrix may be summarized thus: There is no rule of law that corroboration is essential before there can be a conviction solely on the testimony of the prosecutrix. But as a matter of prudence, the necessity of corroboration must be present to the mind of the Judge. There may be circumstances in a given case which might make it safe to dispense with such a corroboration. On the other hand, there may be factors in a case tending to show that the testimony of the prosecutrix suffers from infirmities in a manner so as to make it either unsafe or impossible to base a finding of guilt to the same. Some of the salient factors of this type may briefly be stated thus circumstances showing on the part of prosecutrix an animus against the accused where the question of want of consent is material circumstances tending to show consent e.g. absence of material showing an attempt at resistance absence of any marks of struggle attempt at improvement or exaggeration in the version as attempted the prosecutrix conduct on the part of the prosecutrix inconsistency with the credibility of the version e.g. omission to make a disclosure at the earliest opportunity element of artificiality or unnaturalness in the story as attempted by the prosecutrix and absence of signs of rape in the findings of the medical examination or on chemical analysis. *Suresh Kumar v. State of Rajasthan*, 2007 CriLJ 1939 (Raj).

28. Compensation.—Incident of rape found to be true as reported by Commission appointed by Supreme Court—State Government not yet concluded departmental enquiry pending against officers responsible for such offence. It was held that State Govt. directed to complete enquiry within three months and pay Rs. 50,000/- as interim compensation to victim woman. *P. Rathinam* v. *State of Gujarat*, 1994 SCC (Cri) 1163 (SC).

29. Attempt to rape.—Appellant called 6 years girl and removed her pant and made her to sit on his lap and exposed his private part. Appellant liable to be convicted for attempt to rape. *Sahajan Khan* v. *State of Orissa*,(1994) 2 Crimes 203 (Ori).

The accused attempted to commit rape. Section 375 IPC defines rape whereas Section 376 envisages punishment for rape. There is explanation in Section 375 IPC to the effect that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. So, the natural corollary is that provisions of Section 376 / 511 IPC would be attracted in case the accused tried a penetrate his penis in the vagina of prosecutrix. In the present case, from the testimony of the prosecutrix, it is revealed that neither the accused undressed himself nor he undressed the prosecutrix. The only attribution to the accused is that he caught hold of the prosecutrix, laid her on the ground and then caught hold of her neck.

In the present case, there is neither allegation of ejaculation of accused nor undressing both the prosecutrix and himself. So, I am of the view that the finding of the learned trial Court whereby the accused stands convicted under Section 376 and / IPC is without any basis and the accused stands acquitted under the said provision of law.

The above said ingredients are complete, in the present case. By invoking the provisions of Section 222 Criminal Procedure Code, the accused stands convicted under Section 354 IPC. *Pawan Kumar vs. State of Haryana*, 2010 (2) CrLJ 2077 (P & H).

In the present case, the accused took the prosecutrix to lonely place inside a room where he undressed himself and also the prosecutrix. After laying her on the floor, the accused was just trying to sit over her, at that time, he was caught by the brother of the prosecutrix and other witnesses. This shows that with intention to commit the offence of rape the accused prepared himself by undressing himself and also undressing the prosecutrix and after laying her on the floor, he tried to sit over her. If he was not caught by the brother of the prosecutrix and others, he must have succeeded in the commission of offence of rape. Facts of the present case are suggestive of the fact that accused has not tried to, outrage the modesty of a woman, but had attempted to commit rape on her. *Rupesh Kumar s/o Nischal Das v. State of Chhattisgarh*, 2009 CriLJ 1822 (Chha).

1st accused gave threat not to disclose the incident to anybody and left her. While she was returning, she met her mother and informed about this incident. So, the scrutiny of the evidence of victim and her mother reveal the only discrepancy with regard to an act of forcible sexual intercourse and whereas her mother informed the doctor that the injuries are due to fall from the bicycle. Excepting these two circumstances, there is no such inconsistency so as to disbelieve the evidence of the prosecutrix. So far as the act for the offence punishable under Section 376, IPC is concerned, it is evident from the certificates produced that the injuries were on the vulva region. On perusal of the evidence of victim, it reveals that at the time of the incident, the 1st accused placed his male organ on the private part and nowhere she states that there was penetration of the male organ. In the absence of any such material in the evidence of victim it cannot be said that there was penetration and commission of forcible sexual intercourse. In the circumstances, in my considered opinion, the offence falls within the purview of Section 376 read with Section 511, IPC. The medical evidence does not support the version of the prosecution so far as commission of forcible sexual intercourse and so also, victim does not say anything about the penetration.

The trial Court has convicted appellant for the offence under Section 376, IPC. But had failed to see that there was no penetration and the medical evidence does not support the version of the prosecution and so also, victim. In that view of the matter, the conviction of the 1st appellant by the trial Court for the offence under Section 376, IPC is illegal and to that extent, his conviction is to be set aside. *Channabasappa vs. State by Honnali Police*, 2010 (3) CriLJ 3369 (Karn).

Where the accused rubbed his penis in the vagina but there was no penetration he was held guitly of attempt to commit rape under section 376/511, IPC. *Bhursa v. The State*, 2000 Cr LJ 2722 (Orissa); *Shyam Lal v. State of Uttranchal*, 2005 Cr LJ (NOC) 201 (Uttra).

Intended to do.—In order to find an accused guilty of an attempt to commit rape, the Court has to satisfy itself that the accused when he laid hold of the victim, not only desired to gratify his passions upon her person, but that he intended to do so at all events and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempt at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all resistance, then such materials must exist. Importantly, surrounding circumstances many times throw beacon light on that aspect. *Kailash Laxman Khamkar vs. State of Maharashtra*, 2010 (3) Cri LJ 3255 (Bom).

Where there was attempt to rape and criminal intimidation—Medical examination was performed—Hymen was found intact and no injury on the male organ—Prosecutrix's injury shows attempt of rape—Conviction under Section 376(1), read with Section 511 only made out. *Bolleddu Sreenu* v. *State, Inspector of Police, Jaggayyapeta*, (1994) 2 ALT (Cri) 469 (AP).

Conviction order was given by trial court—Appeal against—Hymen of victim found intact—Injuries found on throat and breast—Male organ found not injured—Whether offence of rape not made out—Only offence of attempt to rape made out. *Bolleddu Sreenu* v. *State*, (1994) 3 Crimes 602 (AP).

Medical examination—Injury on her right cheek of bite found—Supported by eye-witnesses—Conviction was felt to be fully justified. *Papiya* v. State *of Rajasthan*, (1994) 2 Crimes 651 (Raj).

The petitioner took prosecutrix aged 8 years and removed her under garments and prepared himself for commission of offence of sexual inter- course. It could not be committed due to hue and cry raised by prosecutrix. Hence order of trial court framed charge under Section 376/511, IPC does not warrant interference. *Devanand Diwan* v. *State of M.P.*, (1994) 2 Crimes 173 (MP).

The accused removed the underwear of victim and put the saliva on the private part of the girl. It was held that it was not mere outraging of modesty as act of the accused was a step forward towards the commission of actual penetration of male organ and would amount to attempt to commit rape. *Anokha Lal* v. *State*, 2003 Cr LJ 2602 (Uttranchal) : 2003 (46) All Cri C 1071 : 2003(6) All Ind Cas 77 : 2003(2) Cur Cri R 638 : 2003(1) UC 420.

In a case, the accused rubbed his male organ on private part of a minor girl. The victim-girl stated that some coloured liquid had leaked out of his male organ and fell on her private part. it was held that the accused was guilty of attempt to commit rape and not of simple case of outraging her modesty. *Kamla Nand* v. *State*, 2003 Cr LJ 547 (HP) : 2003(1) Shim LC 75.

The accused had committed rape on girl of 5 years of age but she was not medically examined but accused had made extra-judicial confession that he had attempted to commit rape and finding of semen stain on victim's underwear in chemical examination lent support to the prosecution case. It was held that his conviction could be altered from under Section 376 to one under Section 376/511. *Sanju* v. *Patangrao Jagtap*, 2004 Cr LJ 1102 (Bom) : 2004 All MR (Cr) 344 : 2004(2) Rec Cri R 528.

Minor girl was alleged to have been raped but as per version of mother of victim which was duly corroborated by other witnesses, the accused had attempted to commit rape of on victim. The name of victim was not mentioned in charge sheet by investigating officer but Court said that this cannot be a ground to discard evidence of victim girl itself. Conviction of accused under Section 354, 376/511 was upheld but under Section 323 for causing injury was set aside. *Babulal Sao* v. *State*, 2004 Cr LJ 2465 (Jhar) : 2004 AIR Jhar HCR 1314 : 2003(3) East Cr C 140.

Alleged commission of offence punishable under Sections 376 and 323, IPC—Evidence by prosecutrix was corroborated by husband—Medical evidence was not definite. There was no material to show the penetration which is *sine qua non* for an offence of rape—Evidence clearly leading one to believe about attempt to rape—Hence, conviction under Section 376 not maintainable, is allowed to one under Section 511, IPC. *Girideb* v. *State*, (1995) 8 OCR 212 (Ori).

Where there was acquittal from the charge of rape—Accused can be convicted under Section 376, read with Sections 511 and 354—*Held*, Yes. *Lingaraj Pillai* v. *State of Orissa*, (1995) 1 OLR 380 (Ori).

In the present case the proecutrix in clear terms deposed that the applicant had initially caught her sister and gave her slaps due to which she intervened to rescue her sister. The accused caught hold the prosecutrix and took her to nala. The accused then removed her petticoat and also removed her blouse as also his Part and had intercourse with her. She has further stated that the applicant gave her jerk and also pressed her and she cried due to the accused having intercourse with her. She has further stated that when her father came there the accused ran away from the scene of offence. This evidence of the prosecutrix got corroboration from the evidence of doctor who has stated that she has examined the prosecutrix. She found that hymen of the prosecutrix was torn and red and inflamed and redness was seen over the vaginal orifice and *labia minora* and that there was clear pain visible on the touch. According to her, the age of the prosecutrix was 14 to 15 years, and that she was not used to sexual intercourse. She further stated that rape might have taken place 24 hours before the examination. The prosecutrix had seen the accused for quite some time and in cases where the girl is violated the picture of the violator always remains in her eyes and is not obliterated from the mind of the prosecutrix. Thus it was not difficult for the prosecutrix to identify the accused in Court after about 11 years. The FIR was promptly lodged. Conviction of accused under Section 376 read with Section 511, IPC was held proper. *Barakatullakha v. State of Maharashtra* 2002 Cr LJ 427 (Bom.) : 2001 All MR (Cri) 2024.

Accused alleged to have entered into the house made the prosecutrix, lie on the ground and committed rape but as medical evidence not proving comission of rape, accused was guilty of attempt of committing rape only. On the record nothing has been brought by the applicant / accused to show and suggest that the prosecutrix is telling lies. The defence of the consent can straightway be rejected because it is nobody's case that the prosecutrix was seen in the company of the accused and to save her skin she was lodging the false report. On the other hand, it has come on the record that none had seen them and it was the prosecutrix who had opened the bolt of the door of her parents in law. After giving my anxious considerations to the arguments of the parties and on going through the record, I am unable to hold that the applicant has been wrongly held guilty of the commission of the crime punishable under Sections 376 / 511, IPC. *Ramdil v. State of M.P.* 2002 Cr LJ 861 (Chattishgarh) : 2001(2) Crimes 267.

Where according to medical evidence hymen of the prosecutrix was torn and red and inflamed and redness was seen over the vaignal orifice and labia minora, and that there was clear pain visible on the touch. According to her the age of the prosecutrix was 14 to 15 years, and that she was not used to sexual intercourse. She further stated that rape might have taken place 24 hours before the examination. However, the isolated sentence in her deposition that in her opinion it was attempted rape was taken into account by the learned Additional Sessions Judge, and he did not appreciate the evidence of Doctor as a whole as a result of which he recorded the finding of attempt to rape. Unfortunately, the prosecution did not file any appeal in this behalf, and it is the applicant who has come before the court in revision challenging his conviction under Section 376 read with 511, I.P.C. *Barkatullakha v. State of Maharasthra.* 2002 Cr LJ 427 (Bom.) : 2001 All MR (Cri) 2024.

30. Gang rape.—The medical officer who medically examined the deceased found no local injury on their private parts of sorrounding it, no foreign hair or foreign substance and no matting or public hair and no sign of recent sexual intercourse. The medical officer who examined the urethral smear collected from the accused found no spermatozoa. He also examined the vaginal swab of victim and found no living or dead spermatozoa. Thus the medical evidence on record did not support the prosecution case. There was no sign or symptom of recent sexual intercourse and that the lady was married and was habituated to sexual intercourse and, therefore, it could not be said definitely as to whether she had any sexual intercourse or not. In her statement, in cross- examination of medical officer, stated that the abrasion noticed on the forearm of the victim was possible by self-infliction or by friendly hands. In her statement in cross-examination the prosecutrix stated that she also resisted the first rapist by inflicting injuries on his chest, face and other parts of the body and on the second rapist on different parts of his body by means of nail and that she sustained injuries on her shoulder, head and leg but this did not find corroboration from the medical evidence on record. The conduct of the prosecutrix in not reporting the incident to the immediate neighbours, but reporting the incident to the distant neighbours could not be held to be in the normal course of human conduct. In view of the above the accused were not held guilty of the charge under section 376(2)(g), IPC. *Sampad* v. *State*, 2001 Cr LJ 793 (Ori).

As per deposition of the prosecutrix that, two juvenile accused and accused compelled prosecutrix to go upstairs where she was raped by main accused, there is no evidence that accused stood guard when the prosecutrix was forcibly taken upstairs. It cannot be said that accused shared any common intention with main accused and in furtherance thereof facilitated prosecutrix being raped by main accused. Held, accused cannot be convicted for offence of gang rape. *Amit vs. State*, 2010 (3) Cri LJ 3154 (Del).

Accused persons raped a girl aged 14 years. After going through the entire prosecution case, Court finds that the evidences of witnesses have fully supported the prosecution case that in the night of occurrence when the victim had gone out of her house for easing and coming back to her house she was caught hold by the accused, Bablu Singh alias Surya Deo Singh of Rehla committed rape upon her by force. Doctor has also found that the victim girl was a minor aged about 14 years and there was sign of rape. She had external injury on her hand and back which she had alleged was caused when by force the accused threw her on the ground and committed forceful rape, then she received injuries on her back and hand. The doctor also found injury on her private part, which was caused by forceful penetration by erected penis.

The Investigating Officer has also supported the prosecution case and as such, in my opinion, the learned trial Court rightly convicted the appellant, Bablu Singh alias Surya Deo Singh of Rehla.

However, as far as the appeal filed by co-accused is concerned, the informant has only alleged that he was present with the main accused, there is no allegation that he also instigated co-accused to commit rape upon the victim girl, nor he touched her or even attempted to commit any offence against her as per her statement when the main accused after closing her mouth dragged her to the field behind the wall of Mahabir Sao. He did not go behind him rather he stayed in the lane. There is no allegation that even after the occurrence when was giving threat to the victim girl, he simply went away. In that view of the matter, there is no allegation of either committing rape or helping the main accused in committing rape only because he was standing in the lane. The victim, thought that he was guarding the occurrence. *Bablu Singh alias Surya Deo Singh and Anr. vs. State of Jharkhand*, 2010 (1) Cri LJ 622 (Jhar).

The allegations made in the First Information Report are not evidence. She might have named four persons, namely, accused Nos. 1 to 4 in the FIR, but, as indicated hereinbefore, she named only accused Nos. 1 to 3 in her deposition. Only accused No.1. Babu, has been named by PW7 and none other. She, therefore, knew only the four persons. She had not named accused Nos.5 and 6 either in the FIR or in her deposition.

They had been arrested on the basis of the statements made by their co-accused. They had not been put to Test Identification Parade. The prosecutrix, in her deposition before the learned Trial Judge, neither named nor identified accused Nos. 4 to 6. On what basis, therefore, their guilt is said to have been established is not known. Both, the learned Trial Judge as also the High Court, in their judgments did not deal with this aspect of the matter.

In a situation of this nature, a Test Identification Parade was required to be held at least for the purpose of identification of accused Nos. 5 and 6. Some weight should have been given for arriving at a finding as regards the guilt of accused Nos.5 and 6, as they had not been identified in the court.

We, therefore, are of the opinion that in absence of any Test Identification Parade having been held or they having been identified in Court, the accused Nos.4 to 6 cannot be held guilty of commission of the said offence. They are, in our opinion, have wrongly been convicted. *Viswanathan and Ors. v. State, Rep. by Inspector of Police, Tamil Nadu.* AIR 2008 SC 2222 : 2008 (6) SCR 1222 (SC) : 2008 (5) SCC 354 : 2008 (5) JT 629 (SC) : 2008 (6) Scale 462 (SC) : 2008 (4) SLT 795 (SC) : 208 (6) SRJ 41 (SC) : 2008 (2) SCC (Cr) 593 : 2008 (2) Recent CR 888 (SC).

Common intention. Sec. 376(2)(g), Explanation-I one appended to the said provision clearly states that the persons who have common intention to commit the said offence would also be liable in terms of Sec. 376(2)(g) of the Act. The common intention of all the accused need not be supported by the fact that each one of them took part in actual commission of the offence. The very fact that they came on cycles and dashed with the cycle of victim's brother would clearly show that they had a common intention to commit the offence. If they had the common intention of committing the offence, they although were charged under Sec. 376 in general, they could be convicted also under Sec. 376(2)(g) as the latter is merely a graver form of the offence of rape as defined in Sec. 375 of the Code. In any event, we do not find that they were prejudiced in any manner whatsoever; as evidently :

(1) they not only gathered and obstructed her from proceeding towards her residence with her brother in the bicycle but also deliberately making her and her brother to fall down from the cycle; and

(2) She was physically removed to a secluded place and at least three of them took part in committing the offence of rape on her one by one. *Viswanathan and Ors. v. State, Rep. by Inspector of Police, Tamil Nadu*, AIR 2008 SC 2222 : 2008 (6) SCR 1222 (SC) : 2008 (5) SCC 354 : 2008 (5) JT 629 (SC) : 2008 (6) Scale 462 (SC) : 2008 (4) SLT 795 (SC) : 208 (6) SRJ 41 (SC) : 2008 (2) SCC (Cr) 593 : 2008 (2) Recent CR 888 (SC).

The accused took the prosecutrix in the field where both of the accused persons raped her one by one. She categorically stated that she was raped by both the accused persons. The evidence of prosecutrix cannot be disbelieved only for the reason that she forgot as to which of the accused had raped her first. There was nothing to disbelieve the evidence of the prosecutrix which stand duly corroborated by medical evidence which stated that hymen of prosecutrix was found torn and swollen. *Thalli v. State of M.P.*, 2001 Cr LJ 4606 (M.P.).

Accused persons compelled prosecutrix to enter inside structure called Khooni Darwaja and robbed her and thereafter appellant accused raped her by stripping her and continuously threatened her with knife. Testimony of prosecutrix, truthful and reliable.

The injuries on the body of accused MLC have not been explained by accused and the said injuries also suggest that accused had knelt on a hard surface and had pressed his knees. This would have happened if accused either exercised by shifting his weight on his knees or indulged in sexual intercourse with a girl lying below. The injury on the right cheek of accused has not been explained by him.

The report shows that the DNA fingerprint isolated from the blood sample of accused matched the fingerprints isolated from the sanitary pad.

This Court need to note no further *qua* his involvement in the crime of criminally intimidating prosecutrix using a knife to rob her and thereafter raping her. *Amit vs. State*, 2010 (3) Cri LJ 3154 (Del).

On examination of testimony of prosecutrix, it is clear that she was friendly with the appellant No. 1. The appellant No. 1 was apparently financially well of. The appellant No. 1 had been proposing marriage to P.W.2 Edalina. On the day of the incident the appellant No. 1 had promised to marry P.W. 2 if he cooperated. It is, thus, clear that P.W. 2 Edalina had succumbed and had agreed to the sexual intercourse with the appellant No. 1 on the promise of marriage made by the appellant No. 1. Her conduct thereafter in repeatedly going to the house and to the office of the appellant No. 1 would clearly show that since the appellant No. 1 was not fulfilling his promise, she was berating him to fulfill his promise. It is, thus, clear that this report came to be lodged with the police complaining of rape when the appellant No. 1 did not fulfill his promise of marriage. *Agnelo alias Róbert Fernandes and others v. The State* 2002 Cr LJ 3007 : 2002 All MR (Cri) 1294.

A girl of 19 years while walking in public street with her sister was forcibly abducted by 10 accused persons and she was taken to Secluded place where she was gang raped by the accused, one after another. It was fully supported by medical evidence the doctor found that there were injuries on her breasts and hymen ruptured. The reading of Section 376 IPC would clearly show that the minimum punishment is 10 years and the same may be extended to life and shall also be liable to fine. The language of the proviso to Sex Section makes it abundantly clear that the court is under an obligation to impose a minimum punishment once the conviction is recorded under Section 376(2) (g). Undoubtedly, the proviso rest power on the court to award less than minimum punishment, if the court convicting and sentencing the accused, is of the opinion that for any special reasons which the court is under an obligation to record in writing, a sentence of imprisonment for a term less than the minimum is called for. *Rajendran and etc. etc. v. State of Tamil Nadu*, 2002 Cr LJ 2292 (Mad.) : 2003(1) Andh LT (Cri) MD 27 : 2002 (4) Crimes 368.

Prosecution case cannot be rejected only on the ground that there was delay in lodging FIR. Much was said about delay in the FIR, invariably in the rape case, there would be delay. The parents of the victim would be reluctant to come to police to give a complaint of rape, since they may think that the victim's future will be spoiled. Under those circumstances, the delay in lodging the FIR or the delay in FIR reaching the court in this case cannot be a ground to reject the prosecution case unless there is a material to show that the delay has been used by the prosecution to implicate several accused persons falsely. *Rajendran and etc. etc. v. State of Tamil Nadu* 2002 Cr LJ 2292 (Mad.) : 2003(1) Andh LT (Cri) MD 27 : 2002(4) Crimes 368.

In the instant case, the accused took away the victim to the forest from the field where she had gone to serve meal to her grand mother and gang-raped her. The delay in filing of FIR was properly explained and testimony of victim was corroborated by medical evidence as doctor had stated that signs of forcible sexual assault were visible. The conviction of accused for gang rape was held proper. *Dev Kishan* v. *State*, 2003 Cr LJ 1118 (Raj) : 2002(3) Raj LR 441 : 2003(4) Raj LW 2606 : 2003(1) WL 661.

It was alleged that the victim was gang-raped and murdered and victims' brother was eye-witness. It was held that the evidence of victims brother was not reliable as under circumstances of the case no human being would have remained passive if his own sister was being raped and butched to his death before his own eyes. The conviction of accused was set aside. *State* v. *Dayanand*, 2003 Cr LJ (NOC) 259 (Kant) : AIR 2003 Kant HCR 2510 : 2003(2) Andh LT (Cri) Kar 515 : 2003(4) Crimes 93.

Though the evidence of prosecutrix that she was raped by accused persons was fully corroborated by medical evidence yet since accused persons aged below 22 years and remaining in custody for about six years hence sentence reduced to 8 years. *Gulthu Soren* v. *State of Bihar*, 2005 (3) East Cr C 184 (Jhar).

Accused not committing actual rape but was waiting for his turn to commit rape is not entitled for lesser than minimum sentence in case of gang rap. *Bhupinder Sharma* v. *State of HP*, 2004 Cr LJ 1 (SC) : AIR 2003 (SC) 4684 : 2003(8) SCC 551 : 2004 SC Cri R 488 : 2004 SCC (Cri) 31 : 2003(8) Scale 735.

The victim was caught and gang raped by accused persons. There was no evidence showing that victim was a consenting party and consent cannot be presumed merely because she was 16 years of age. The evidence of prosecutrix and her mother was trustworthy and reliable. The conviction of accused was held proper. *Kuldeep Singh* v. *State*, 2003 Cr LJ 3777 (P&H) : 2003(3) Rec Cri R 455.

In a Jharkhand case the victim was repeatedly gang-raped. She was so much ravished that she was unable to wear her clothes and to walk. Due to fear none come forward to depose against the accused who happened to be hardened criminals. The victim had no reason to falsely implicate the accused. The accused persons on the basis of evidence of victim. *Sangi Hambram* v. *State*, 2004 Cr LJ 3375 (Jhar) : AIR 2004 Jhar HCR 1848 : 2004(2) BLJR 1057 : 2004(1) JCJR 272.

In a Bombay case, the victim was raped by her husband, father in law and three other relatives. She was so shocked that police sent her for medical treatment first and registered the FIR after 3 days when she became normal. Her statement was supported by medical evidence and recovery of torn clothes. The conviction under Section 376(G) was held valid. *State* v. *Ambarnath*, 2004 Cr LJ 4445 (Bom) : 2004(2) Bom CR (Cri) 342.

Woman cannot be prosecuted for alleged commission of offence of gang rape. In the present case, complaint was lodged by the prosecutrix alleging that she was returning by Utkal Express after attending a sports meet. When she reached her destination at Sagar, accused-husband of appellant-accused met her at the railway station and told her that her father has asked him to pick her up from the railway station. Since the prosecutrix was suffering from fever, she accompanied accused to his house. He committed rape on her. When commission of rape was going on, appellant-accused his wife, reached there. The prosecutrix requested the appellant to save her. Instead of saving her, the appellant slapped her, closed the door of the house and left place of incident. On the basis of the complaint lodged, investigation was undertaken and charge-sheet was filed. While accused was charged for offences punishable under Ss. 323 and 376, I.P.C. the appellant was charged for commission of offences punishable under Ss. 323 and 376(2)(g), I.P.C. The High Court was of the view that though a woman cannot commit rape, but if a woman facilitates the act of rape, Expln. I to Sec. 376(2) comes into operation and she can be prosecuted for 'gang rape.' Held, the language of sub-section (2)(g) of Sec. 376 provides that whoever commits 'gang rape' shall be punished etc. The Explanation only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape within this sub-section (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The Explanation only indicates that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape. By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. The sine quo non for bringing in application of Sec. 34, I.P.C. that the act must be done in furtherance of the common intention to do a criminal act. The expression 'in furtherance of their common intention' as appearing in the Explanation to Sec. 376(2) relates to intention to commit rape. A woman cannot be said to have an intention to commit rape and, therefore, appellant-accused cannot be prosecuted for alleged commission of the offence punishable under Sec. 376(2)(g). *Priya Patel v. State of M.P. and Anr.*, 2006 CriLJ 3627 (SC).

31. Rape of married woman.—The injuries found on the person of the prosecutrix PW-1 Kalawati have corroborative value and her complaints just after the occurrence to /PW-2 Kumbharam and after coming over to her house, to her sister and mother-in-law, warrant credence to her statement. The medical evidence amply corroborates that she had injuries on her body and this leads to only one conclusion that she resisted at her best to the act of the accused-appellant, as she has clearly stated that in third attempt, the accused - appellant became successful in committing rape with her. Apart from this, even the chemical examination report Ex. P/13 shows that gagra of the prosecutrix PW.1 Kalawait was stained with human semen and this fact also corroborates the statement of the prosecutrix PW-1 Kalawat. Therefore the statement of prosecutrix was fully corroborated by medical evidence. Therefore conviction upheld. *Jaswant Singh v. State of Rajasthan.* 2002 Cr LJ 3260 Raj. H.C.

32. Presumption.—Presumption is attracted to cases falling under Section 376(2) and not to cases falling under Section 376(1). *Ramcharan* v. *State of M.P.*, 1993 Cr LJ 1825 (MP).

33. Abetment.—Offence was committed in hut in possession of accused—Hence it was held that simply because said hut was in possession same would not be sufficient to conclude any abetment on his part. *Ashok Nivruti Desai* v. *State of Maharashtra*, 1995 Cr LJ 826 (Bom).

34. Sexual Assault.—The evidence of the Doctor showing that victim was less then 16 years. The word 'hath path', according to this dictionary, means "Laying hands on - Garnu to lay hands on, (esp) to violate (a woman)". Learned counsel submits that 'hath path means only laying hands on. This submission ignores the words "to violate (a woman)". It is true that Sashikala in her evidence used the expression 'indecent act'. But note has also been taken of the fact that she used the expressions 'forcibly' and 'without her consent' also. All the words taken together could with the fact that her father used the word 'rape' in his examination-in-chief left no manner of doubt that the words, 'indecent act' and 'hath path' were understood by all the witnesses suggesting sexual intercourse. This is further fortified by the fact that subsequently, a female child was born from Sashikala after a pregnancy of about 34 weeks. *Madan Chettri v. State of Sikkim* 2002 Cr LJ 3149 (Sik).

From the evidence of P.W.1. It is clear that only A-1 to A-6 committed the offence and A-7 and A-8 only watched the incident. She further deposed that all the accused physically lifted her to her own fields and made her to stand at one place and discussed about the manner in which she should be killed *i.e.*, whether she should be put in a gunny bag and thrown in a well or to kill her by stabbing. That indicated that the accused had the initial intention to commit the offense under Section 302, I.P.C., but somehow they developed the idea of committing the offense under Section 376. IPC and such idea culminated into offense. Therefore, it is clear from the evidence on record that A-1 to A-6 are liable for the offense under Section 376, I.P.C. and as per the evidence of P.W.1, A-7 and A-8 did not participate in the offense and they simply watched the incident. As already discussed, the initial intention of all the accused was to kill and therefore, it cannot be accepted that A-7 and A-8 also had an intention to commit the offense under Section 376, I.P.C. *Mekala Raji Reddy and Others v. State of Andhra Pradesh* 2002 Cr LJ 3407 A.P. H.C. : 2002(1) ALD (CrL) 477 : 2002 Andh LT (Cri) AP 306.

35. Charge. —I, (*name and office of the Sessions Judge, ect.*) hereby change you (*name of the accused*) as follows—

"That on or about the........day of....... at........you committed rape on (the *woman* raped) and thereby committed an offence punishable under Section 376 of the Indian Penal Code and within my cognizance."

36. Medical Evidence.—Having gone through the evidence on record, it was found that the evidence of the prosecution was to the effect that the appellant caught hold of Smt. Usha Devi and made her fall down. There was no sufficient evidence on record to show that the appellant attempted to commit rape on the deceased. The medical evidence also did not indicate any such attempt. The catching hold of the deceased and making her fall down fall down cannot be said an attempt to rape, but it amounted to assault or force used to outrage the modesty of the deceased. Therefore, though there was no sufficient evidence to make out the offense punishable under Section 376 read with 511 I.P.C. Therefore held conviction of appellant under Section 376/511 I.P.C. is liable to be converted into conviction under Section 354 I.P.C. *Shiv Shankar v. State of U.P.*, 2002 Cr LJ 2673 (Allah.) : 2002 All Cri C 731 : 2002(1) All Cri R 693.

A case of this nature should be viewed having regard to the materials brought on record in their entirety. We have noticed hereinbefore the prosecution case. Indisputably, the prosecutrix was examined medically after a long time. The explanation offered by PW-5 in this behalf, in our opinion, is clear and sufficient. Not only the father of the prosecutrix was not in the village, he had to be sent for and came back to the village only on the next day. Evidently, for good reasons, they did not want to lodge a First Information Report immediately. A panchayat was convened and only when it did not yield any fruitful result, the First Information Report was lodged.

The evidence of the doctor appears to be wholly insufficient. Even she could not complete the medical examination. Despite passage of a long time, an injury on the private parts of the prosecutrix was found. The doctor at least testified that there had been an attempt to commit rape. While saying so, she found the hymen absent which having regard to the medical jurisprudence is of some significance.

Fault in the judgment of the High Court could have been found out if the prosecutrix was a major. Having regard to the nature of medical evidence as also the authorities noticed hereinbefore the conclusion arrived at by the High Court, in our considered opinion, cannot be said to be perverse. Furthermore, for the purpose of satisfaction of the ingredients of rape, it is not necessary that there should be complete penetration. See *Aman Kumar and another v. State of Haryana.*, (2004) 4 SCC 379 : 2004 AIR SCW 827. Satyapal v. State of Haryana., AIR 2009 SC 2190 : 2009 (5) SCR 577 (SC) : 2009 (6) SCC 635 : 2009 (5) JT 291 (SC) : 2009 (5) Scale 431 (SC) : 2009 (3) Supreme 33 (SC) : 2009 (4) SLT 41 (SC) : 2009 (2) Crimes 96 (SC).

Accused lifted victim, a minor handicapped girl on her request in getting down to ground floor and took her into his house, laid her on a cot and committed rape. There is every possibility of these witnesses to get down from the upstairs through the stair case to watch television, was unable to get down from the stairs because of physical incapacity i.e. right leg and right hand were affected with polio. At that time, the accused came there and child witnesses requested him to take her to the ground floor, but the accused after taking her by physically lifting to the ground floor, taken her inside his house and committed rape on her. There is a ring of truth in the evidence of other children coupled with the objective findings in the observation report. When child witnesses was taken inside the house, there will be curiosity for the other children to see what was happening inside the house. Admittedly, wooden door planks have not been fixed to the door frames, but only curtains were fixed. When such is the case other children peeped through the curtain by pushing the curtain slightly aside and witnessed the incident, cannot be ruled out.

Testimony of child witnesses that accused removed his lungi and laid on victim girl after lifting her skirt. Is truthful and corroborated with medical evidence. In view of the above discussion, this Court has no hesitation in holding that there was no appreciation of evidence at all by the trial Court and that the prosecution proved its case against the accused beyond all reasonable doubt of the offence punishable under Section 376, IPC. Therefore, the impugned judgment is liable to be set aside. *The Public Prosecutor, High Court of A.P., Hyderabad vs K. Venkateshwarlu*, 2010 Cri LJ 1568 (AP).

DNA test is clinching piece of evidence. In the instant case a minor school student was raped by a watchman in her school. Medical evidence corroborated evidence of witness. The clinching evidence has come from the Senior Scientific Officer who carried out the DNA test on the basis of the material forwarded to him and which was collected by Dr. 'S'. He has confirmed that the accused is the contributor of the semen which was collected by Dr. 'S' in the form of vaginal swab. DNA (Deoxyribonucleic acid) is found specially in cell nuclei which are the foundation of heredity. DNA is the genetic blue print for life and is virtually contained in every cell. No two persons, except identical twins have ever had identical DNA. DNA testing can make a virtually positive identification when the two samples match. It exonerates the innocent and helps to convict the guilty. The DNA testing hits the nail on the head of the accused and is the last and clinching piece of evidence which shows that it is the accused and the accused alone who committed the rape on the victim. *Raghuvir Dessai v. State*. 2007 CriLJ 829 (Bom).

37. Application for Bail.—Where the victim could recognise all the accused however, did not know their names and the accused was later on recognised by the prosecutrix, *prima facie* involvement of the accused, stood proved and therefore, bail could not be granted. If *prima facie* material is available to show that the accused has actively participated in the commission of offence the court may in its discretion refuse to grant bail. In the present case, at the time of lodging F.I.R. though the victim lady had seen all the four accused persons did not know two of them by name including the petitioner. While searching for the accused persons along with the police officers, she could identify the petitioner along with two other accused persons standing together and, therefore, there is no scope to disbelieve the victim lady. *Anil Kumar Samartha v. State of Orissa* 2002 Cr LJ 1194 (Ori.) : 2002(4) All Cri LR 118.

38. Conspiracy of wife of accused.—The co-accused wife took the minor girl to her house and closed door from outside leaving girl and her husband (accused) alone inside the house. Thereafter accused committed rape on her and disclosure of fact was made by prosecutrix to her parents after two days. There was convincing evidence of prosecution that co-accused had entered into in conspiracy with her husband. Her plea that no wife will help her husband in commission of sexual intercourse with another woman was not accepted. The conviction of accused under Section 376 and co-accused under Section 376 read with Section 120B was held proper. *Tej Khan* v. *State*. 2004 Cr LJ 276 (MP) : 2003 Cri LR (SC&MP) MPJ 815 : 2003(4) MPLJ 581.

39. Kidnapping, rape and offence of business of prostitution.—It is clear from the statement of the prosecutrix under Section 164 Criminal Procedure Code, recorded by the Magistrate, in her written report and in her statement before the Court that the accused appellant kidnapped her from Nagpur on the pretext of leaving her to her house at Vardha, but he taken her away to his village Ramnagar in Bundi where he committed rape with her and also business of prostitution by collecting money from other persons. The brother of the accused appellant also stated that he has seen Sharda prosecutrix with the accused appellant in a rented house, though he has been declared hostile. The police witnesses in equal vocal terms stated about the mischief done with the prosecutrix by the accused appellant. I am in agreement with the finding of rape arrived at by the trial Court with the prosecutrix and she has been forced by the accused appellant to do prostitution with other persons and collected money from them. It is also clear from the evidence of the prosecution witnesses mentioned above and as per the statement of the prosecutrix coupled with the report of FSL and medical examination done by the doctors, her statement under Section 164 Criminal Procedure Code and her written report submitted to the police, that accused committed rape with her and further the accused appellant forced her to do the business of prostitution and he collected money from the persons who came to him for sex satisfaction with the prosecutrix. The findings arrived at by the trial Court cannot be said to be perverse. I am also in agreement with the finding of the trial Court that the prosecution has been able to prove the charges levelled against the accused appellant beyond reasonable doubt. The judgment of conviction recorded by the trial Court on the charges levelled against him and proved by the evidence of prosecution witnesses is confirmed. But looking to the age of the accused appellant his sentence can be reduced from 10 years to 7 years.

In the result the conviction of the accused appellants for Sections 366, 366-A, 368, 372, 376 IPC and for Sections 3, 6 and 9 of the Immoral Traffic (Prevention) Act, 1956 is confirmed but his sentence is reduced from 10 years to 7 years. *Yogesh vs. State of Rajasthan*, 2010 (1) CriLJ 629 (Raj).

40. Rape and unnatural offence.—Accused Headmaster have raped or subjected school girls aged between 8-12 years to unnatural offence. Victims, capable of being tutored and overwhelming evidence reflecting such tutoring. Their testimony being not corroborated, cannot form basis for conviction. *Sekaran vs. State*, 2010 (2) CrLJ 2341 (Mad).

41. Rape and Unnatural intercourse—Intercourse is necessary ingredient in both offences.—In the instant case the prosecution itself has alleged that the accused is guilty of the offences punishable under Sections 376 and 377 of IPC. It is true that such a charge in a given case can be levelled and framed. However, both acts are separate offence. If sexual intercourse forcibly with a woman and that too a minor is an offence punishable under Section 376 and unnatural intercourse is independently made an offence under Section 377, then mere version of the victim when both charges are levelled i.e. the act of rape and unnatural intercourse, would not necessarily be conclusive to hold that the charges are proved. The medical evidence and the reports of chemical analyzer assume some significance. In this case, the samples have been collected nearly two months from the incident and the analysis report has been forwarded a good five and half months after the date of incident. The findings therein do not conclusively show that either of the offences have been committed. The charge under Section 375 can be proved by demonstrating that the case falls in the explanation to Section 375. However, there has to be evidence of atleast intercourse and penetration so as to bring it within the case of the explanation. In the instant case, even that is not conclusive, leave alone, reliable and trustworthy. Rape constitutes sexual intercourse with a woman. The explanation states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Section 377 of IPC presupposes carnal intercourse against the order of nature. It has similar explanation. However, intercourse is necessary ingredient in both the offences. That itself is not proved in this case. Hence accused would be entitled to acquittal. *Kailash Laxman Khamkar vs. State of Maharashtra*, 2010 (3) Cri LJ 3255 (Bom).

42. Delay.—*Delay in lodging FIR*.—If the incident of rape was true and the complainant had the support of Laxman Sarpanch, he would have gone to police station to lodge the report soon after the occurrence, but after passing more than 50 hours, the complainant is found to have lodged the report with the police, whereas the distance between the place of occurrence and the police station is only 5 kms. The prosecution has utterly failed to furnish reasonable and satisfactory explanation of more than 50 hours inordinate delay in lodging the FIR. Hence, this delay is found to be fatal to the prosecution. *Ramdhan vs. State of Rajasthan*, 2010 (3) CrLJ 2652 (Raj).

We find no merit in the submission made for the appellants that FIR was ante timed and brought into existence so as to falsely implicate the appellants. There is no reason to disbelieve the evidence of prosecutrix and her mother that attempts were made to lodge the FIR on the next day of the occurrence of the incident but the police did not co-operate and intimated any action. The attempt on the part of the police to protect the accused from day one of the occurrence is clear and obvious.

This Court, in exercise of its jurisdiction under Article 136 of the Constitution of India, does not act as a third appellate Court. Suffice it to hold that the verdict in the instance case did not result in any miscarriage of justice. The impugned judgment is not an erroneous one. Nor the judgment is vitiated on account of any error either in appreciation of evidence or application of legal principles. *Jaswant Singh & Ors. vs. state of Punjab*, AIR 2010 SC 894.

The offence alleged against accused is particularly an offence under Section 376, IPC. So also an offence under Section 377, IPC. Such an offence committed against the victim at the instance of the 1st accused would be a stigma during the lifetime of the victim and it is in these circumstances, taking into consideration the culture, and the effect on the reputation of the victim that the complainant was hesitant to approach the Police to lodge a complaint immediately after the incident. They think many a times whether a complaint is to be lodged or not. So, if this aspect is taken into consideration. Held, the delay has not any effect to disbelieve the evidence led. *Channabasappa vs. State by Honnali Police*, 2010 (3) CriLJ 3369 (Karn).

Delay in lodging complaint—Properly explained.—Appellants raped two victim sisters. It is further seen from the evidence of PWs. 1 and 2/victims that on reaching their home, apart from informing their mother, they also informed about the incident to one Nonayya Gowda PW. 5 who, in turn, informed their owner Subhash Jain PW. 4. PW. 1 explained that though PW. 4 asked them to make a complaint, because of the threat posed by accuseds and out of fear they did not inform the incident to the police and after gaining confidence an courage, finally a complaint (Exhibit. P1) was lodged with the police on 14.07.2004. Though there was a delay of 42 days in lodging complaint to the police, PWs. 1 and 2, in their evidence, explained that all their family members including themselves are uneducated, no male members in their family for their assistance and they settled in the present village to take out their livelihood. Admittedly, on the date of the incident, they were working in quarry owned by PW. 4 and while returning from their workplace by force accuseds committed rape of PWs. 1 and 2. The mother of PWs. 1 and 2 was examined as PW. 14. She also corroborated the assertion of PWs. 1 and 2 about their illiteracy and fear due to the threat call of accuseds. In those circumstances, the evidence of PWs. 1 and 2 and their complaint Exhibit. P1 cannot be rejected as unacceptable. In a case of rape, particularly, the victims are illiterate, uneducated, their statements have to be accepted in toto without further corroboration.

From the evidence of PW. 1, PW. 2, owner of the quarry PW. 4 and mother of the victim PW-14, there was a delay of 42 days in lodging the complaint, the same was properly explained by the victims and the other witnesses. In addition to the same, Court had also noticed that except the victims, no male member is available in their family to help them. In fact they came to the village where the incident occurred to take out their livelihood. Further, PWs. 1 and 2 asserted that after committing rape A-1 and A-2 threatened that they would kill them if they inform anyone. All these material aspects were duly considered by the trial Court and accepted by the High Court. Court concur with the same.

Coming to the discrepancies in the evidence of PWs. 1 and 2, as rightly pointed out by the prosecution and accepted by both the Courts below, they are negligible in nature and it had not affected their grievance, hence Court rejected the said contention also.

Discrepancies in evidence of victims were negligible in nature. Absence of injury on private part of victims due to fact that they were taken to doctor after a month and 14 days. Conviction of appellants is proper. *Santosh Moolya and Anr. vs. State of Karnataka*, 2010 (3) CrLJ 2892 (SC).

Delay in lodging FIR—Contra. In normal course of human conduct an unmarried girl who is victim of sexual offence would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate such incident. Overpowered, as she may be, by a feeling of shame her natural inclination would be to avoid talking to anyone, lest the family name and honour is brought into controversy. Thus, delay in lodging the first information report cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same on the ground of delay in lodging the first information report.

In the instant case, the girl was a minor below the age of 16 years. She was studying in Class VIII and the accused was the drawing teacher of that class. It is no doubt true that the prosecutrix did not report the incident to anyone either on the first occasion or on the second. Ultimately a stage was reached when she could not keep it a secret since her mother discovered that she was pregnant. In these circumstances, she was compelled to disclose the true facts. Having regard to the facts and circumstances of the case, delay could not be treated as fatal to prosecution case. *Dildar Singh v. State of Punjab*, 2006 CriLJ 3914 (SC).

43. Evidence of prosecutrix—Evidentory value.—Accused took prosecutrix to a school on pretext of giving toffee and raped her. Prosecutrix being a young girl aged 8-9 years at time of incident it is extremely unlikely that she would make false allegation of rape against accused who was residing in same locality. Plea of false implication on account of quarrel with parents of prosecutrix over parking of vegetable carts.

It is by now settled proposition of law by a catena of decisions of the Hon'ble Supreme Court, including *Rafiq vs. State of U.P*, 1980 CriLJ 1344 = AIR 1981 SC 559 and *Bhoginbhai Hirjibhai vs. State of Gujarat* AIR 1983 SC 753 = 1983 CriLJ 1096, *State vs. Chandra Prakash*, AIR 1990 SC 658 = 1990 CriLJ 889, and also the decision in the case of *Radhu vs. State of MP*, AIR 2007 SC (Supp) 847 relied upon by the learned counsel for the appellant herself that conviction in a case of rape can be based solely upon the uncorroborated evidence of the prosecutrix, which should not be rejected on the basis of minor discrepancies and contradictions, unless there are such facts and circumstances present in a particular case which would persuade the Court to look for corroboration for her testimony. In the present case, there are no such circumstances as would justify looking for the corroboration of the testimony of the prosecutrix. The Court cannot treat the testimony of the prosecutrix in a rape at par with that of an accomplice in a crime which requires corroboration and no infirmity is attached to the testimony if a victim of such a heinous crime. In fact, it would only be adding insult to the injury if the Court insists on corroboration of her testimony, even in the absence of circumstances which would warrant adoption of such a course of action.

In any case, even if the Court does look for corroboration of the testimony of the prosecutrix, the same is available in abundance in the present case. The testimony of the prosecutrix, finds full corroboration not only from the injuries, including torn vagina found on her person when she was examined in the hospital but also from the statement made by her first to her parents and then to the doctor soon after this incident took place. The previous statements of the prosecutrix are admissible in evidence under Section 157 of the Evidence Act and this proposition of law was recognized by the Hon'ble Supreme Court in *Madan Lal vs. State of J & K*, AIR 1998 SC 386 = 1998 CriLJ 667, where the statement made by the prosecutrix to her mother soon after the incident was accepted as a corroboration of her testimony in the Court.

The appellant had raped the prosecutrix taking advantage of her tender age and taking her to a secluded school which had no watchman and, therefore, he has rightly been convicted under Section 376(f) of Indian Penal Code the age of the prosecutrix at the time of commission of offence being less than 12 years. *Hari Om vs. State (NCT)*, 2010 (2) CrLJ 1281 (Delhi).

Accused took prosecutrix, a minor girl inside his house and committed rape on her. Testimony of prosecutrix inspires full confidence and corroborated with medical evidence and serological report indicating presence of human semen on salwar of prosecutrix clearly brings home the guilt of the appellant that he raped a young girl of eight years of age who was an orphan and was living on the platform. Her statement was recorded by investigating officer only after her medical examination when it revealed that she had been ravished by someone. It was the prosecutrix who in her statement had given the detail description of the house, its surroundings and the gali number. Not only this, she led the police to the house of the appellant and identified him. It was on her identification that the appellant was arrested. She also identified the appellant in the court. Held, Conviction of accused is proper. *Arshad vs The State*, 2010 Cri LJ 954 (Delhi).

Hymen of the prosecutrix was intact. Perusal of the record would show that FIR was lodged by the prosecutrix herself on the date of the incident at the police station soon after the incident. When she was sent for medical examination, she again narrated rape on her by the appellant before the medical officer which finds place in her medical report. Thus, the testimony of the prosecutrix stands corroborated by her FIR and contents of medical report.

Cumulative reading of the aforesaid would prove beyond shadow of doubt that it was the appellant who had committed offence of rape on minor girl and had completely ravished her.

However, in the case in hand, even without the examination of doctor, the evidence of prosecutrix stands fully corroborated by the evidence of Sub-inspector of the police station who had virtually caught the appellant red-handed. Thus, even if doctor had not been examined it would not throw or completely discard the prosecution story. The evidence of prosecution witnesses is fully trustworthy and there is no reason to doubt genuineness thereof.

It was also contended by learned counsel for the appellant that since hymen of the prosecutrix was found to be intact, therefore, it cannot be said that an offence of rape was committed on her by the appellant. This contention cannot be accepted as offence of rape has been defined in Sec. 375 of the IPC. *Wahid Khan vs State of Madhya Pradesh*, AIR 2010 SC 1 : 2010 CrLJ 517 (SC).

We find that this case is rather an unusual one. The fact that the appellant was in the house of the prosecutrix is admitted on both sides. The prosecution story that the appellant a young man of 31 years had been overpowered by a much older woman is rather difficult to believe.

As per the prosecutrix she had caused these injuries to the appellant during the time of rape and thereafter that the accused had caused her three minor injuries as well whereas the case of the appellant is that he had gone to her house to recover his cow and in a quarrel that followed both had received injuries. In any case as the investigating officer had not verified the statement of the appellant some corroboration for the prosecutrix's story was required. As already mentioned, her son Babulal and Shivbalak, a relative, who had reached the place of incidence, were both declared hostile and did not support the prosecutrix. We find that even her husband Sampat who had accompanied her to the police station to lodge the report did not come into the witness box and the doctor was also unable to confirm the factum of rape.

In *Motilal v. State of Madhya Pradesh*, 2008 SCC (11) 20 : AIR 2008 SC (Supp) 882 : 2008 AIR SCW 4846 held that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances. There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one. *Dinesh Jaiswal vs State of M.P.*, 2010 AIR SCW 1606 : AIR 2010 SC 1540.

The learned Counsel for the appellants made at attempt to contend that the appellants were falsely implicated in the present case due to enmity between the parents of prosecutrix and the appellants with regard to construction of a wall. The Courts below having considered the similar submission rejected the same and observed that the alleged dispute over a common wall was not of such a grave nature compelling the entire family of the prosecutrix to go to the extent of putting at stake its reputation and fair name of a young girl child to settle the scores with the accused. *Jaswant Singh & Ors. vs. State of Punjab*, AIR 2010 SC 894.

Rape on minor girl — Sole testimony of prosecutrix. The following parameters and factors that need to be kept in mind, which emerge in cases of a rape of a girl child. Such cases need to be dealt with sensitively and not like cases involving other penal offences. In other words, the whole approach of the Courts must be quite different. The traditional non-permissive bounds of Indian Society must be kept in mind while examining the evidence in cases involving sexual offences. Social factors play an important role in the nature and quality of available evidence. The sole testimony of a prosecutrix is enough to convict a person accused of rape, if the testimony is free from blemish and implicitly reliable. Such testimony does not need corroboration; but if there is some doubt about the implicit reliability of the testimony, then the Court may look for assurance to the acceptability of the testimony, short of its corroboration. If the testimony of the prosecutrix is reliable and trustworthy, then minor contradictions are not enough to throw out the evidence and other issues such as non-examination of an available witness, even the non-examination of a doctor or the non-production of the doctor's report would not be fatal to the case of the prosecution. *Mohd. Alam v. State (NCT of Delhi)*, 2007 CriLJ 803 (Del).

Contra. The bare statement by a child, aged 16 years that she was "raped" alone may not be sufficient for the Court to come to a finding that an offence under S. 376 IPC is committed. The Court must be satisfied that she was subjected to penile penetration or that there was at least an attempt of penile penetration. In the light of the medical evidence that the vagina admits only one finger, a more detailed investigation into the relevant details would be necessary. But in the absence of it it will be improper for the High Court to enter a finding that accused committed only an offence under S. 354 IPC and not under S. 376. *Santhosh Madhavan alias Amrutha Chaithanya v. Circle Inspector of Police Ernakulam and Anr.*, 2008 CriLJ 4246 (Ker).

44. False implication due to enmity.—The learned Counsel for the appellants made at attempt to contend that the appellants were falsely implicated in the present case due to enmity between the parents of prosecutrix and the appellants with regard to construction of a wall. The Courts below having considered the similar submission rejected the same and observed that the alleged dispute over a common wall was not of such a grave nature compelling the entire family of the prosecutrix to go to the extent of putting at stake its reputation and fair name of a young girl child to settle the scores with the accused. *Jaswant Singh & Ors. vs. state of Punjab*, AIR 2010 SC 894.

45. Extra-judicial confession.—According to this Court, in such a situation, to go in search of corroboration itself tends to cause a shadow of doubt over the evidence and if the evidence of extra-judicial confession is reliable, trustworthy and beyond reproaching, the same can be relied upon and a conviction can be founded thereon. Here, in this case, it is proved by the prosecution that witness (Ex-Pradhan of Village) was not on inimical terms with the appellant at all. After subjecting his evidence to a rigorous test on the touchstone of credibility, this Court finds that extra-judicial confession referred to by the witness is reliable and is rightly accepted by the trial Court and the High Court. The contention that when the appellant was being brought to the Court, he was in custody and, therefore, the extra-judicial confession referred to by witness would be hit by the provisions of Section 26 of the Evidence Act and could not have been received in evidence, cannot be accepted. The appellant could not probablise his defence that he was in custody of police officer. He could not name the police officer who had brought him to the Court premises for extension of judicial remand nor it is his case that to the hearing of the police officer who brought him to the Court premises, he had made confessional statement before witness. On the facts and in the circumstances of the case, this Court is of the opinion that it is not probabilised by the defence that the appellant was in custody of police officer while he had made extra-judicial confession before witness. The evidence relating to extra-judicial confession inspires confidence of this Court. On this point, there is concurrent finding by the Courts below and no case is made out by the appellant to interfere with the said finding in the present appeal. *Aftab Ahmad Anasari vs. State of Uttaranchal,* AIR 2010 SC 773.

46. Rape and outraging of modesty of woman.—The prosecution has clearly established commission of offence punishable under Secs. 354 and 506 IPC. So far as the offence punishable under Sec. 376 IPC is concerned, the basic ingredients are set out in Sec. 375 IPC. On a reading of the evidence of the prosecutrix, we find that a case of rape has not been established so far as the respondent is concerned.

That being the position, we allow the appeal of the State to the extent that the respondent is convicted for offences punishable under Secs. 354 and 506 IPC. The sentence are two years' and six months' rigorous imprisonment respectively. It is stated that the appellant has suffered more than that period of custody. If that being so, he need not surrender to custody. The appeal is allowed to the aforesaid extent. State of *Himachal Pradesh vs. Prem Singh,* AIR 2009 SC 1010 : 2009 (1) SCC 420 : 2008 CrLJ 786 : 2008 (15) SCR 1058 : 2009 (15) Scale 132.

Attempt to rape — Outraging modesty of women. Action of lifting victim, putting her on bed, removing her underwear and lifting her frock did outrage the modesty of victim. There was no attempt to rape as there was no attempt to penetrate. Held, offence under S. 354 made out. *Tika Ram Chettri vs State of Sikkim,* 2010 (4) CriLJ 4025 (Sikkim).

An attempt to commit an offence can be said to begin when the preparations are complete and culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. This is what exactly provisions of S. 511 IPC require. In the present case accused has made preparations, his preparations were complete when he had put off his pant and took out his male organ in order to fulfill his lust, he put his male organ into the mouth of the prosecutrix and then struck against her private part or vice versa the accused had commenced his act and it was subjected towards the commission of offence, but in the meantime he was interrupted by the calls of the mother of the prosecutrix and fled away from the spot. Thus, series of acts inevitably leads to the commission of the offence which accused neither foresaw nor intended, happens to prevent this. Therefore, there is no escape but to hold accused guilty of the offence of attempt to rape and outraging the modesty of the prosecutrix. *Kamal Kumar v. State of H. P.,* 2009 CriLJ 36 (HP).

47. Abduction and rape.—The appellant belonged to the same Caste and Gotra of the prosecutrix and was a frequent visitor to the house of the prosecutrix. There was a love affair between them and the Court also observed that she did not ever resist her being repeatedly deflowered by the appellant Sunil. In this background, close and careful determination of the age of the prosecutrix is imperative. Doctor, who had clinically examined the prosecutrix, found that her secondary sex characters were well developed.

Doctor who examined the prosecutrix referred her for verification to the Dental Surgeon and the Radiologist. The failure of getting the prosecutrix examined from the Dental Surgeon or the Radiologist despite the fact that she was referred to them by doctor is a serious flaw in the prosecution version. The prosecution also failed to produce any Admission Form of the school which would have been primary evidence regarding the age of the prosecutrix.

The School Leaving Certificate produced by the prosecution was also procured, six days after the incident and three days after the arrest of the appellant. As per that certificate also, she joined the school in the middle of the session and left the school in the middle of the session. The attendance in the school of 100 days is also not reliable.

The prosecutrix was admitted in the school by her brother. The said Ashok Kumar was not examined. The alleged School Leaving Certificate on the basis of which the age was entered in the school was not produced.

The father of the prosecutrix has also not been able to give correct date of birth of the prosecutrix. In his statement he clearly stated that he is giving an approximate date without any basis or record.

On consideration of the totality of the facts and circumstances of this case, it would unsafe to convict the appellant when there are so many infirmities, holes and lacunas in the prosecution version. The appellant is clearly entitled to benefit of doubt and consequently the appeal filed by the appellant deserves to be allowed. The appellant is directed to be released forthwith, if not required in any case. The appeal is accordingly disposed of. *Sunil vs. State of Haryana*, 2009(4) Crimes 321 (SC) : 2009(14) JT 644 : 2009(14) Scale 370 : 2009(8) Supreme 20 : 2009(9) SLT 92 : 2010(1) JCC 140.

Abduction and rape—Consent. Appellant abducted victim girl and committed rape on her. Victim girl was a minor aged about 13 years. It was established that at time of abduction, appellant offered laddu to victim and after taking laddu she was under intoxication. Further plea that victim girl left her house out of her own will and that she stayed with appellant has got no relevancy since there is no value of her consent she being minor. Conviction of appellant is proper. *Pappu Rajak vs State of Jharkhand*, 2010 (4) CriLJ 3998 (Jhar).

48. Amendment in provisions—Object of.—The offence of rape occurs in Chapter XVI of IPC. In that Chapter, there is a separate heading for 'Sexual offence', which encompasses Sections 375, 376, 376-A, 376-B, 376-C, and 376-D. 'Rape' is defined in Section 375. Sections 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act, *i.e.* 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with iron hand, the offence of rape which affects the dignity of a woman. *State of Madhya Pradesh vs. Sheikh Shahid*, AIR 2009 SC 2951 : 2009 (12) SCC 715 : 2009 (8) JT 277 : 2009 (5) SCR 1038 : 2009 (5) Scale 679 : 2009 (3) SLT 744; See also *State of Madhya Pradesh vs. Basodi*, AIR 2009 SC 3081 : 2009 CrLJ 4284 : 2009 (2) Crimes 273 (SC) : 2009 (12) SCC 318 : 2009 (6) JT 92 : 2009 (6) SCR 1166 : 2009 (6) Scale 353 : 2009 (3) Supreme 501.

49. Intention to introduce Sexual offences—Scope—Discussed.—The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for 'Sexual offence', which encompasses Secs. 375, 376, 376-A, 376-B, 376-C and 376-D. 'Rape' is defined in Sec. 375. Secs. 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new Secs. were introduced by the new Act, *i.e.* 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-b); or as expressed more fully,' rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will (Hale PC 628). The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape; 1 Hon. 6, 1a, 9 Edw. 4, 26 a (Hale PC 628). In the crime of rape, 'carnal knowledge' means the penetration to the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephen's "Criminal Law" 9th Ed. P. 262). In 'Encyclopaedia of Crime and Justice' (Volume 4, page 1356) it is stated ". . . . . even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order. *Shekara vs. State of Karnataka*, 2009 (4) JT 360 : 2009(3) Scale 104 : 2009(1) Crimes 472 SC.

50. Rape—Meaning of.—The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-b);' or as expressed more fully', rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will' (Hale PC 628). The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape; 1 Hon.6, 1a, 9 Edw. 4, 26a (Hale PC 628). It is violation with violence of the private person of a woman; an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order. *State of Madhya Pradesh vs. Sheikh Shahid*, AIR 2009 SC 2951 : 2009 (12) SCC 715 : 2009 (8) JT 277 : 2009 (5) SCR 1038 : 2009 (5) Scale 679 : 2009 (3) SLT 744.

51. Adequate and special reasons for Imposition of less than prescribed minimum.—In both Sub-sections (1) and (2) of Section 376 minimum sentences are prescribed. Both in cases of Sub-sections (1) and (2) the Court has the discretion to impose a sentence of imprisonment less than the prescribed minimum for 'adequate and special reasons'. If the Court does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the prescribed minimum. What is applicable to trial Courts regarding recording reasons for a departure from minimum sentence is equally applicable to the High Court. *State of Madhya Pradesh vs. Sheikh Shahid*, AIR 2009 SC 2951 : 2009 (12) SCC 715 : 2009 (8) JT 277 : 2009 (5) SCR 1038 : 2009 (5) Scale 679 : 2009 (3) SLT 744.

52. Promise of marriage.—Prosecutrix had categorically mentioned about a promise of marriage and the conduct of the appellant in not honouring the same requiring her to submit herself to a person from whom the appellant had to seek a favour.

The suicide note establishes that the intention of the appellant was to use the unfortunate girl and never marry her. Consent of prosecutrix was obtained under a promise of marriage and that the intention of the appellant from the very beginning was not to marry prosecutrix. The proposed matrimonial bond was nothing but a bait to obtain prosecutrix's consent to have physical relationship with the appellant. *Ashok Rai vs State*, 2010 (1) Cri LJ 1105 (Delhi).

Willingly consented. In the instant case admittedly the prosecutrix was a grown up lady and she was in love with the appellant and she without informing her parents and other persons, used to meet the appellant frequently for last few years at the lonely place and cohabited with him. The only question which needs to be considered is whether she has consented to sexual intercourse after giving assurance of marriage by the appellant to her or not. From scrutinizing the evidences of the witnesses including the informant on record and the contents of the Panchayati report, it is clear that they were in love and they used to meet often. There is no such evidence that the first act of the sexual intercourse was done after giving assurance of marriage by the appellant to the prosecutrix. It usually happens in such cases, when two young persons are madly in love, they make promises several times to get themselves married whatsoever obstacle may come in their way. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they in a weak moment, succumb to the temptation of haveing sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was in love, not because he promised to marry her but because she also desired it. In these circumstances it would be very difficult to impute to the appellant's knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.

Considering all these circumstances, we find that the prosecution has miserably failed to bring home the charge under Section 376, IPC against the appellant beyond all reasonable doubts. Therefore, we allow this appeal and set aside the judgment of conviction and sentence. *Supai Hansda vs. State of Bihar, now Jharkhand*, 2010 (3) Cri LJ 3359 (Jhar).

False assurance to a minor girl. In the present case, the victim/prosecutrix, a minor, was deceitfully allured on the false assurance of marriage and under psychological pressure she had been agreeing for repeated sexual intercourse with accused while they were living together for long time as husband and wife and the accused since inception knowing it fully well that he would not marry had successfully exploited the virginity of victim and subsequently resiled from the assurance of marriage betraying her. In these circumstances, the whole testimony of minor victim/ prosecutrix divulged in natural course, inspires confidence and is sufficient to prove the guilt of offence against the accused under Sec. 376 and evidence of the mother as well as the grandmother of the victim are corroborating the fact of repeated physical interaction and sexual exploitation of the victim/prosecutrix by the accused. The fact of residing together having physical relation as husband and wife for long time gives sufficient support to the prosecution version. Thus the prosecution beyond reasonable doubt has been able to prove the guilt/offence under Sec. 376 of IPC against the accused and keeping in view the facts and circumstances the conviction and sentence of accused under Sec. 376 would be proper. *Santosh Sinha v. State of Tripura*, 2007 (1) CriLJ 7 (Gau).

53. Rape and attempt to rape—Distinction between.—Distinction between an attempt to rape and rape is very suttle. When an attempt to penetrate is made, but no penetration takes place, it can be said to be an attempt to rape; but when an attempt to penetrate is made and a slight penetration takes place, the same would constitute rape. In the present case, the evidence on record does not suggest that there was an attempt to penetrate. That being the situation, there was no attempt to rape. *Tika Ram Chettri vs State of Sikkim*, 2010 (4) CriLJ 4025 (Sikkim).

54. Sodomy & Rape.—Victim aged 10 years. Instead of informing doctor about sexual assault stated to have sustained injuries fall from bicycle. As the victim was examined by doctor, though she revealed the history as due to bicycle injury, the fact that victim sustained swelling in the region of vulva and that it may be caused trauma to vulval region, it is evident that the injury was on the private part and there were no external injuries on the victim. If really, victim had fallen from the bicycle, there was no reason for her or her mother to lodge the complaint with an allegation of forcible sexual intercourse and an act of sodomy by putting the male organ by accused in the mouth of victim. It is in these circumstances, if the injury sustained by victim is looked into as mentioned the absence of external injuries on the body is inconsistent with the version of the accused about victim sustaining injury by fall from the bicycle. In this context, if the material placed on record is appreciated, it is relevant to note that when a girl aged 10 years is subjected to sexual assault or an act of sodomy, generally the victim does not desire to expose such fact to the people as it would be an insult and it causes lot of humiliation and embarrassment. It may be because of this reason that her mother instead of informing the doctor about sexual assault, might have stated that victim had sustained the injury by fall from the bicycle and when the material placed on record overrules the possibility of the victim's sustaining the injuries by fall from the bicycle and the fact that victim has sustained injury on the private part would lead to the only inference that her mother did not give the true information with regard to the sexual assault by accused.

The prosecution has examined the medical officer of the Government Hospital at Honnali, who examined the accused and after the examination, issued the certificate stating that accused is able to or have the potency to commit the rape.

The Investigating Officer has collected the FIR, which has been produced with regard to registration of crime-against accused for the offence punishable under Section

309, IPC. The perusal, the FIR reveals that the Head Constable of Honnali Police Station submitted the complaint stating that when he went to the hospital, wherein accuse was admitted to take treatment for consuming poison and attempted to commit suicide. He came to know that after the incident of sexual assault on victim accused had consumed insecticide and thereafter admitted in the hospital for the purpose of treatment. So, the fact that accused was in the hospital for the purpose of treatment which supports the prosecution and an inference could be drawn that after the sexual assault, apprehending the possibility of insult and arrest, accused could have made an effort to commit suicide and thereafter must have been in the hospital for treatment. *Channabasappa vs. State by Honnali Police*, 2010 (3) CriLJ 3369 (Karn).

55. Rape is most serious offence then outraging modesty.—Section 354 is attracted when a person assault or uses criminal force to outrage the modesty and the offence is punishable with imprisonment upto 2 years. Offence of rape is actually entering the private part of a man into the private part of woman. Thus, these three offences stand on different grades. The offense under Sections 354 and 509 are minor in relation to the offence under Section 376, IPC. The offence under Sec. 509 is complete as soon as the accused makes certain sound or gesture even though he does not assault or uses any force against the woman. Offence under Section 354 is complete as soon as assault or criminal force is used against the woman even though no attempt is made to commit rape. Offence of rape punishable under Sec. 376 is the most serious offence against a woman. Normally, to commit the offence of rape, the accused assaults and uses criminal force and it is followed by the penetration. In view of this, when a person is convicted for the offence under Section 376, IPC there is no logic or reason to separately convict and sentence the accused for the offence punishable under Section 354 also, if it pertains to the same woman and the offence is committed in the same transaction. It is possible that the accused may assault on another, during the same transaction. In that case he may be convicted and sentenced for both the offences separately. But in the present case, the accused committed rape on the prosecutrix. No other woman or any other transaction was involved in this case. Therefore, there could be no justification for the conviction of the accused for offence under Sec. 354 also when he is convicted for the offence punishable under Section 376, IPC. *Salim Alim Shamsher Shaikh vs State of Maharashtra*, 2010 (4) CriLJ 4064 (Bom).

56. Rape on minor girl.—*Sole testimony of prosecutrix.* The following parameters and factors that need to be kept in mind, which emerge in cases of a rape of a girl child. Such cases need to be dealt with sensitively and not like cases involving other penal offences. In other words, the whole approach of the Courts must be quite different. The traditional non-permissive bounds of Indian Society must be kept in mind while examining the evidence in cases involving sexual offences. Social factors play an important role in the nature and quality of available evidence. The sole testimony of a prosecutrix is enough to convict a person accused of rape, if the testimony is free from blemish and implicitly reliable. Such testimony does not need corroboration: but if there is some doubt about the implicit reliability of the testimony, then the Court may look for assurance to the acceptability of the testimony, short of its corroboration. If the testimony of the prosecutrix is reliable and trustworthy, then minor contradictions are not enough to throw out the evidence and other issues such as non-examination of an available witness, even the non-examination of a doctor or the non-production of the doctor's report would not be fatal to the case of the prosecution. *Mohd. Alam v. State (NCT of Delhi)*, 2007 CriLJ 803 (Del).

Victim a minor girl—Consent immaterial. When out of the two victims of rape, one of them is a minor girl, plea of consent would be unsustainable. The plea of consent is too shallow to even need detailed analysis or consideration. A minor girl cannot legally give a consent which would necessarily involve understanding of the effect of such consent. It has to be a conscious and voluntary act. There is a gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow, and mere act of submission does not involve consent. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress or impaired due to deficiency cannot be considered to be consent as understood in law. For constituting consent, there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the act. In the instant case, the faculty of the victims was clouded by fear and duress. Therefore, the contention with regard to the consent is not tenable. Even assuming that the victim was previously accustomed to sexual intercourse, that is not a determinative question. On the contrary, the question which was required to be adjudicated was did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any person to rape her. *Sarafat v. State of Uttaranchal*, 2006 CriLJ 654 (Uttaranchal).

* * * * *

[1][**Sec. 376-A. Intercourse by a man with his wife during separation.**—Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Comments

Series of sexual acts. Prosecutrix on her own went to meet accused at various places and hotel rooms. Held, those been forcible acts those would not have gone unnoticed by persons around.

The assertion of mistaken belief cannot be pressed and pursued barely in the form of argument. There has to be a charge to that effect. It is not the case of the prosecution and it is apparent from the charge that the prosecution has proceeded on the basis or foundation that due to mistaken belief of the prosecutrix she had consented for sexual intercourse.

It is not the case of the prosecution that from the very beginning promise to marry was a hoax and was made without intention to perform from the very inception.

The argument of prosecution is that due to promise by accused to marry, the prosecutrix had consented. Even if any such argument is now advanced at this stage, it

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1. Sections 376 and 376-D inserted by Act No. 43 of 1983, Section 3.

denies to the accused an opportunity to defend the charge. No such charge was at all framed.

In the background of these successive meetings and sexual relations, the prosecution and the prosecutrix want that Court should believe that she had no craving for what was due during every meeting and was repeatedly happening. Prosecutrix feels that she was unwilling for sexual relations which unwillingness she construes and interprets to be "resistance" on her part. This physical desire with inner unwillingness seems to be her psychological resistance i.e. from within than physical resistance.

What emerges from appreciation of evidence and its analysis is that the prosecutrix must be under compulsion from within for what her mind and body wanted, and she has succumbed to the passion, and to this her second thought resists.

Had it been that prosecutrix had no desire to have company of the accused or keep sexual relations with him, may be in spite of promise to marry, she would not have repeatedly visited the hotel rooms with the accused, apparently with close doors. Had those been forcible acts those would never have gone unnoticed by even those around and would not have gone unchecked.

It is a mystery which has not been solved by the prosecutrix as to why her version about the sexual relations on 13.04.2004 of the accused, removing her salwar and committing intercourse could not be treated to be a voluntary act on the part of the prosecutrix.

Considering the flow of statement of prosecutrix as regards her version about rape on every date of visit or/occasion after 05.05.2004, it becomes very difficult to believe that the incident dated 13.04.2004 as well was a sheer act of rape on her by the accused.

Had the incident which had occurred on 13.04.2004 been an act of rape which also resulted in injury and bleeding from her private part, she would not have, within a span of 20 days on 15.05.2004, and offered herself for further meeting and suffered another rape, and re-submitted for the same episode.

In the given situation, it is hard amongst hardest cases to believe that version of the prosecutrix that even the first act of sex between her and the accused was a forcible act. If the version of the prosecutrix as stands in the examination-in-chief is accepted on the face of record, nothing except unqualified and un-conditional the consent for sexual intercourse on every occasion would emerge.

The version of the prosecutrix that on all occasions commencing from 05.05.2004, all are the acts at forcible sexual intercourse, does not inspire confidence.

In the result, this Court concurs with the submissions advanced in support of the appeal and disagrees with the prosecution case. The appreciation and construction of evidence of the prosecutrix seen from any angle fails in satisfaction of the story couched by prosecutrix that it is a case of rape being the acts without consent or with consent on mistaken belief of facts.

Present case is more or less replica of this Court's judgment in case of *Anil alias Bowa S/o Ashanna Nannewar*, 2009 All MR (Cri) 15, cited by learned APP, as well as the case of *Uddhav* supra, and caveats recorded in all other citations do not help the prosecution in distinguishing present case on facts.

All that reveals from the version of the prosecutrix if said version turns out to be believable a little, is that it is due to the promise to marry which the prosecutrix subsequently believed, she did not object the sexual access by the accused which now she calls as forcible intercourse. *Anwar Khan Iqbal Khan vs. State of Maharashtra*, 2010 (3) CriLJ 3597 (Bombay) (Nagpur).

* * * * *

Sec. 376-B. Intercourse by public servant with woman in his custody.—Whoever, being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse and amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

* * * * *

Sec. 376-C. Intercourse by superintendent of jail, remand home, *etc.*—Whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and induces or seduces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation. 1.—"Superintendent" in relation to a jail, remand home or other place of custody or a women's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he can exercise any authority or control over its inmates.

Explanation 2.—The expression "women's or children's institution" shall have the same meaning as in *Explanation 2* to sub-sec. (2) of Sec. 376.

* * * * *

Sec. 376-D. Intercourse by any member of the manage-ment or staff of a hospital with any woman in that hospital.— Whoever, being on the management of a hospital or being on the staff of a hospital, takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation.—The expression "hospital" shall have the same meaning as in *Explanation 3* to sub-section (2) of Section 376.]

Synopsis

1. Reduction of sentence 2429
2. Statement of prosecution does not require corroboration 2429
3. Procedure 2429
4. Intention to introduce Sexual offences—Scope—Discussed 2429
5. Charge 2430

1. Reduction of sentence.—Where the offence was committed by the appellant prior to Indian Penal Code being amended. Section 276(2)(f) was brought on the statute book afterwards and thus, would not be applicable to the case in hand. However, the maximum life imprisonment could be imposed even under Section 376 of the unamended Indian Penal Code. In the present case, the Court felt that sentence of life imprisonment imposed on the appellant was harsh. Held the interests of justice would be well met by imposing sentence of ten years rigorous imprisonment in place of imprisonment for life. *Balbir Singh* v. *State*, 1996 Cr LJ 2403 (Del).

The appellant was admittedly a young man of 21 years of the age at the time of the commission of the offence. He committed the said offence on account of an erotic impulse and with a view to satisfy the same. The prosecutrix after the operation has recovered. She is hale and hearty now, keeping in view the above circumstances, a sentence of ten years RI with fine of Rs. 2,000/- would be sufficient enough to meet the ends of justice under Section 376 of the Indian Penal Code. *Zamir Ahmed* v. *State*. 1996 Cr LJ 2354 (Del).

2. Statement of prosecution does not require corroboration.—In the statement of the prosecutrix it is quite clear and unequivocal on the point as to who has ravished her, there is no reason, whatsoever, as to why the said statement, without any corroboration from any quarter, whatsoever, cannot form the basis of conviction Thus her statement is to be scrutinised like the statement of any other witness and if there is a ring of truth about it and if it inspires confidence the Courts would be under an obligation to rely thereupon. In that eventually they need not look for corroboration. *Zamir Ahmed* v. *State*, 1996 Cr LJ 2354 (Del).

3. Procedure.—The offence of rape under Section 376 is cognizable, non-bailable and triable by Court of Session. If the intercourse is by a man with his wife not being under twelve years of age, the offence is non-cognizable, bailable and triable by Court of Session. Under Section 376-A, the offence is non-cognizable, bailable and triable by Court of Session. Under Sections 376-B, 376-C and 376-D, the offence is cognizable (but no arrest shall be made without a warrant or without an order of a Magistrate), bailable and triable by Court of Session.

4. Intention to introduce Sexual offences—Scope—Discussed.—The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for 'Sexual offence', which encompasses Secs. 375, 376, 376-A, 376-B, 376-C and 376-D. 'Rape' is defined in Sec. 375. Secs. 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act, *i.e.* 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-b); or as expressed more fully,' rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will (Hale PC 628). The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape; 1 Hon. 6, 1a, 9 Edw. 4, 26 a (Hale PC 628). In the crime of rape, 'carnal knowledge' means the penetration to the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephen's "Criminal Law" 9th Ed. P. 262). In 'Encyclopaedia of Crime and Justice' (Volume 4, page 1356) it is stated ". . . . . . even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order. *Shekara vs. State of Karnataka*, 2009 (4) JT 360 : 2009(3) Scale 104 : 2009(1) Crimes 472 SC.

5. Charge.—I, *(Name and office of the Sessions Judge)* hereby charge you *(name of the accused) as* follows :

"That you on or about............at........you committed rape on A (name *of the woman raped*) and thereby committed an offence punishable under Section 376, IPC and within the cognizance of the Court of Session or the High Court."

"And I hereby direct that you be tried on the said charge by the said Court."

* * * * *

OF UNNATURAL OFFENCE

Sec. 377. Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with *imprisonment for life*, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Synopsis

1. Amendment....................2431
2. Consent....................2431
3. Carnal intercourse....................2431
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1. Amendment.—The words in italics have been substituted for the words "transportation for life" by Act 26 of 1955, Section 177 and Sch. with effect from 1.1.1956.

2. Consent.—To establish an offence under this section, the consent of the party upon whom the offence is committed is quite immaterial. *In re Mathuranath Ghosh*, 1 J.G. 43. A mere fifthy and indecent assault, without proof of attempted or intended penetration would not amount to an offence under this section. 1 Weir 383 ; AWN 1884, 25. A conviction can be safely based on the uncorroborated testimony of the boy, if it is not otherwise doubtful. 42 PR 1914 Cr ; but *see* 73 PLR 1918. It is doubtful whether the act of having connection with a woman in her mouth would amount to an offence under this section. 1 Weir 382. A sentence of whipping is far more suitable for a juvenile offender convicted of bestiality than a sentence of imprisonment. 3 PR 1884 Cr ; AIR 1937 Pesh 22 ; 38 Cr LJ 429. But an attempt should not be punished with whipping. AIR 1938 All 16 ; 39 Cr LJ 233.

3. Carnal intercourse.—*Coitus per os* is an offence. 26 Cr LJ 945 ; AIR 1925 Sind 286. Evidence to support charge under Section 377 must be convincing. AIR 1926 Lah 375 ; 8 LLJ 180 ; 27 Cr LJ 593 ; 27 PLR 353 ; 95 Ind Cas 257 ; AIR 1932 Sind 143 : 33 Cr LJ 900. Stains of semen make important evidence in sodomy. AIR 1930 Lah 311 : 10 Lah 794 ; 31 Cr LJ 343. The offence made punishable under Section 377 requires that penetration however little should be proved strictly. Thus an attempt to commit this offence should be an attempt to thrust the male organ into the anus of the passive agent. Some activity on the part of the accused in that particular direction ought to be proved strictly. A mere preparation for the operation should not necessarily be construed as an attempt. AIR 1934 Sind 206. Where the accused was proved to have had carnal intercourse by placing his penis inside the nostril of a bullock, *held*, that he was guilty of an offence under Section 377. AIR 1934 Lah 261 ; AIR 1968 Guj 252 (putting miles organ into the mouth of a boy).

4. Cases.—A charge under Section 377, IPC should allege the time, when the place where and any known or unknown person whom, the particular act charged as an offence under Section 377 was committed. 6 All 204.

The defence examined three witnesses, including Dr. Shiv Shankar Prasad (D.W. 2) who stated about treatment of the appellant in the Kurhani Hospital when he was hospitalised and remained confined during the period from 3.8.1988 to 4.8.1988. Pursuant to which he was discharged from the hospital. Other two defence witnesses were examined obviously to place some documents on record to suggest litigation between the parties. The trial court on meticulous appreciation of the evidence placed on the record while acquitted Dinesh Thakur giving him benefit of doubt for insufficiency of evidence about his identification, rendered verdict of guilt under Section 363 and 377, IPC and sentenced appellant to suffer rigorous imprisonment for a term of six months and 2 and 1/2 years both these counts, respectively with the direction that both the sentences shall run concurrently. On considering of totality of the circumstances of the case, while upholding the finding of guilt recorded by the court below, the petitioner is sentenced to a term of 1 and 1/2 years under Section 377, IPC. *Mohan Ojha v. State of Bihar*, 2002 Cr LJ 3344 : 2002(2) BLJ 196 : 2002 East Cri C 500.

5. Evidence.—In a prosecution for an offence under Section 377, IPC, the complainant, a boy, who is found to have been a willing party, must be regarded as an accomplice and it is not therefore safe to convict the accused on the evidence of the complainant boy, unless his evidence is corroborated in material particulars. 61 CLJ 538 ; 39 CWN 1051. On evidence of boy only and medical evidence showing abrasion on anus due to unnatural intercourse, conviction was to be held proper. 1961 Jab LJ 405.

6. Medical evidence.—In a case of completed offence under this section medical evidence could and should be definite against the accused. AIR 1947 All 97 ; 48 Cr LJ 376 ; ILR 1945 Nag 226 ; 46 Cr LJ 68 ; AIR 1944 Nag 245.

7. Sentence.—The punishment of whipping is in a case of bestiality (sodomy on a boy of eight years) is useful as deterrent. 167 Ind Cas 655 ; 30 Cr LJ 429 ; AIR 1937 Pesh 22 ; 9 R Pesh 90 ; *see* also AIR 1936 Lah 256 ; 1936 Cr C 205 ; 38 PLR 437 ; 37 Cr LJ 474 ; 161 Ind Cas 591.

Where there was conviction under Section 377, IPC—Oral evidence corroborated by medical evidence—Commission of offence established. Therefore it was held conviction confirmed however in the facts and circumsta-nces of the case lenient view taken. *Avinash* v. *State of M.P.*, 1995 Cr LR 119 (MP).

There was swelling in anus area and there was injury of 1 cm. length. The injured prosecutrix and other witnesses were there to support, and hence case is proved. But looking to age of accused the sentence was reduced to 4 years from 7 years. *Chouhal Singh* v. *State of Rajasthan*, 1995 Cr LR 237 (Raj).

In case of highway robbery and murder when accused did not show any regard for human lives, life sentence be enhanced to capital punishment. *Prem* v. *State of Maharashtra*, 1993 Cr LJ 1608 (Bom).

Where appellant was a boy of young age and faced—Agony of trial was established fine and sentence reduced. *Jit Masih* v. *State of Punjab*, (1994) 1 CC Cases 335 (P & H).

Where the charge was of committing sodomy with student of 8th class by petitioner, a Sanskrit teacher—Conviction and sentence was given and revision petition was filed. The petitioner having faced agony of trial, his educational background and serious consequences concerning job, his sentence reduced to already undergone. *Om Prakash* v. *State of Haryana*, (1994) 2 Crimes 250 (P & H) : (1994) 2 Recent Cr R 78 : 1994 (2) CC Cases 487 (P & H).

When medico-legal report coupled with injuries found on victim supported allegation to sodomy and when identification of accused is established then accused was rightly convicted under Section 377, IPC. *Kailash* v. *State of Haryana*, 2004 Cr LJ 310 (P&H) : 2003 (3) Rec Cri R 462.

8. Procedure.—Cognizable—Warrant—Not bailable—Not comp- oundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

9. Evidence.—In a complaint for unnatural offence when it is found as a fact that the complainant was a perfectly willing party, it is not safe to convict the accused unless the complainant's evidence is corroborated in material particulars implicating the accused. It is a matter of prudence, that there ought not to be any conviction without such corroboratlon, except in very exceptional case. 61 Cr LJ 883 ; 39 CWN 1051 ; 38 Cr LJ 70.

The man convicted for offence of sodomy pleaded for leniency in sentence on ground that such type of acts are not considered as offence in England. Rejecting the plea it was held that practice of adopting English Laws is not always conductive to Indian society. The medico-legal report coupled with injuries found on complainant victim supported allegation of sodomy. The conviction and sentence were, therefore, upheld. *Kailash* v. *State*, 2004 Cr LJ 310 (P&H) : 2003 (3) Rec Cri R 462.

10. Charge.—I *(name and office of the Magistrate, etc.)* hereby charge you (*name of the accused)* as follows :

That on or about the.............day of......at.......you had carnal intercourse against the order of nature with........ (*specify the object.........whether man, woman or animal)* and thereby committed an offence punishable under Section 377 of the Indian Penal Code, and within my cognizance (or the cognizance of the Court of Session or High Court).

And I hereby direct that you be tried (by the said Court)[1], on the said charge.

Sentence.—1975 Cr LJ 30 ; AIR 1974 SC 352 ; 1974 SCC (Cr) 49 Q (reduction of sentence by Supreme Court).

11. Acquittal.—Where there was prosecution for sodomy and had delayed in FIR—Delay was not properly explained—Evidence was not reliable and there was also non-corroboration of medical evidence.—Accused, held, entitled to benefit of doubt. *Dilip Maheshwari* v. *State of M.P.*, 1995 Cr LR 80 (MP).

12. Conviction.—Where there was appreciation of evidence—Victim's version found to be natural—Medical evidence corroborating prosecution case—FIR lodged next day with proper explanation for delay and no illegality or perversity in findings of courts below, hence conviction was upheld. *Chandrashekhar* v. *State of Madhya Pradesh*, (1995) 1 CCR 86 (MP).

13. Attempt.—For committing or for attempt to commit an offence under Section 377, IPC penetration must be proved before the accused can be convicted. Since preparation to commit an offence, under Section 377 is not an offence no offence is said to have been committed and charges under Sections 377/511 could not have been framed. Hence quashed. *Biren Lal* v. *State of Bihar*, (1995) 2 East Cr C 526 (Pat).

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[1] In cases triable by Magistrate, omit the words within brackets.

14. Rape and unnatural offence.—Accused Headmaster have raped or subjected school girls aged between 8-12 years to unnatural offence. Victims, capable of being tutored and overwhelming evidence reflecting such tutoring. Their testimony being not corroborated, cannot form basis for conviction. *Sekaran vs. State*, 2010 (2) CrLJ 2341 (Mad).

15. Sodomy & Rape.—Victim aged 10 years. Instead of informing doctor about sexual assault stated to have sustained injuries fall from bicycle. As the victim was examined by doctor, though she revealed the history as due to bicycle injury, the fact that victim sustained swelling in the region of vulva and that it may be caused trauma to vulval region, it is evident that the injury was on the private part and there were no external injuries on the victim. If really, victim had fallen from the bicycle, there was no reason for her or her mother to lodge the complaint with an allegation of forcible sexual intercourse and an act of sodomy by putting the male organ by accused in the mouth of victim. It is in these circumstances, if the injury sustained by victim is looked into as mentioned the absence of external injuries on the body is inconsistent with the version of the accused about victim sustaining injury by fall from the bicycle. In this context, if the material placed on record is appreciated, it is relevant to note that when a girl aged 10 years is subjected to sexual assault or an act of sodomy, generally the victim does not desire to expose such fact to the people as it would be an insult and it causes lot of humiliation and embarrassment. It may be because of this reason that her mother instead of informing the doctor about sexual assault, might have stated that victim had sustained the injury by fall from the bicycle and when the material placed on record overrules the possibility of the victim's sustaining the injuries by fall from the bicycle and the fact that victim has sustained injury on the private part would lead to the only inference that her mother did not give the true information with regard to the sexual assault by accused.

The prosecution has examined the medical officer of the Government Hospital at Honnali, who examined the accused and after the examination, issued the certificate stating that accused is able to or have the potency to commit the rape.

The Investigating Officer has collected the FIR, which has been produced with regard to registration of crime-against accused for the offence punishable under Section 309. IPC. The perusal, the FIR reveals that the Head Constable of Honnali Police Station submitted the complaint stating that when he went to the hospital, wherein accuse was admitted to take treatment for consuming poison and attempted to commit suicide. He came to know that after the incident of sexual assault on victim accused had consumed insecticide and thereafter admitted in the hospital for the purpose of treatment. So, the fact that accused was in the hospital for the purpose of treatment which supports the prosecution and an inference could be drawn that after the sexual assault, apprehending the possibility of insult and arrest, accused could have made an effort to commit suicide and thereafter must have been in the hospital for treatment. *Channabasappa vs. State by Honnali Police*, 2010 (3) CriLJ 3369 (Karn).

16. Rape and Unnatural intercourse—Intercourse is necessary ingredient in both offences.—In the instant case the prosecution itself has alleged that the accused is guilty of the offences punishable under Sections 376 and 377 of IPC. It is true that such a charge in a given case can be levelled and framed. However, both acts are separate offence. If sexual intercourse forcibly with a woman and that too a minor is an offence punishable under Section 376 and unnatural intercourse is independently made an offence under Section 377, then mere version of the victim when both charges are levelled i.e. the act of rape and unnatural intercourse, would not necessarily be conclusive to hold that the charges are proved. The medical evidence and the reports of chemical analyzer assume some significance. In this case, the samples have been collected nearly two months from the incident and the analysis report has been forwarded a good five and half months after the date of incident. The findings therein do not conclusively show that either of the offences have been committed. The charge under Section 375 can be proved by demonstrating that the case falls in the explanation to Section 375. However, there has to be evidence of atleast intercourse and penetration so as to bring it within the case of the explanation. In the instant case, even that is not conclusive, leave alone, reliable and trustworthy. Rape constitutes sexual intercourse with a woman. The explanation states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Section 377 of IPC presupposes carnal intercourse against the order of nature. It has similar explanation. However, intercourse is necessary ingredient in both the offences. That itself is not proved in this case. Hence accused would be entitled to acquittal. *Kailash Laxman Khamkar vs. State of Maharashtra*, 2010 (3) Cri LJ 3255 (Bom).

* * * * *

CHAPTER XVII

OF OFFENCES AGAINST PROPERTY

Scope of the chapter.—"The offences defined in this Chapter are made punishable on the ground that they are violations of the right of property. But the right of property is itself the creature of law. It is evident, that if the substantive law touching this right be imperfect or obscure, the penal law, which is auxiliary to that substantive law, and of imperfect or obscure, the penal law, which is auxiliary to that substantive law, and of which the object is to add a sanction to that substantive law, must partake of the imperfection or obscurity. If it be a matter of doubt what things are the subject of a certain right, in whom the right resides and to what that right extends, it must also be matter of doubt whether that right has or has not been violated. For example *A*, without *Z's* permission, shoots snipes on *Z's* ground, and carries them away, here if the law of civil rights grants the property in such birds to any person who can catch them. *A* has not, by killing them and carrying them away, invaded *Z*'s right of property. If, on the other hand the law of civil rights declares such birds are the property of the person on whose lands they are, *A* has invaded *Z's* rights of property. If it be matter of doubt what the state of the civil law on the subject actually is, it must also be matter of doubt whether, *A* has wronged *Z*, or not . . . . As the substantive civil law varies, the penal law, which is added as a ground to the substantive civil law, must vary also".—*Morgan and Macpherson.*

OF THEFT

Sec. 378. Theft.—Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Explanation 1.—A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft ; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.—A moving effected by the same act which effects the verance, may be theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move the animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be expressed or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Illustrations

(*a*) A cuts down a tree on *Z's* ground, with the intention of dishonestly taking the tree out of *Z's* possession without *Z*s consent. Here, as soon as *A* has severed the tree In order to such taking, he has committed theft.

(*b*) *A* puts a bait for dogs in his pocket, and thus induces *Z's* dog to follow it. Here if *A*'s intention he dishonestly to take the dog out of *Z*s possession without *Z*s consent. *A* has committed theft as soon as *Z*s dog has begun to follow *A*.

(*c*) *A* meets of bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, *A* has committed theft of the treasure.

(*d*) *A* being *Z*s servant, and entrusted by *Z* with the care of *Z*s plate, dishonestly runs away with the plate, without *Z*s consent. *A* has committed theft.

(*e*) *Z*, going on journey, entrusts his plate to *A*, the keeper of a warehouse, till *Z* shall return. *A* carries the plate to a goldsmith and sells it. Here the plate was not in *Z*s possession. It could not therefore be taken out of *Z*s possession. and *A* has not committed theft, though he may have committed criminal breach of trust.

(*f*) *A* find a ring belonging to *Z* on a table in the house which *Z* occupies. Here the ring is in *Z*s possession and if *A* dishonestly removes it, *A* commits theft.

(*g*) *A* finds a ring lying on the high road, not in the possession of any person. *A* by taking it, commits no theft, though he may commit criminal misappropriation of property.

(*h*) *A* sees a ring belonging to *Z* lying on a table in *Z*s house. Not venturing to misappropriate the ring immediately for fear of search and detection. *A* hides the ring in a place where it is highly improbable that it will ever be found by *Z*, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here *A*, at the time of first moving the ring, commits theft.

(*i*) *A* delivers his watch to *Z*, a jeweller to be regulated. *Z* carries it to his shop. *A* not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of *Z*s hand, and carried it away. Here *A*, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(*j*) *A* owes money to *Z* for repairing the watch, and if *Z* retains the watch lawfully as a security for the debt, and A takes the watch out of *Z*s possession, with the intention of depriving *Z* of the property as a security for his-debt. he commits theft, inasmuch as he takes it dishonestly.

(*k*) Again, if *A* having powned his watch to *Z*, takes it out of *Z*s possession without *Z*s consent not having paid what he borrowed on the watch. he commits theft. though the watch is his own property, inasmuch as he take it dishonestly.

(*l*) *A* takes an article belonging to *Z* out of *Z*s possession without *Z*s consent. with the intention of keeping it until he obtains from *Z* as a reward for its restoration. Here *A* takes dishonestly : *A* has therefore committed theft.

(*m*) *A* being on friendly terms with *Z*, goes into *Z*s library in *Z*'s absence, and takes away a book without *Z*s express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable, that A may have conceived that he had *Z*s implied consent to use *Z*s book. If this was *A*'s impression, *A* has not committed theft.

(*n*) *A* asks from *Z*s wife. She gives *A* money, food and clothes, which *A* knows to belong to *Z* her husband. Here it is probable that *A* may conceive that *Z*s wife is authorised to give away alms. If this was *A*'s impression, *A* has not committed theft.

(*o*) *A* is the paramour of *Z*s wife. She gives a valuable property, which *A* knows to belong to her husband *Z*, and to be such property as she has not authority from *Z* to give. If *A* takes the property dishonestly, he commits theft.

(*p*) *A* in good faith, believing property belonging to *Z* to be A's own property takes that property out of B's possession. Here, as *A* does not take dishonestly, he does not commit theft.

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1. Essentials of offence.—To constitute the offence of theft the prosecution must establish (*a*) that there was dishonest intention to take property, (*b*) that the property was moveable property, (*c*) that it was taken out of the possession of another, (*d*) that it was taken without the consent of that other, and (*e*) that there was removal of the property in order to accomplish the taken of it. 54 Ind Cas 992. Commission of theft consists in (1) moving a moveable property of a person out of his possession without his consent (2) the moving being in order to the taking of the property with a dishonest intention. Thus (1) the absence of the person's consent at the time of moving and (2) the presence of dishonest intention in so taking and at the time are the essential ingredients of the offence of theft. AIR 1957 SC 369 : 1957 SCA 364 : 1957 SCC 192 :

1957 SCJ 386 : 1957 SCR 627 : 1957 Cr LJ 552. The offence of theft is contemplated where there is dishonest moving of the property even though the property is detached from that to which it is secured. But for moving the property the offence of theft is not contemplated, though it may be still an attempt. AIR 1958 Mad 476 : 1958 All Cr R 330 : 1958 Cr LJ 1198. Guilt depends not on mere ownership of property in any one but on its removal from possession of owner and appropriation. ILR 1953 Mys 617 : 33 Mys LJ 188 ; *see* also AIR 1963 SC 1098 ; AIR 1965 SC 926 (whether illegal seizure of cattle who trespassed into accused's land and caused damages to the crop, amount to theft. AIR 1962 Tripura 25 ; (1961) 1 Cr LJ 685.

The loss contemplated by Section 378, need not be a total deprivation but it is enough if it is a temporary keeping deprived the owner of the lorry with a view to gain a temporary advantage for themselves in view of the strike at the workshop of the owner of the lorry.' 1959 Ker LJ 1053 : 1959 Ker LJ 878. Before the offence of theft is made out it has to be established that (1) the accused was not legally entitled to the property alleged to be stolen and that the complainant was wrongfully deprived of the property ; (2) the means employed to take possession were unlawful and (3) the taking was without consent. 1964 All Cr R 483 : 1964 All WR (HC) 674 : 1965 All LJ 214. It is necessary for the prosecution to establish in a case of theft that certain movable property was taken out of the possession of a person without his consent and that for the purpose of such taking the said property was removed. Another important ingredient which has to be established is that the accused had the intention to take the said property dishonestly. 1961 (1) Cr LJ 685 ; AIR 1960 Pat 546 : 1960 Cr LJ 1646.

It is clear from the definitions of 'dishonestly' in Section 24, and 'wrongful gain' and 'wrongful loss' in Section 23, that the gain or loss contemplated need not be a total acquisition or a total deprivation but it is enough it is a temporary retention of property by the person wrongfully gaining or temporary "keeping out" of property for the person legally entitled to. This is clearly brought out in Illustration (1) to Section 378, Penal Code, and is uniformly recognised by various decisions the High Court which point out that in this respect "theft" under the Penal Code, differs from 'larceny' in English law which contemplated permanent gain or loss. AIR 1957 SC 869 : 1957 SCJ 386 : 1957 SCR 623 : 1957 Cr LJ 552 : 1957 SCC 192. There can be no theft of fish from a tank which belongs to another and is in his possession, if the offender catches them without the consent of the owner and without any *bona fide* claim of right. (1964) 1 SCJ 410 : (1964) 1 SCWR 92 : 1964 SCD 287 : 1964 All Cr R 129 ; 29 Cut LT 425.

Proof of possession is an essential ingredient in case of theft. 29 Cut LT 425.

2. Intending dishonestly.—The intention is the gist of the offence. There must be an intention to take dishonestly. 3 WR Cr 2 ; 63 PLR 1903; 2 Bom LR 752 ; 5 MHC App 37 ; 1 Weir 411 ; 2 Pat LT 583 ; 39 Ind Cas 1100 ; 38 Ind Cas 318 ; 29 CWN 1011 : 26 Cr LJ 1505 ; 52 Cal 1015 ; 28 Cr LJ 531 ; 26 Cr LJ 652 : 85 Ind Cas 940 ; 17 Cr LJ 295 : 14 ALJ 398 : 35 Ind Cas 167 ; 142 Ind Cas 624 : 14 PLT 71 : 1933 Cr C 510 : 54 Cr LJ 407 : AIR 1933 Pat 179 ; AIR 1935 Sind 115 ; 35 Cr LJ 761 : 58 Cr LJ 434. A charge of theft will lie even where there is no intention to assume the entire dominion over the property taken or to retain it permanently. Where a person removes another's property under a mistake of fact and in ignorance of the law, believing that he has a right to take such property, he is not guilty of theft, as his intention is innocent and not criminal. 15 Bom 344 ; Rat Un Cr R 920 : 1 Weir 411 ; 1 LBR 334 : 3 CWN 332. But a mere assertion of a claim of right is not itself a sufficient plea. 4 Bom LR 936 : 7 BLR App 55 ; 16 WR Cr 18 ; 16 WRC 78 ; 16 WR Cr 75. The assertion must be of a *bona fide* claim of right. 10 Bom LR 166 ; 14 ALJ 399 ; 20 CWN 1270 ; 1922 PHCC 10 : AIR 1922 Pat 265 ; 44 MLJ 138 ; 4 Pat LT 608 ; 1 PLT 121 ; 28 CLJ 120 ; 16 Cr LJ 458 ; 16 CLJ 715 ; 23 CWN 385 ; 2 Pat LT 394 ; 31 Cr LJ 1222 ; 32 Bom LR 1140 : AIR 1930 Bom 488 ; AIR 1928 Rang 113 ; *see* also AIR 1935 All 214. *Bona fide* claim of title depends on facts of each case. AIR 1933 Oudh 50 : 34 Cr LJ 547 : 9 OWN 1196. Where the owner of a thing removes it from the possession of a person to whom it has been given for repairs he is not guilty under this section. 90 Ind Cas 289 : 29 CWN 1011 : 26 Cr LJ 1505 ; 25 Cr LJ 809 : 81 Ind Cas 345 ; 4 Bom LR 56 ; 28 M 304 ; 14 CWN 408 ; 7 WR Cr 57 ; 15 WR Cr 57 ; 43 PWR 1913 Cr ; AIR 1924 Pat 125 ; AIR 1924 Rang 72 ; 96 Ind Cas 879 ; 27 Cr LJ 343 ; 99 Ind Cas 104 ; 103 Ind Cas 84. *Bona fide* taking of property is not theft. AIR 1935 Sind 115 ; 166 Ind Cas 490 : 38 Cr LJ 223 : 3 BR 174. Where a person acts in the *bona fide* belief that he has a right to take away the thing and asserts such a right immediately after he is charged with theft, no offence is committed. ILR 1951 Nag 59 : 4 AI Cr D 769 ; AIR 1959 AP 530 : 1959 Cr LJ 1141 (reversed in AIR 1962 SC 586). A *bona fide* claim cannot be inferred from the fact that the accused acted openly while cutting the timber not owned by him. 152 Ind Cas 477 : 1933 Cr C 1075 : AIR 1934 Pat 491. Where a person of respectable position, without any criminal intent or ulterior motive, takes away temporarily a cycle belonging to another, as his own cycle at the time it is missing, and the temporary loss of the use of the cycle is not even complained about by its owner, no offence of theft is committed, as the important element of criminal intention is completely absent. 161 Ind Cas 268 : 37 Cr LJ 456 : 1933 OWN 258. Where certain persons, purchasing a share in the land and structures jointly owned by some co-sharers, in execution of a decree against one of them and taking possession through Court, utilise some of the old materials of huts belonging to the co-sharers which have been flown away and build a hut on the same land, they are not guilty of an offence under Section 379, there being, no dishonesty on their part of any wrongful loss to other co-sharers. 162 Ind Cas 660 : 37 Cr LJ 747 : 1936 Cr C 485 : AIR 1936 Cal 261. The removal of property in the assertion of a *bona fide* claim of right, though unfounded in law and facts does not constitute theft, although a colourable pretence to obtain or keep possession of property would not avail as a defence. Whether a claim is *bona fide* or not must be determined upon all the circumstances of the case and a Court ought not to convict unless it holds that claim is a mere colourable pretence. 29 SLR 121 : 158 Ind Cas 282 : 36 CLJ 1310 : 1935 Cr C 494 : AIR 1935 Sind 115 ; *see* also 39 CWN 1306. Where the accused has no *bona fide* claim of right, it must be proved that he had *bona fide* belief that he had such a *bona fide* claim, otherwise he is guilty under this section. 159 Ind Cas 36 : 1935 Cr C 1117 : AIR 1935 Cal 675. Where a person acts in *bona fide* belief that he has a right to take away a thing and asserts such a right immediately after he is charged with theft no offence is committed. If on the other hand, he takes away a thing, not because he *bona fide* believes that he has a right to take away the thing, but with the intention of coercing the person in possession to do something, even though he does not intend to deprive that person of the thing permanently, he must be deemed to have committed the offence of theft. AIR 1951 Nag 162 ; *see* also AIR 1926 Cal 149 : 27 Cr LJ 89 ; AIR 1930 Bom 485 : 32 Cr LJ 28 ; 148 IC 892 : 35 Cr LJ 761 ; AIR 1941 Pat 383 : 42 Cr LJ 293 ; 44 Cal 66 : 17 Cr LJ 456 : AIR 1917 Cal 648. 22 Cal 1017 (FB) ; AIR 1951 Cal 207 ; 4 DLR (Cal) 299 : 3 AI Cr

D 538 ; AIR 1944 Pat 274 ; 45 Cr LJ 386 ; 27 PLT 173. Dishonesty is an essential ingredient of the offence of theft, and the prosecution must prove that the accused acted dishonestly in doing the act, which constitute the offence. 226 IC 576 : AIR 1947 Pat 274 : 47 Cr LJ 992 ; AIR 1941 Pat 383 : 42 Cr LJ 293 ; (1953) 1 MLJ 290 : 1953 Cr LJ 1035 : AIR 1953 Mad 516. Illegal seizure of bullocks to impound them is theft. ILR 1946 Nag 326 : AIR 1946 Nag 221, 1953 Cr LJ 1081 : AIR 1953 Nag 211. Owner of bullock taking away the cattle illegally seized under distress warrant does not commit theft. 1953 BLJR 382. No offence is caused where theft of committed in assertion of right or supposed right. AIR 1944 Pat 274 : 46 Cr LJ 183 ; AIR 1941 Mad 799 (1) : 1941 MWN 571 ; AIR 1941 Mad 674 : 42 Cr LJ 896 ; AIR 1941 Lah 917 : 42 Cr LJ 601 ; AIR 1940 Pat 588 : 41 Cr LJ 509 ; 1940 MWN 871 ; AIR 1939 Sind 333 : 41 Cr LJ 103 : ILR 1940 Ker 105 ; AIR 1939 Mad 775 : 40 Cr LJ 904. Dishonest intention cannot be said to be present when the property is removed in assertion of a *bona fide* claim of right though unfounded in law and fact. 1953 Cr LJ 600 : A1R 1953 Madh B 79 : ILR 1953 Madh B 33 ; ILR 1965 Cut 234 : 31 Cut LJ 679 : (1965) 7 OJD 165. But removal of property of the debtor by the creditor is an offence under this section. AIR 1941 Lah 221 : 42 Cr LJ 625 ; 1938 NLJ 301. In order to constitute theft the fact of dishonest intention must be present. AIR 1935 Sind 115 : 36 Cr LJ 1310 ; AIR 1943 Oudh 230 : 44 Cr LJ 640 ; AIR 1941 Mad 41 : 42 Cr LJ 294 ; AIR 1941 Pat 369 : 42 Cr LJ 339 ; AIR 1943 Cal 73 : 43 Cr LJ 886 ; AIR 1938 Cal 281 : 37 Cr LJ 747 ; AIR 1943 Oudh 444 : 45 Cr LJ 386. Removal of property with no right to do so, by way of asserting right to such property is theft. AIR 1933 Lah 481 : 34 Cr LJ 843 : 34 PLT 276 : 1933 Cr C 737. Where in jungle in Dalbhum estate in Patna, *raiyat* pays *Jungle kar* and takes forest produce without permission openly and not stealthily, there is no dishonest intention. AIR 1931 Pat 99 : 32 Cr LJ 617. Where a person committed theft of some bricks from an underground wall part of which was on his own premises, *held*, that there was no dishonest taking of the bricks, even if they were not the property of the accused. 21 PR 1890 Cr.

To prove an offence of theft, dishonest intention of the accused in removing the property has to be established. In order to prove dishonest intention the question of title to the property certainly will enter into the picture. A *bona fide* claim of right would be a good defence in a charge of theft. AIR 1962 Trip 25 : 1962 (1) Cr LJ 756 ; 1961 (2) Cr LJ 435 ; 25 Cut LT 249 ; 62 CWN 500 : 1958 All Cr R 326 ; 1953 BLJR 526 (mere claim is not enough. It must be an honest one) ; 1961 (1) Cr LJ 685 (Manipur) ; (2) Cr LJ 495 (Tripura).

Taking the definition of 'dishonestly' in Section 24, and "wrongful gain" and "wrongful loss" in Section 23, together, a person can be said to have dishonest intention if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss by wrongful means of the property to which the person so losing is legally entitled to. AIR 1957 SC 862 : AIR 1957 SC 364 : 1957 SCJ 386 : 1957 SCR 623 : 1957 Cr LJ 552.

Where *mistries* attached to the Electricity department cut branches of trees over hanging the electrical line under the orders of the departmental head without prior orders from a Magistrate under Section 18 (3), of the Electricity Act, there is no want of good faith on the part of the mistries and they could not be prosecuted under Section 378. AIR 1963 Pat 207.

It is essential for the offence of theft that the removal of the property must however been with the intention to take it dishonestly. 88 CWN 336 ; 1980 Cr LR (Mah) 85 ; 1978 Cr LJ 715 ; 1960 Cr LJ 1414. A person can be said to have dishonest intention if in taking the property it is his intention to cause gain by unlawful means of the property to which he is not legally entitled or to cause loss by unlawful means, of property to which the person so losing is legally entitled. AIR 1965 SC 585 : 1965 (1) Cr LJ 496 ; AIR 1957 SC 369 : 1957 Cr LJ 352. The gain or loss need not be total. Even temporary keeping out of property of the person legally entitled is enough. AIR 1963 SC 1094 : 1963 (2) Cr LJ 178.

3. Moveable property.—Moveable property only and no other. description of property can be the subject of theft. Moveable things which are of small intrinsic value become very valuable when they show a title to property or constitute the evidence of legal right. By what is written upon it the material may become a title deed or mortgage deed, or a bond bill of exchange, promissory note, *etc*. *Vide* 72 Ind Cas 526 : 24 Cr LJ 417 ; 83 Ind Cas 889 ; 89 Ind Cas 893. Water running freely from a river through a channel made and maintained by a person cannot be the subject of theft. 35 Cal 437 : 12 CWN 534 : 7 Cr LJ 36. A cancelled currency note cannot be a subject-matter of theft. 83 Ind Cas 893. The cattle may be subject of theft. 4 Weir 405 ; AWN 1888 97 ; 17 Cr LJ 239. Fish in an enclosed tank belonging to a Municipality are restrained of the natural liberty and liable to be taken at any time according to the pleasure of the owner, and are, therefore, upon principle, and according to the better opinions, subjects of theft. 10 Bom 193 ; UBR (1892-1896) Vol. I, 234 ; 1 Weir 384 ; 15 Cr LJ 77 ; 5 SLR 122. But fish in a navigable river where *no jalkar* right exists are not subject of theft. 19 WR Cr 47 ; 20 WR Cr 15 ; 16 WR Cr 78 ; 11 PR 1878 ; 5 M 390 ; 1 Weir 384 ; 14 Cal 402 ; 15 Cal 300 Note ; 15 Cal 392 ; 24 M 81. Fish in an enclosed tank can be subject of theft. 36 M 472 ; 10 Bom 193 ; 105 Ind Cas 826 ; 53 MLJ 759 : 1927 MWN 788. Where fish are able to go in or out of private fishery, act of fishing, though followed by removal of fish does not amount to theft. 35 CWN 455 : AIR 1931 Cal 358. Valuable securities are moveable properties and may be the subject of theft. Rat Un Cr 43. Forcibly carrying away crops is an offence under this section. 8 WR Cr 59 ; 43 Ind Cas 404 ; 105 Ind Cas 813 ; 28 Cr LJ 989 19 ALJ 961 : 67 Ind Cas 498. A human body, whether living or dead except human bodies or portions of such, or mummies, preserved in museums or scientific institutions, cannot be the subject of theft as defined in the Penal Code. 25 All 129 : AWN 1902, 191. The prevailing view in England and America is that water in a pond or running in a channel is not the subject of larceny. 1912 MWN 119. But water when conveyed in pipes and so reduced into possession can be the subject of theft. 45 All 680 : 21 ALJ 654 ; *see* also 75 Ind Cas 159. A boat may be subject of theft and it does not cease to be moveable property. 16 WR Cr 63 ; 8 WR Cr 32. Removal of clods of earth of petty value from public channel beds is not theft. 18 Cr LJ 632 : 39 Ind Cas 1000. Obstruction of currency note which had been held up by currency officer for destruction is theft, though process of destruction was partly done at the time of obstruction. AIR 1925 Sind 21 : 17 SLR 260 : 26 Cr LJ 189 : 83 Ind Cas 196. Standing crop so long it is attached to the earth is not moveable property as defined in the Code but the moment it is severed from the earth its character is changed and it can become the subject of theft. 1965 MLJ (Cr) 119.

Standing crop so long it is attached to the earth is not a moveable property but the moment it is severed from the earth it is moveable property. 1965 Ker LT 66. The theft of electricity is both an offence under Section 39, of the Electricity Act as well as under this section. AIR 1965 SC 666 ; (1964) 1 Cr LJ 472 ; AIR 1964 Mad 367 : (1964) 77 MLW 271 ; AIR 1962 Mad 497.

4. Possession.—"In theft, as it is here defined, the object of the offender always is. to take property which is in possession of a person out of that person's possession. The Code does not admit a single exception to this rule."—*Morgan and Macpherson.* Where in the presence of owner, a bullock follows a cow and disappears and is not found after search, the owner lost possession of it and there could be no offence of theft in respect of it. 18 Cr LJ 300 : 38 Ind Cas 332. But taking of cattle turned out in jungle to graze is theft and not criminal misappropriation. AIR 1938 Rang 138. There must be an independent finding as to who was in actual possession of the land and crops in cases of theft of crops. 17 Cr LJ 81 : 31 Ind Cas 673. Where the crops were sown by the accused no offence is committed under this section by the removal of the same by the accused. 17 Cr LJ 75 : 32 Ind Cas 667 ; 13 ALJ 1058. Accused Nos. 2 and 3, having made default in the payment of land revenue, the *Mamlatdar* proceeded to their house and made a *panchnama* declaring their buffaloes to be under attachment. At the instigation of accused No. 1. the other accused untied and removed the buffaloes. *Held*, that the accused were rightly convicted of the offence of theft, for the *Mamlatdar* was to be deemed to be in possession inasmuch as he had a statutory right to take possession. 43 Bom 550 : 21 Bom LR 251. There was an agreement between the accused and the complainant that the latter should advance money to him on the security of goods deposited by the former. The accused afterwards removed the goods placed as security from the godown. *Held*, that the removal was dishonest and amounted to an offence under this section. AIR 1923 Cal 594. Where the accused takes possession of his own property forcibly he cannot be convicted under this section. 42 MLJ 499. Where the crop which was in the physical possession of the accused was removed, *held*, that the removal, even if dishonest, could not constitute an offence under this section. 5 SLR 130 : 12 Ind Cas 987 : 12 Cr LJ 611. Under Section 12, sub-Section (4), Punjab Tenancy Act, the tenant is entitled to the exclusive possession of the whole produce until it is divided, and it is only after division that the landlord becomes entitled to the possession of his share. Under this section, theft is committed if moveable property is taken dishonestly out of the possession of any person without that person's consent. The possession being that of the tenants themselves, one important ingredient of the offence that the property stolen should be removed from the possession of another person, is wanting. There is consequently no offence of theft ; AIR 1950 Lah 42. The possession of the servant is the possession on behalf of the master. AIR 1942 Oudh 318 : 43 Cr LJ 578. As long as water flows in and out of the pond, thereby enabling fish to enter and leave it, the fish are free and in a state of nature ; and so no more belong to the owner of the pond than a bird that settles on a tree in a person's garden belongs to that person ; but when once the water has fallen to such a level that fish cannot leave it, then they are trapped, and consequently, in the possession of the owner of the pond. That being so, any person who takes fish from that pond without the owner's consent with intention to cause him loss commits theft. AIR 1943 Mad 34 : 44 Cr LJ 173 : *see also* AIR 1939 Oudh 14 : 40 Cr LJ 22 ; AIR 1936 Pat 152. Cattle turned to graze in the pasture or jungle are still in the possession of the owner. AIR 1938 Rang 138 : 39 Cr LJ 607. Where land is attached under Section 88, Cr PC and actual possession is taken by posting a constable on the spot, a person removing standing crop from such land is guilty under Section 379, IPC. AIR 1940 Cal 163 : ILR (1939) 2 Cal 419 : 41 Cr LJ 396. Where a person removes a tree under on honest belief that it belongs to him, but where, in doing so, he betrays want of due care and attention, that is, good faith, in ascertaining the ownershipping of the same, he can be convicted of the offence of theft. 4 Bom LR 936. Removal of crops sown by another is an offence under this section. 4 CWN 199. If a person picks up some rubies lying besides a channel, into which water pumped from a ruby mine or pit was poured to be carried away, the accused commits the offence of criminal misappropriation and not theft as it is difficult to *see* how the rubies could be in any one's possession, since they could be carried away to the river or elsewhere. UBR (1892-1896) Vol. I, 236. In a case where there women wiped out certain pots, after discharging the earth oil they had contained, the only offence committed it at all an offence may be said to be committed, is theft. *Held*, that in such case Section 95 should apply. UBR (1892-1896) Vol. I, p. 235, Removal of crop regarding which an agreement for purchase has been entered into does not constitute an offence under this section. 4 CWN 345. Where judgment-debtor's nephews cut and remove crops attached only by beat of drums with consent of judgment-debtor, no theft is committed. AIR 1931 All 42 : 32 Cr LJ 437 : 1931 Cr C 208 : 129 Ind Cas 715.

In case of rescue of attached property action should not be left to be taken by private complainant. 1933 MWN 110 : 65 MLJ 732 : AIR 1933 Mad 840. The taking away with property lawfully possessed is not theft but may be criminal breach of trust. 1 WR Cr 2 ; *see* also 159 Ind Cas 346 : 16 Pat LT 645 : 1935 Cr C 1174 : AIR 1935 Pat 472. In the absence of an express agreement in the *patta* or elsewhere between the landlord and tenant in regard to trees, they must be taken to be the tenant's property and the tenant cannot be convicted of theft of such trees. 1 Weir 426. Where the prisoner, acting *bona fine*, in the interests of his employers and finding some fishermen on his master's fisheries, took charge of the nets, and retained possession of them, pending the orders of his employers, *held*, that the prisoner was not guilty of theft, the taking not being criminal when the possession was charged. 6 WR Cr 79. It is an offence under this section where a creditor takes property of the debtor in order to coerce payment. 32 Bom LR 351 : AIR 1930 Bom 167. Where a person is found in possessions of stolen articles soon after the theft, the law presumes that such person must either be the thief, or the receiver of stolen goods. 7 OWN 527 : AIR 1930 Oudh 353. Where an *amin* in good faith and under the authority of a warrant attached certain buffaloes belonging to the accused and the letter subsequently effected rescue of the cattle in the possession of *amin*. *Held*, that the offence under Section 379, IPC, had been committed. 1930 MWN 90. Where crops were sown by the complainant, the accused commits an offence under this section by removing them and the question of title of the complainant is not all material in the case. 19 ALJ 961. A proprietor of *jalkar* right in a running stream has not such possession of the fish in the stream, as to make the taking away of fish, theft within the meaning of Section 378, and no theft can be committed in respect of such fish. 161 Ind Cas 477 : 37 Cr LJ 452 : 17 Pat LT 189 : 1936 Cr C 236 : AIR 1936 Pat 152. Where a man intrusted by another to go to a place where some of his property is stored, and held himself to a given quantity of material, and the other taking advantage of the confidence was reposed in him takes away something in addition as well, there is dishonest intention and the offence of theft is committed for which he is liable to conviction. It is more than a mere technical offence.

19 NLJ 187. Where a property has not been validly attached the accused commits no offence in removing them. 59 Ind Cas 411. Where a creditor forcibly takes his debtor's goods out of his possession against his will in order to compel him to discharge his debt he is guilty of theft. 25 Cr LJ 650 ; UBR (1897-1901), 339 ; 22 Cal 1017 ; 18 All 88 ; AWN 1895, 233 ; 13 CPLR Cr 185. Where the lands of a minor are in the possession of tenants who have sown crops thereon, if the guardian goes and takes forcibly possession of the crops, he commits an offence under this section. 77 Ind Cas 237. The accused has committed no offence by removing bricks from a heap that had been lying untouched for 8 years. 3 Bur LJ 1957. A joint owner can be legally charged with theft in respect of joint property. AWN 1881, 1115; 7 M 557 : 2 Weir 456 ; 12 PR 1889 *contra* : 10 ALJ 527 ; *see* also 26 M 481 ; 19 MWN 106, 483. The offence in such a case consists in conversion of joint possession into separate or exclusive possession. 11 M 196 : 1 Weir 408 ; 12 PR 1889 Cr ; 1 Weir 408 ; 1914 MWN 483.

A tame peacock may be the subject of theft, although it may not be kept in confinement. AWN 1891, 14 *see* also 27 M 551 ; 1914 MWN 368 ; 5 SLR 122. The removal of animals grazing on open land where the owner has driven them amounts to theft. 4 Bom LR 626 ; Rat Un Cr C 43 ; 5 NLJR 14 ; UBR (1892-1896), Vol. 1. 228. Dishonest removal of salt naturally formed in a creek, under the supervision of an offence belonging to the Government is theft. 10 BHCR 74 ; 4 M 261 : 228 Weir 412 : 10 BHCR 74 Note. But such removal is not theft where it was not proved that the swamp was so guarded by the Government as to enable the accused to know that it was in the possession of the Government. 1 Weir 412. An accused can be convicted for removing his own property where that property is in charge of a third person and for which the person is accountable. Rat Un Cr C 343. Where the complainant washed a carpet at the village tank and hung it up there to dry, the carpet was in the possession of the complainant. Rat Un Cr C 293. Even if a transaction be one of pledge between two parties, still, if the pawner takes away the property pledged dishonestly with the knowledge of the pawnee, it is theft. UBR (1892-1895), Vol 1, 232. If the materials of a house are taken away dishonestly, the act is theft, even though the house is left uncared for. UBR 1904 1st Qr. Penal Code, Section 7. No theft can be committed in respect of a property, where the owner has given up possession of it. 4 MHC App 30. An owner retaking property, which was illegally distrained, cannot be convicted of theft. 1 Weir 422 : 1 Weir 421. Where the accused cut and removed certain crops under attachment in order to save them from being washed away, *held*, that the mere removal, without proof of dishonest intention would not constitute the offence. 1 Weir 423 : see AIR 1956 All 630 ; 1956 Cr LJ 1176. Where the accused cut and removed crop from the possession of the custodian under attachment orders of the Court in spite of the knowledge, was held guilty of the offence under Section 378. Where in execution of decree against certain person, property belonging to another person is wrongfully taken away by the bailiff, the owner takes back the same, he does not commit offence under Section 379. AIR 1959 Raj 289 : ILR (1958) 8 Raj 1109 ; 1959 Cr LJ 1475 ; AIR 1956 Raj 190 , 1956 Cr LJ 1430 (2) ; ILR 6 Raj 722. If a Jointly owned animal is actually in possession of one co-owner, this circumstance alone would not be sufficient to bring act of the accused within Section 378. The act must be done dishonestly as defined in the Code. 103 Ind Cas 847 : 28 Cr LJ 767: AIR 1927 Lah 650. If a person exacting has been allowed to inspect he is guilty of theft. 7 Lah LJ 118 : 86 Ind Cas 671 : 26 Cr LJ 847 : 26 PLR 96. Edible bird's nests are not in the possession of any body until they are collected. 4 LBR 275. Taking away cattle by one co-owner from the possession of the other not dishonestly is not an offence. 103 Ind Cas 847 : AIR 1927 Lah 650 : 28 Cr LJ 747.

Fish in water are corporeal property and become the subject of theft as soon as they are separated from water, dead or alive, and are removed. 1977 Cr LJ 1055 (see however) 1970 Cr LJ 638 (fish in a large sheet of water of several acres cannot be the subject of possession or theft). Fish in private enclosed tank the sluice of which remains closed so that the fish can not escape, are in the possession of the owner and can be the subject of theft. AIR 1965 SC 585 : (1965) 1 Cr LJ 496.

The case was of stealing railway property—Accused found moving trolley loaded with railway property.—Possession of accused of such property was proved.

5. Husband and wife.—There is not the same union of interest between a Mohammedan wife and her husband which exists between the English husband and wife and she can be convicted of theft or abetment of theft of her husband's property. 6 BH Cr C 6. The intent with which the husband's property is removed is a question of fact and where a dishonest conversion is intended, it clearly amounts to theft. 17 M 401. But the removal by a Hindu wife of her *stridhan* property from the possession of her husband does not amount to the offence of theft. 8 BHC Cr 11 ; Rat Un Cr C 44 ; 74 CWN 935 (theft alleged of trust and gift to accused by complainant).

6. Master and servant.—Servant taking away master's goods for unpaid wages without consent commits theft. 28 Cr LJ 531 ; AIR 1927 All 470 ; 102 Ind Cas 339 ; AIR 1965 Cal 355 ; AIR 1956 Orissa 212 ; 1956 Cr LJ 1421.

7. Without consent.—An essential ingredient of theft is the taking of the property out of the owner's possession and without the owner's consent. Where a debtor gave certain property to the creditor upon the understanding that a debt was due from him to the accused, but subsequently he found out that the debt was a "time barred" debt, *held*, that the subsequent knowledge could not change the fact, that at the time when the consent was given, it was a full and unqualified consent, and that the accused should not therefore, have been convicted of theft for retaining possession of the property. 1 ALJ 508. Where a servant, with the consent of his master, renders a person the assistance sought by him, in order to procure his punishment, the removal of the property by such person, with such assistance would not constitute the offence of theft, inasmuch as the owner has knowledge of the removal. 4 Cal 366 : 3 CLR 625.

8. Bona fide claim.—In case of *bona fide* claim of right in the property there can be no conviction for theft. AIR 1951 Cal 207 : 51 Cr LJ 1575 ; AIR 1965 SC 585 : 1965 (1) Cr LJ 496 ; 1974 Cut LR (Cr) 343 ; 1962 (1) Cr LJ 766 : AIR 1961 Tripura 25 ; AIR 1962 SC 586 : 1962 (1) Cr LJ 518 : 1982 All Cr R 222 ; AIR 1965 SC 926 : 1965 (2) Cr LJ 18 ; 1971 Cr LJ 1363.

9. Creditor removing property of debtor.—Seizure of camel of debtor to enforce repayment amounts to theft. AIR 1959 Raj 148 : ILR (1959) 9 Raj 497 : 1959 Cr LJ 908 : 1956 MBLR (Cr) 156 : 1966 MBLJ 759 ; 1963 Mah LJ 674 : ILR 1963 Bom 524 ; 22 Cal 1017 ; ILR 1963 Bom 524.

10. Removal of property for taking.—Where crop was dishonestly cut and removed by the order of the accused, he himself, being present, *held*, that the accused was guilty of an offence under this section. 43 Ind Cas 404 : 19 Cr LJ 404. The act of cutting the string by which a pass was fastened to woman's neck and forcing the ends apart constitutes a sufficient moving to bring the act within the purview of this section. 29 PR 1917 Cr: 37 PWR 1917 Cr. In order to constitute theft, it is sufficient if property is removed against his wish, from the custody of a person, who has an apparent title, even a colour of right to such property. 27 Cal 501 : 4 CWN 480. Where there is no proof of taking the property found in the possession of the accused he must be convicted of an offence under this section. Rat Un Cr C 143. Removal of property dishonestly, that is, with the intention of wrongfully depriving the owner of the possession thereof for however short a period, is theft. Rat Un Cr C 908. Where the intention of the accused is not to convert the property to his own use or take make it his property permanently, no offence under this section has been committed. 11 Cal 635. Theft of silver anklet from a child calls for a deterrent sentence because it very often leads to murder. 1930 MWN 173. In theft the original taking is without honesty and without the consent of the owner. In criminal breach of trust the original taking is with honesty and with the consent of the owner. In obtaining property by cheating the taking is dishonest but with the consent of the owner. In criminal misappropriation the taking is honest but without the consent of the owner. 106 Ind Cas 678 : 29 Cr LJ 86 : AIR 1928 Nag 113. But in a latter case it was held that to constitute the offence of theft it is not necessary that the taking should be permanent or intention to appropriate the thing taken, or there should be wrongful gain to some one in addition to the wrongful loss to the owner, but there must be an intention to take the thing dishonestly. 25 Cal 416: 2 CWN 347 ; 1 Weir 417 ; 1 Weir 419 ; LBR (1872-1892), 399 ; 1 PR 1887 ; 1 Bom LR 515. But in 1953 Cr LJ 1035 : AIR 1953 Mad 516 : (1953) 1 MLJ 290, it was held that Section 379, requires that the removal of the property from the possession of another should be with intent to cause wrongful gain to himself or wrongful loss to the other person. Dishonest intention is the gist of the offence.

Since the intention of theft in Section 378, requires that the moving of the property is to be in order to such taking, "such" meaning "intending to take dishonestly" the very moving out must be with dishonest intention. AIR 1957 SC 369 : 1957 SCA 364 : 1957 SCJ 386 : 1957 SCC 192 : 1957 Cr LJ 552 ; AIR 1959 AP 530 : 1959 Cr LJ 1141 : AIR 1960 Tripura 40 : 1960 Cr LJ 166 ; 1961 (2) Cr LJ 453 ; (1957) 2 All ER 796.

It is not the Indian law that where property is removed on the assertion of a contested claim of right, however ill founded that claim may be, the removal does not constitute theft. AIR 1958 Mad 476 : 1958 All Cr R 330 : 1958 Cr LJ 1198.

A deer in the reserve forest is `feral natural' and therefore it can not be said to be one in the possession of any person so as to make the removal of it theft within the meaning of the section. AIR 1955 Mad 299 : ILR 1955 Mad 795 : 1955 Cr LJ 817.

Illegal seizure of cattle and removal to cattle pound does not amount to theft. 24 Cut LT 256 : ILR 1958 Cut 363 ; but *see* AIR 1954 Nag 55 : 1954 Cr LJ 280.

It is an essential ingredient of the offence of theft that the moveable property was moved out of this possession of any person without his consent. (1979) 4 SCC 23 and with a dishonest intention. AIR 1959 AP 530 : AIR 1965 Tripura 42 ; AIR 1962 Tripura 25 (dishonest intention not proved).

The taking out of aircraft for an authorised fight give him the temporary use of the aircraft for his own purpose and temporarily deprives the owner *i.e.*, the Government of its legitimate use for its purpose. AIR 1957 SC 369 : 1957 SCA 364 : 1957 SCC 192 : 1957 SCJ 386 : 1957 SCR 623 : 1957 Cr LJ 552 ; *see* also 1963 SCD 341 : 1963 All Cr R 192 : 1963 (2) Cr LJ 178 : AIR 1963 SC 1094.

When the property of the judgment-debtor is under attachment and placed under the custody of *sapurdar*, the judgment-debtor with the knowledge of it takes the property and appropriate it, he is guilty of theft. ILR (1978) 1 Cut 381 ; 1965 Ker LJ 51 ; 1978 Cr LJ (NOC) 78 : 1978 BLJR 124 ; 1981 Cr LJ 1910 (High Court's inherent jurisdiction to question the proceedings under Section 144, Cr. P. Code, where subsequent process under Sections 147 and 379, of the Code is issued cannot be quashed) ; 1966 Cr LJ 728 (where but seized under conditional order of attachment and possession taken from the accused but no order of attachment against the accused, the accused did not commit the offence of theft if he removed the bus). In case of a hire-purchase agreement that taking by the owner of the possession of the articles in case of default is not theft as the consent is already given by the hire-purchaser in the agreement. 1965 All LJ 234 : AIR 1965 All 433 ; 1964 (2) Cr LJ 369.

11. Explanation 1.—"If the property be attached to the earth the mere severing is not theft. To constitute theft of any kind, there must be, as is noticed in the definition and there after, a moving of that thing after severance. The severance as such, only puts the thing into that condition in which a theft can be committed of it. In many cases things attached to the earth may be severed from it without being moved and then, if there be no subsequent moving, there is no theft. If Indeed the same act which effects the severance, also effects a moving of the things as in the case supposed in the illustration, that moving is sufficient ; but in many cases thing attached to the earth may be severed from it without being moved : and then if there be no subsequent moving there is no theft".—*Morgan and Macpherson.* Where by the term of the *kabuliat* it was proved that if the tenant cut any trees, he would pay to the landlord compensation at a certain rate and it was found that the tenant *mala fide* cut some trees in order to injure the landlord. *Held*, that although the tenant was in possession of the land he committed theft by severing the trees from the ground as they were in the possession of the landlord. 27 CLJ 228. Theft of the trees will be committed only when they were out to remove them from the possession of the owner and not when the cutting was merely to annoy him. 29 Ind Cas 672 : 16 Cr LJ 544. Where the trees are the property of the *zamindar* the tenant commits an offence under this section by cutting and removing them. 24 All 53 : 17 ALJ 974 : AWN 1881. 73 ; *see* also 5 MHC App 36 ; 20 Bom LR 672 ; 39 Cal 758.

Earth, that is soil, and all the component parts of the soil inclusive of stones and minerals severed from the earth, are movable property capable of being the subject of theft. Whoever, therefore, severers such earth from the earth with the dishonest intention specified in this section can be said to commit theft. 13 Bom 702.

12. Explanation 2.—The moving of a tree by the same act which effect its sentence may constitute a theft. 1 Weir 383 : 5 MH Cr App 36 ; AIR 1942 Oudh 423 : 43 Cr LJ 646.

13. Evidence.—Where the complainant is shown to have grown the crops, the accused cutting and removing the same would be guilty of theft. AIR 1941 Pat 613 : 43

Cr LJ 294 : AIR 1957 All 678 : ILR (1957) 1 All 494 : 1957 Cr LJ 1060 : (1960) 2 Ker LR 431. It is the duty of prosecution to produce the recovered stolen property. 1975 Cr LJ 957. Delay in filing FIR and evidence not sufficient was reappreciated by Supreme Court in the interest of justice. AIR 1984 SC 454 : 1984 Cr LJ 187.

14. Summary procedure.—*See* 20 CWN 1212.

15. Theft and similar offences.—Complainant must make out a *prima facie* case of any deterioration in value ; unless such was made out there was no offence under Section 426, but under Section 379. 23 Cr LJ 504 : 2 Pat LT 394 : 68 Ind Cas 40. Where the accused steals bull and subsequently kills it, he is guilty both of theft and mischief and so he may be sentenced separately. AIR 1938 Rang 138. In theft original taking is without honesty and without consent of owner ; in criminal breach of trust it is with booth. In cheating taking is dishonest but with consent of owner, and in criminal misappropriation it is honest but without his consent. AIR 1928 Nag 113 : 29 Cr LJ 86 : 106 Ind Cas 678 ; *see* also 18 Cr LJ 564 : 1 Pat LW 416 : 39 Ind Cas 804. Theft and robbery cannot be committed unless one sets with dishonest intention. AIR 1933 All 620 : 1933 Cr C 992 : 1933 ALJ 917. In order that theft may amount to robbery, hurt must be caused for committing theft and must be quite separate and distinct from act of theft. AIR 1933 Lah 407. It is not in every case who theft has been committed as well as assault that the transactions becomes robbery. 1953 BLJ 330 : 1954 Cr LJ 215 : AIR 1954 Pat 157. Dacoity does not become theft, even where there is no resistance and no violence. 1932 ALJ 1078 : 1933 Cr C 209 : 34 Cr LJ 448 : 55 All 11 : AIR 1933 All 114. Where property not belonging to the judgment-debtor was attached and handed over to other persons on giving security the real owner is not guilty of theft if he rescues property from such person. AIR 1933 Mad 840 : 65 MLJ 732 : 1933 M Cr C 61 : 1933 MWN 110. Section 39, of the Electricity Act creates no offence, and prosecution for theft of electric energy can be instituted only by one of the persons mentioned in Section 50, of that Act. 35 PLR 758. Theft of copper wire belonged to Telegraph Dept. is also an offence under Section 5, of the Telegraphs Wires (Unlawful Possession) Act, 1950. 28 Cut LT 185. The price of copper being very high, deterrent sentence in case of theft of telegraph wires (1962) 22 Çut LJ 185 ; AIR 1969 Goa 55 : 1969 Cr LJ 728. Theft of cheques of no value will be property in respect of which an offence can be committed. AIR 1955 Mad 264 : 1955 Cr LJ 116. Electricity found to have been dishonestly consumed in house by artificial means is an offence of theft. 1964 (1) Cr LJ 472.

Possession of stolen property same after theft may lead to the presumption of theft. (1978) 45 Cut LJ 125 ; AIR 1965 Orissa 123 : 1965 Cr LJ 746. But the presumption suferred to illustration is a remittable presumption. AIR 1954 SC 279 : 1954 Cr LJ 743 ; 1967 All Cr R 399.

16. Common intention.—If two persons go to steal a particular article and one who actually committing the theft is not able to find that article but steals something else instead and they run off together, both must be held guilty of theft inasmuch as the other, who did not actually steal the article must be taken to have acted in furtherance of common intention to commit theft. AIR 1942 Pesh 50 : 43 Cr LJ 837 : 202 IC 379; AIR 1936 Rang 70 : 37 Cr LJ 416 ; but *see* AIR 1941 Pat 492 : 42 Cr LJ 579. Common intention if found in AIR 1961 Ker 29 : 1969 Cr LJ 116. when the group detaining the person carrying the articles, carried on negotiation with the person help the other group to remove the articles. But *see* 1984 Cr LR (Mah) 18 where the prosecution failed to establish relationship amongst the three accused or in proving the conspiracy or the part played by the accused in the commission of the offence.

* * * * *

Sec. 379. Punishment for theft.—Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Synopsis

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1. Cases.—Where it appeared that a landlord had jointly cultivated land with a non-occupancy tenant and had cut and removed the crops, *held*, that the landlord must be deemed to be a part owner and in possession and could not be convicted of theft. 10 ALJ 427 : 14 Cr LJ 3 : 18 Ind Cas 146. Whether the removal of fish from an irrigation tank amounts to theft depends upon the facts of each case. When the water is so low that the fish could not escape, the removal may be theft. 36 M 472. The possession of a trustee is a sufficient possession within the definition of theft. LBR (1872-1892), 410. A Criminal Court should not convict of theft any person who asserts a claim of right unless it is in a position to say that the claim is a mere pretence. 9 CWN 974 : 2 Cr LJ 836 ; for power of criminal Court to decide title *see* 6 DLR 13. In order to constitute larceny, there must be an intention to take entire dominion over the property, *i.e.*, the taker must intend to appropriate the property to his own use but there may be theft without an intention to deprive the owner of the property permanently. 8 ALJ 1237. Where the tenant is accused of theft of paddy, reaped and stored up, his and the landlord's share not having been divided, a conviction for theft is bad. 15 Cr LJ 186. A tenant was ejected from his holding under the provisions of the Agra Tenancy Act. Formal possession was delivered to the *zamindar* but as he failed to tender the price of the standing crops the tenant cut and removed them. *Held*, that the tenant was not guilty of theft. 14 ALJ 279. A son who appropriates to his own use any part of the family property he thinks fit, against the will of his father who is the manager of the property, commits theft, and a sentence of fine only passed on him was held to be proper. 4 CPLR 174. In cases of theft from a railway train, where the Magistrate is once satisfied that the accused has committed the offence, the sentence should be of a deterrent nature. 14 Bom LR 504. There cannot be *bona fide* assertion of right in answer to a charge of theft when the accused knew that he had possession of the property and gathered a produce grown by the complainant. 16 Cr LJ 458 ; AIR 1929 Pat 502. Where the petitioner was convicted of abetment of theft of wood from a forest, and the defence of the petitioner was that he had right to take wood from the forest in question without a pass, he could not be convicted of theft or abetment thereof when it was not found as matter of fact that he was not entitled to take wood from the forest. 18 CWN 397. Where process is signed by a*min* but does not bear seal of Court, the attachment is illegal. Hence, removal of such property is not offence. AIR 1935 All 214 : 57 All 660 : 153 Ind Cas 428 : 1935 ALJ 63 : 36 Cr LJ 340: 1935 A Cr C 14 : 1935 Cr C 257 : AIR 1935 All 214.

An attempt to commit theft under this section is not punishable with whipping. LBR (1872-1892), 338. It is wholly illegal to punish a man for a grave offence, involving many totally different ingredients to a charge of theft on a charge under this section. 16 Ind Cas 165. No offence under this section has been committed when the pledgee takes possession of the things pledged. 1 CPLR Cr 100. When the accused was found in possession of two freshly flayed skins of a goat and kid within 24 hours of theft he was charged under Section 379, of the Penal Code. *Held*, that it was absolutely necessary for the prosecution to establish that the skins found on the accused were those of the goats recently stolen. 16 Cr LJ 440 : 29 Ind Cas 72. In a case of theft with rioting the evidence adduced by the prosecution of a general nature that the accused were present on the scence of the occurrence, is not enough, and unless something specific is mentioned in a rioting case, socially when the accused have also been convicted under Section 379, it is not safe to convict the accused even under Section 147. AIR 1941 Pat 613 : 43 Cr LJ 294.

Where the properties are removed from the possession of the sureties with whom they were left by the *amin*, the complaint of Court is not necessary for a prosecution for the offence under Section 379. 43 Cr LJ 438 : 199 IC 210. Charge-sheet under Section 379, setting out facts which constitute the offence under Section 163, Cl. (a)(2), Madras Local Boards Act, amounts to a complaint as defined in Section 4, Criminal Procedure Code. AIR 1939 Mad 839 : 41 Cr LJ 20. Person illegally seizing cattle and taking them to pound are not guilt of theft as there is neither wrongful gain to persons seizing them nor wrongful loss to owners. AIR 1943 Oudh 280 : 44 Cr LJ 640 : *see* also AIR 1944 Mad 26 : 45 Cr LJ 220. Larcency and embezzlement in English law are offences which represent what is known in India as theft, criminal misappropriation and criminal breach of trust. There is no exact equivalent in English Law of criminal breach of trust. AIR 1941 Rang 342 : 43 Cr LJ 263. Withdrawing money from the Bank under joint names is not theft. AIR 1944 Cal 224 : 45 Cr LJ 666. Where persons are found with stolen property just after theft, the inference is that he committed theft. AIR 1944 All 281 : ILR 1944 All 694 : 216 IC 248. There is no connection between Sections 457 and 380, and hence the accused can be convicted under both sections. AIR 1942 Oudh 214 : 43 Cr LJ 252. In the absence of sufficient evidence of theft an accused cannot be convicted under Section 379, or under Section 411. 1948 AWR (HC) 151. Fish in a tidal or navigable river are not in possession of anybody and third person catching fish without permission does not commit theft. AIR 1950 Orissa 106.

Where the accused took a child of about four years outside the village, stripped him of his ornaments, and then when child threatened to tell his mother, beat him, *held*, that the offence did not amount to robbery aside fined in Section 390, of the Penal Code, though there was nothing to prevent the Magistrate from convicting the accused separately of theft and the causing of hurt under Section 235, para 16.6 CPLR 36 Cr. Removal of attached property from the custody of another after his death by judgment-debtor is an offence under this section. 8 ALJ 656 : 11 Ind Cas 142 : 12 Cr LJ 374.

Where a crop, raised by the accused, was duly and properly distrained for arrears of rent and was in possession of a person in whose custody it had been placed to secure the landlord's claim, and the accused removed it, in order to defeat the claim *held*, that the accused was guilty of theft inasmuch as he dishonestly removed property over which a lien was created by operation of law. 1 Weir 420. Removal by one single act of several articles constitutes one offence of theft only, though the articles may belong to different persons. Rat Un Cr C 927 : Cr Reg 33 of 1897. Every repetition of theft is a grave offence when it indicates a habit not cured by previous light punishment. Rat Un Cr C 296. A person who steals a fowl and then kills it, cannot be punished separate for the offence of theft and mischief. 5 Bom LR 460. Where a person steals a bullock and then kills it, he can only be convicted of theft under Section 379, of the Indian Penal Code, and not of mischief also under Section 428, of the Code. Rat Un Cr C 129. Where one prisoner stole and the other received certain property, *held*, that they committed different offences in the same transaction. 5 CLR 574. Person asserting right to property can be guilty of theft. 142 Ind Cas 584 : 1933 Cr C 218 : 34 Cr LJ 369 ; AIR 1933 Sind 90. Removing cattle from pound without paying fee amounts to theft. 129 Ind Cas 451 : 1931 Cr C 32 : 1930 MWN 529 : 33 MLW 205 : 32 Cr LJ 354 : AIR 1931 Mad 18.

In order to sustain a conviction of theft or dishonest receipt of stolen property, it is sufficient that the property found in the prisoner's possession was like that stolen. There must be finding to the effect that the property was stolen. Rat Un Cr C 277.

Persons, who cleared a piece of Government land, cutting down and appropriating the trees thereon without permission were convicted of theft under Section 379, IPC and of mischief under Section 425. *Held*, that the conviction was not illegal as the mischief proceeded the theft, which under Section 379, Exp 1, could not have been committed until the tree had been detached from the ground. 2 BHC 392. The stealing of two bullocks belonging to two different persons at the same time, from the same custody, is only a single offence and should be punished only once. AWN 1881, 154. Where the accused were entrusted with certains lands with the standing crops to be taken care of and they subsequently cut and disposed of the crops, they could be convicted under Section 379, IPC, of theft, and not under Section 405, 36 Cal 758 : 10 Cr LJ 253 : 3 Ind Cas 189. The accused, an employee under a Steamer Company, whose business it was to check the tickets of passengers, asked to see the complainant's ticket but the complainant for having got one, the accused took possession of his umbrella as security that he might be compelled to pay his fare. *Held*, that there being no suggestion that the accused intended either to get any wrongful gain to himself by compelling payment of the fare or to cause any wrongful loss to the complainant who was bound to pay his fair a conviction for theft was wrong. 14 CWN 936 : 7 Ind Cas 257 : 11 Cr LJ 444. Where question of title or right to possession of property stolen is not determined, a conviction under this section is bad. 8 MLT 119 : 7 Ind Cas 416 : 11 Cr LJ 484. The fact that a person has cultivated a certain land, contrary to a departmental rule of the Board of Revenue, could not justify a taking of the crops out of his possession by a party who had no right to it. 1 Weir 426. Where a matter, not identifiable such as rice, is found in the possession of a man, who is not able to explain the possession, or gives an account of it which he does not prove, he cannot be convicted of theft unless the whole evidence is such as to exclude a reasonable hypothesis of his innocence of the offence. 1 Weir 427 : 7 MHC App 19. Salt is an article, the identification of which in bulk is difficult, if not impossible. Where a quantity of wet salt from a cart in the vicinity of the honest of the accused was lost, and the accused was found the next morning in the act of drying certain wet salt, *held*, that the accused could not be convicted of theft without sufficient evidence to identify the salt. 1 Weir 429.

The appellant was in dire need of money as established. The Accused/appellant knew that his visa had come on and that a large amount of money was required. He had also tried to arrange for loan.

According to accused in the house of the deceased, a large amount of cash and jewellery was available which could have been taken away by the accused/appellant and that he, as a conscientious man, had taken so that he could repay before his departure. The contention is devoid of any merit and has been found to be incorrect by the Courts below. It would be pertinent to mention here that the trial Court has adverted to the fact that the jewellery and cash were lying in hidden condition and thus knowledge of its existence cannot be attributed to the accused/appellant.

At the stage of recording of statement under Sec. 313 of the Code, the accused had come with another explanation that the deceased Augustine had paid him amount. No evidence at all has been adduced to show that he was present in the shop of Augustine and had been given the said amount. Furthermore, even wife of the accused/appellant has not stated that she was told at any stage by her husband that he had received amount from the deceased Augustine. The trial Court and the High Court both have disbelieved it.

The analysis of the evidence shows that the accused/appellant was in dire and urgent need of more and he had a motive for getting the said amount of money. *M.A. Antony vs. State of Kerala*, AIR 2009 SC 2549 : 2009 (6) SCC 220 : 2009 (7) JT 372 : 2009 (6) SCR 829 : 2009 (6) Scale 36 : 2009 (8) SLT 255.

Theft of cloth, spread out on the top of a house by scalling the wall, is neither house breaking nor theft in house, but is simple theft. 1 Weir 435. If a person trespasses on land in the possession of another and sows paddy on it, that does not entitle him to ownership to the paddy grown thereon and, consequently, if a person in possession of the land rapes and removed paddy resulting from such trespasser's sowing, he does not thereby commit theft. 3 LBR 199 : 4 Cr LJ 464. A person who steals a bullock and has been sentenced for theft cannot again be convicted by mischief for slaughtering it, since the common ingredient of both offence, *viz.* "wrongful loss" has already taken place in the theft. UBR (1892-1896), Vol. I, 241. But theft and castle thefts call ordinarily for a severe sentence, *e.g.* of two years' rigorous imprisonment, and summary trial is not suitable for them. LBR (1893-1900), 198. A removal of property in the assertion of a *bona fide* claim of right though unfounded in law is not theft. 7 Mys LJ 65 ; 44 Cal 66 ; AIR 1924 Pat 125 ; 10 Pat LT 57: 115 Ind Cas 684 : 30 Cr LJ 511 : 103 Ind Cas 840 : 28 Cr LJ 760 : AIR 1927 Pat 385 ; 52 Cal 1015 ; 22 LW 673 ; 91 Ind Cas 256 ; 96 Ind Cas 879 ; 48 All 368 ; 1922 P 12 ; 1953 Cr LJ 660 : ILR 1953 Madh B 33 : AIR 1953 Madh B 79. Removal of a calf to prevent its sacrifice amounts to theft. 10 Pat LT 483 : 115 Ind Cas 895 : 30 Cr LJ 546 : AIR 1929 Pat 429. Stealing property to bring pressure to restore other property is theft. 1935 Cr C 1059 : AIR 1935 Lah 769. Where a Magistrate attached the crops in proceedings under Section 145, Cr PC, and subsequently one of the parties removed the crops. *Held,* that the persons were guilty of theft. 22 SLR 151 : 105 Ind Cas 813 : 28 Cr LJ 989: AIR 1928 Sind 68 ; 1952 Cr LJ 994 : AIR 1952 Assam 109. A person charged and convicted under Section 379, IPC, cannot be given a sentence of less than seven days' rigorous imprisonment. 9 Pat LT 572 : 106 Ind Cas 451: 29 Cr LJ 35. Where a person removed property in the assertion of a *bona fide* claim of right there is no proof of the element of dishonesty to constitute the offence of theft. 105 Ind Cas 661 : 28 Cr LJ 949 : AIR 1927 Nag 404. When cattle-stealing is very rife in a locality, a severe sentence should be passed. 103 Ind Cas 137 : 28 Cr LJ 651. Sections 379, of the Penal Code is the most doubtful application in a cases where the question of property is only in course of determination in a civil suit. 99 Ind Cas 104 : 28 Cr LJ 72 : 8 Pat LT 79 : AIR 1927 Pat 130. Where a servant takes away good in lieu of wages no conviction should be made under this section. AIR 1927 All 470 : 28 Cr LJ 531 : 102 Ind Cas 339.

A servant who was assisting his master in removing the goods on another is guilty under this section if he has knowledge of the illegal. 90 Ind Cas 439: 26 Cr LJ 1559. Temporary removal of correspondence with dishonest intention without consent of custodian is an offence under this section. 27 Bom LR 1391. Owner cannot accused person removing trees for tenant's possession of theft. AIR 1931 Mad 241. Act of fishing followed by removal does not amount to theft. AIR 1931 Cal 358. Preservation of jungle is irrelevant to a charge of theft. AIR 1931 Pat 99. Removing cattle from pound without paying fee amounts to theft. AIR 1931 Mad 18. When a person offers to take any gratification on account of helping a person to recover property stolen from him, and on receipt of the gratification points out where the stolen property is concealed, he may be properly convicted of theft in the absence of any evidence to show that anyone else had committed theft. LBR (1873-1892). 449 ; *see* also LBR (1872-1892), 461. When the thief has restored the property the fact may well be taken into consideration in punishing him. LBR (1893-1900), 226. A person who dishonestly misappropriates certain cattle commits the offence of theft and not criminal misappropriation. 7 CPLR Cr 34. The possession of stolen property may be evidence of offence under this section. 6 Bom LR 1093. In order to raise legitimately the presumption of theft from possession of stolen property, the possession must be exclusive and recent. AIR 1929 Sind 9. Fish confined to ponds which are caught by baling the water out can be subject of theft. AIR 1928 Mad 20. Removal of crops knowing them to be attached amounts to theft. AIR 1928 Sind 68. A person who steals a buffalo and subsequently kills it cannot be convicted both of theft and mischief. 14 CPL Cr 149. The law does not seem to contemplate that a thief should be more severely punished, because he renders the recovery of the stolen property impossible. LBR (1893-1900), 633. The accused, being an inmate of his uncle's house broke open a chest and took out money from it. *Held*, that he was not liable to be convicted under Section 457. but under Section 379. 6 NWP 301. Whipping in addition to imprisonment can not be awarded for theft. AIR 1935 Rang 64. Where the value of articles alleged to be stolen by the accused would be only about Rs. 15, sentence of fine of Rs. 100, on conviction is severe. A fine of Rs. 30. would sufficiently meet the purpose. 19 NLJ 187. Where an accused commits deliberate thefts (motor wheels), the mere fact that the thief is a first offender is not sufficient reason for imposing a light sentence of fine only, especially when his crime, if undetected, may well have caused considerable financial profit to him, but a substantive term of imprisonment should be imposed. 164 Ind Cas 822 : 37 Cr LJ 1024 : 1936 Cr C 828 : AIR 1936 Pesh 170.

Where the right to a 'char' in the Rupnarain river was in dispute between the Burdwan Raj and the Collector of Howrah Pewas the lessee of the former and *N*, the lessee of the later, entitled under the lease to take the sand from the char, *P* was prosecuted under Section 379, for having removed sand therefrom. *Held*, that it was an abuse of the process of Courts inasmuch as the criminal Courts are hardly fitted to decide the nice questions of the right of char. 51 Cr LJ 1575 : AIR 1951 Cal 207.

The offence of theft of fish consists of dishonest taking of the movable property out of possession of another without his consent. (1964) 1 SCWR 92: (1964) 1 SCC 419 : AIR 1965 SC 584 : 1964 SCD 287 : 1965 (1) Cr LJ 496.

Where there is an order under Section 144, Cr. P. Code, prohibiting the parties from going upon the disputed lands and a person dishonestly cuts and removes crops from that land, he dishonestly takes that crops out of the possession of the party who may be held to have been in possession and to have grown the crops before the order under Section 144, was dashed and his act amounts to theft. 1963 BLJ 211.

It is well settled by catena of decision by Apex Court that taking away of movable articles in exercise of the claim of *bona fide* right is a good defence for an offence under Section 379, IPC. *Sant Ram* alias *Santu Samaru Gond* v. *State of M.P.*, 1995 MPLJ 823 (MP).

The accused, who was a lessee of a property took from the lessor the original agreement of lease for the purpose of making entries with regard to rent giving an undertaking to return the document. *Held*, that the conviction under Articles 379 and 409, under the French Code was misconceived because the obstruction or taking away was with the knowledge and consent of the owner and as such the offence was that of breach of trust under Article 408, of the French Code. ILR (1964) 1 Mad 915 : (1964) 2 Mad LJ 271 : 1964 Mad LJ (Cr) 562.

Where there was complaint by head constable who was prior tenant of accused—Summoning order was passed by Magistrate—Petition against the same was filed—Complaint was held to be abuse of process of court. *Janak Raj Rana* v. *Abhimanyu Singh*, (1994) 3 CC Cases 389 (P&H).

When *A* was in lawful possession of colliery on material dates, extraction of coal by his men would not amount to theft under Section 379, of the Penal Code. 87 CWN 15 : 1982 Cr LJ 1960.

Where the complainant was a debt holder by Finance Company and his instalments was not paid. There was seizing of bus by guarantor of loan this seizing of bus to handover to the company does not amounts the offence of theft. Nature of dispute is civil. *Sham Lal Sood* v. *Jagdev Singh*, (1994) 2 Recent Cr R 21 (P&H).

When accused is admittedly owner of land, allegations that he removed rocks from his own land for commercial purpose constitute no offence under Section 379 or 427, IPC. *Harichandran* v. *State*, 1997 Cri LJ 41 (Mad).

2. Sentence.—When the offence charged are theft and house breaking and the Magistrate gives merely a nominal sentence of imprisonment till the rising of the Court, then although he is complying with the letter of the law, he is in the fact treating the accused more leniently than if he had applied Section 562 (1), Cr PC. But theft and house breaking are offences for which separate punishments can be given. If the accused is convicted under Section 379, IPC, theft, or Section 380, IPC theft in a building, he may, in a proper case, be released on probation of conduct. If he is convicted of house-breaking with intent to commit theft (Sections 454 and 457), a sentence of imprisonment is obligatory. Where therefore the accused is convicted under both these sections and the Magistrate considers that it is not desirable to inflict a substantial of imprisonment, his proper course is to direct the accused to execute a bond under Section 562 (1), for the offence of theft and to sentence him to imprisonment until the rising of the Court for the offence of house-breaking. AIR 1938 Bom 463 : 40 Bom LR 927. A heavy fine must be imposed for cattle theft. AIR 1939 Sind 339 : 41 Cr LJ 187 : AIR 1940 Ker 88. A sentence of six months' rigorous imprisonment, was held proper where railway employee was found guilty of stealing sleeper placed on railway line. AIR 1941 Lah 31 : 42 Cr LJ 823.

In a case of an offence under Section 380, Magistrate has two alternatives before him. He may send the offender to prison or in lieu thereof, he may either cause him to be whipped or send him to Borstal, but the power to order a person to be whipped is only in lieu of another punishment under the Code and once an order of detention in Borstal has been passed, there is no power to alter this order to sentence of whipping. AIR 1940 Rang 81 : 41 Cr LJ 455. A sentence of solitary confinement though legal must be awarded, if ever, only in the most exceptional cases of unparalled atrocity or brutality. AIR 1947 Mad 386 ; AIR 1947 Mad 381 : (1947) 1 MLJ 410.

Plea of Alibi—When not reliable. The theatrical explanation given by the accused/appellant that he was going Perumbavoor and at Thottuva, nearly 35 kms away, the auto driver tried to snatch his money and he ran and stayed at a dilapidated house for the whole night has been rightly rejected by the Courts below. And if he was at Thottuva which is admittedly 35 kms away from the place of occurrence, he could not have been seen on the early hours, at the place of occurrence. *M.A. Antony vs. State of Kerala*, AIR 2009 SC 2549 : 2009 (6) SCC 220 : 2009 (7) JT 372 : 2009 (6) Scale 36 : 2009 (6) SCR 829.

3. Who can complain ?—The general rule is that a complaint need not necessarily be made by the person injured but may be filed by any person of the offence and the only exceptions to this rule are in Sections 195 to 199, of the Cr. P. Code. An offence under Section 379, IPC, not being one to which Sections 195 to 199, Cr. P. Code, apply the prosecution for theft can be launched by a person who is not directly interested in the property stolen or adversely affected. 1962 Ker LJ 1099 : ILR (1962) 2 Ker 696 : 1963 (1) Cr LJ 458.

4. Scope.—The main ingredient of theft is that movable property should be taken away dishonestly. If the wife takes away her "*Stridhan*" property as alleged in the complaint, then it cannot be said that she has taken it away dishonestly. A person cannot be said to have committed theft of her own property even if she is a married woman. (1988) 1 Cr LC 28.

Accused persons took deceased forcibly along with his jeep and thereafter dead body of deceased was found in well, contradictions in statements of witnesses to prove that accused persons kidnapped deceased forcibly. No evidence to prove motive, either personal enmity or theft for killing deceased, recovery of purse, driving licence and number plates at instance of accused persons not significant. Held, accused entitled to benefit of doubt. *Bablu @ Om Prakash vs. State of Rajasthan*, 2010 (2) CrLJ 1728 (Raj).

Plea of Alibi—When not reliable. The theatrical explanation given by the accused/appellant that he was going Perumbavoor and at Thottuva, nearly 35 kms away, the auto driver tried to snatch his money and he ran and stayed at a dilapidated house for the whole night has been rightly rejected by the Courts below. And if he was at Thottuva which is admittedly 35 kms away from the place of occurrence, he could not have been seen on the early hours, at the place of occurrence. *M.A. Antony vs. State of Kerala*, AIR 2009 SC 2549 : 2009 (6) SCC 220 : 2009 (7) JT 372 : 2009 (6) Scale 36 : 2009 (6) SCR 829.

5. Applicability.—The accused was convicted under the section for the offence of picking pocket of the petitioner. He picked up money from the chest pocket of petitioner and tried to run away but was caught by the petitioner with the held of others. Counsel for accused contended that accused was young person of 19/20 years, at the relevant time and incident dated back to over 10 years and there was nothing against petitioner's antecedent or character apart from the present allegation the punishment of imprisonment might turn him into more serious criminal while in the company of hardened criminals in jail. *Held*, that offender to be released on probation of good conduct instead of taking the sentence forthwith. 1987 Cr LJ 1378 (Gau).

In a case of illegal transport of Sandal-wood, the plea that offence was punishable only under Forest Rules and not under Section 379, IPC and under Sections 86, 87 of the Forest Act was held not tenable. *Abdul Khaleel* v. *State of Karnataka*, 2004 Cr LJ (NOC) 368 : 2004 AIR Kant HCR 973 : 2004(2) Crimes 325 : ILR (Kant) 2003(4) KAR 4358 : 2004(1) KCCR 127 : 2003 (6) Kant LJ 193.

Regarding charge under Section 379, it was observed that there must be proof of commission of offence of theft by taking the property out of possession of another person without that person's consent. It followed that offence would be wholly inapplicable if property was removed from a dead person. There was no evidence that property had been removed from the possession of the deceased while he was still alive. No charge under Section 304, was framed which provided for dishonest misappropriation of property possessed by deceased person at the time of death. 1987 Cr LJ 196 (Ori).

6. Conviction.—Where there was snatching of Scooter which was recovered from out side and not from the physical possession of the accused. Conviction was not held justified. *Dilkish F. Dessai* v. *State*, (1994) 3 Crimes 1046 (Bom).

Where the offence was for trespassing field and harvesting paddy crop of complainant. Conviction was given and field was jointly recorded in names of *R* and *J* in revenue record—Applicant harvested crop on behalf of *J* in exercise of *bona fide* claim of right—Ingredients of Sections 379 and 447, not attracted.—Conviction and sentence of applicants are set aside. *Sant Ram* v. *State of M.P.*, 1995 Cr LR (MP) 201.

In a Madras case, it was alleged that complainant while proceeding to his house on his scooter was waylaid by accused and at knife point accused snatched his wrist watch which was identified by complainant when same was produced before Court. Confessional statement by accused pursuant to which watch and knife were recovered from accused proved nexus between accused and crime and conviction of accused was held proper. *R. Shanmugam* v. *State*, 2004 Cr LJ 873 (Mad).

7. Sentence.—The conviction was based only on the basis of two departmental witnesses one of them appeared in civil suit. The civil suit decreed against department. Hence, revision is allowed and sentence reduced to period already undergone and fine of Rs. 1,000/- imposed and in default RI of one month. *Tota Ram* v. *State of U.P.*, 1995 JIC 827 (Alld).

Accused found in possession of stolen box soon after theft—He is held liable to be punished as thief, hence Court imposed sentence of one year's imprisonment with fine of Rs. 500/- upon him. *State of Maharashtra* v. *Ashok Yeshwant Kasbe*, (1995) 2 Bom Cr C 284 (Bom).

8. Theft by Minor.—The accused convicted of theft under Section 376, IPC was aged between 16-17 at the time of the occurrence on 27-3-1978. Giving margin of one year in approximation, he was taken to be a child on the date of the incident on 27.3.1978. At the time of hearing of appeal, his age was about 37 years, so there was no question of sending him to an approved school either as per Section 29 of the U.P. Children Act. The Supreme Court maintained the conviction of the accused under Section 379, IPC but quashed the sentence of one year R.I. *Ram swarup* v. *State of U.P.*, 2000 Cri LJ 3926 (All). In a situation like the one in *Ram Swarup's* case the Supreme Court directed the release of the accused in *Jayendra* v. *State*, AIR 1982 SC 685.

9. Acquittal.—Acquittal of accused on the technical ground of non-examination of material witnesses by prosecution can not be sustained. *P.L. Kasichettiyar* v. *Karuppasamy*, (1994) 3 Crime 1108 (Mad).

When *chowkidar* of house, from where alleged generator was stolen, not produced in evidence, delay of 20 days in filing FIR and *superdginama* furnished not containing any identification mark of generator, order of acquittal upheld. *State* v. *Amit*, 1997 Cri LJ 121 (Raj).

In the instant case, the accused was alleged to have snatched gold chain, the witness in relation to alleged recovery of stolen article turned hostile and infirmities were also recorded in Test Identification parade. It was held that the acquittal of accused was proper. *Public Prosecutor, High Court, AP* v. *Venudhar*, 2004 Cr LJ 4364 (AP) : 2004(2) Andh WR 627.

Allegation was for theft of jackfruits from tree of complainant. Statements of witnesses were shaky and did not corroborate testimony of complainant. No neighbouring witness was examined by complainant. Delay in filing of complaint was not properly explained. One witness in his evidence stated that he was at a distant place and could not see as to who was present at spot, the guilt was not established and accused was acquitted. *Ganesh Chandra Pati* v. *Baidhar Pati*, 2004 Cr LJ (NOC) 99 (Orissa) : 2004(27) OCR 226.

Where it appeared that two witnesses who were the only eye-witnesses had been assaulted by the accused and during the course of assault, theft was also committed, there was no reason to disbelieve the two eye-witness on the ground that there was no specific evidence as to who of the accused persons removed which of the article from the house and therefore, conviction of the accused persons had been rightly recorded by the trial Court. *Dinesh Chaudhary* v. *State*, 2004 Cr LJ 4360 at p. 4363 (Pat) : 2004(3) BLJ 488.

10. Omissions-Effect of.—Where there was relevant omissions on the part of the prosecution. It was held fatal to the prosecution. *Khairaj* v. *State of Rajasthan*. (1995) 1 CCR 420 (Raj).

11. Practice and procedure.—The petitioner were alleged to have cut a portion of the fence from the land of the OP and removed same branches of a mango tree. When their statement under Section 313, was recorded, no question was put to them of the alleged theft. *Held*, the conviction is liable to be set aside. (1986) 2 Crimes 652.

12. Recovery.—Where there was theft of Electric wire drum and recovery from the open field but independent witnesses not supporting the case—Recovery of the same was from populated area—Conviction was held non-sustainable. *Khairaj* v. *State of Rajasthan*, (1994) 3 Crimes 788 (Raj).

Property recovered at the instance of respondent—His ownership was not established and articles already in possession of petitioner on *supredginama*, ordered to be given to the petitioners. *Kheraj* v. *Sona Ram*, 1995 Cr LR 314 (Raj).

13. Removal of crop.—Complaint against removal of crops and trees was filed dispute of possession invoked—Both parties claiming possession—Proceeding may not be quashed—*Prima facie* case established. *Kamail Singh* v. *Risal Singh*. (1994) 2 Recent CR 291 (P & H).

In an Orissa case, the accused allegedly cut ánd removed paddy crops from land belonging to complainant. Both parties claimed to be the rightfull owners of the said land. The evidence showed that accused had cut and removed paddy claiming their *bona fide* right on disputed land and that they had not committed theft of crops. Acquittal of accused was held proper. *Ashish Kumar Ray* v. *Jitu Andia*. 2004 Cr LJ (NOC) 236 (Orissa) : 2004(27) OCR 288.

Articles were allegedly removed with intention to evict complainant from building. There was no intention to cause any wrongful loss of any movable property. It was held that no offence of theft was made out. *N. Kesavan Nair* v. *State of Kerala*, 2005 Cr LJ (NOC) 239 (Ker) : 2005(4) All Cri LR 530 : 2005(34) All Ind Cas 756 : 2005(2) Ker LJ 517 : 2005 Mad LJ (Cri) 976 : 2005 (4) Rec Cri R 43.

Property was attached under Section 145, therefore, it came to the custody of the court. As such either party was prohibited from entering upon the subject-matter of dispute with standing paddy crops which has *custodian legis*. *Held*, that respondents in flagrant violation and disobedience of the prohibitory order raped and removed standing crop. Their action tantamounted to an offence under Section 379. 1987 Cr LJ 631 (Ori).

The removal of trees planted on agreement of the land does not constitute offence of theft. The agricultural is a term of wider import and keeping in view the petitione could not be considered having committed theft of the produce now in questio notwithstanding it was in form of trees. Hence, FIR is quashed. *Sultan* v. *State o Haryana*, (1994) 2 Recent CR 665 : (1994) 3 CC Cases 120 (P&H).

14. Mere travelling in stolen car.—Mere travelling in a stolen car does no amounts to the offence of theft—Offence must be proved by the other evidence. *Kailas Chand Agarwal* v. *State of Rajasthan*, 1994 Cr LR 260 [Raj].

15. Hire-purchase agreement.—If the owner under hire-purchase agreemen terminates the agreement and takes possession of the hired vehicle in terms of the hire-purchase agreement which binds the onwer and the hirer, the re-possession of the vehicle may not amount to any criminal offence. But where the hirer-complains that the entire amount is paid but the owner did not get the entry of hire-purchase agreement cancelled, the Court dealing with the complaint of theft alone has to look into the matter. To escape the criminal liability, the financier must show to the Court either before trial Magistrate or before the High Court dealing with an application under Section 482 of Cr.P.C., for quashing that the financier has taken possession of the vehicle for commiting default by the hirer in terms of the hire-purchase agreement. The owner/financier after expiry of the period of agreement, especially after long lapse of time cannot exercise the right to take possession of the vehicle covered by hire-purchase agreement. The rights of the owner/financier under the agreement is extinguished in accordance with Section 27 of the Limitation Act. *Utham Kumar Jain, v. The State of A.P. and others*, 2005 CriLJ 3601 (AP).

16. Procedure.—Cognizable—Warrant—Not bailable—Not compou-ndable except when the value of the property is less than Rs. 250/-Triable by any Magistrate.

17. Charge.—I (*name* and *office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That on or about the............day of.....at......you intending to take dishonestly a certain movable property, to wit........out of the possession of.......(*name of the person in possession*) without his consent moved it is order to such taking, and thereby committed the offence of theft punishable under Section 379, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried for the said offence.

* * * * *

Sec. 380. Theft in dwelling house, *etc.*—Whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

STATE AMENDMENT

Tamil Nadu.—(Amendment by Tamil Nadu Act No. 28 of 1993. Sec. 2).

Section 380 of the Indian Penal Code (Central Act XLV of 1860) (hereinafter in this Part referred to as the principal Act) shall be renumbered as sub-section (1) of that section and after sub-section (1) as so renumbered, the following sub-section shall be added, namely:—

> "(2) Whoever commits theft in respect of any idol or icon in any building used as a place of worship shall be punished with rigorous imprisonment for a term which shall not be less than two years but which may extend to three years and with fine which shall not be less than two thousand rupees :
>
> Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than two years."

Synopsis

1. Essential for the offence 2461
2. Sentence 2463
3. Procedure 2464
4. Charge 2464
5. Convicition 2464
6. Acquittal 2464
7. Cases 2465
8. Evidence 2465

1. Essential for the offence.—The essential point in the offence of theft in a building is that the property should be under the protection of the building and the offence may be committed by the owner of the building or other person who has lawful access to the building. Hence, there is nothing in the above section to prevent a person from being convicted for a theft committed by him in his own house. LBR (1872-1892), 367. This is an aggravated form of the offence mentioned in Section 379, and the culpability is not diminished by the presence of the owner. Rat Un Cr C 56. Where the presumption of theft raising from recent possession of stolen property is correctly raised, the inference should where the property was stolen from a dwelling house, be an offence under Section 380, and not merely under Section 379, of the Penal Code. AWN 1882, 143. A person who removes cattle from a pound where they are secured without paying legitimate fee has the dishonest intention of saving himself of the fee and is liable to be convicted under Section 24, of the Cattle Trespass Act as well as under Section 380, IPC, 1930 MWN 529 : 1931 Cr C 32 : 129 Ind Cas 451 : 32 LW 205 : AIR 1931 Mad 18. Separate consecutive sentences under Sections 380 and 457, IPC, cannot be passed. 123 Ind Cas 393 : 31 Cr LJ 492 : AIR 1930 Pat 385. Theft of cattle in an agricultural country like India must be regarded as a serious offence and where the sentence has been sufficiently reduced by the Sessions Judge for the reduction in revision will not be justified. 1951 AWR (HC) 616 : 1951 ALJ 630. A cattle shed has been held to be "a building used for the custody of property". Mad HCR Nov. 25, 1866. Theft by a boatman on board comes under this section. 8 WR Cr 32. Theft by constables of property from the house they were employed to guard is punishable under this section. 3 WR 29. In order to convict a person under this section it need not be shown that the prisoner entered the building unlawfully. All that is necessary to constitute an offence of theft in a building is that the property should be under the protection of the building. 24 WR Cr 49. A theft from a *varandah*, which is outside the house, is not theft in a building. 1 Weir 435. But theft of property in a *varandah* may be theft within a building, when the *varandah* forms part of a building which is itself used as a human dwelling or for the custody of property. 1 PR 1881 Cr. But a railway carriage or a breake-van is not a building, tent or vessel used as a human dwelling or for the custody of property. 1 Weir 436 (1) : 1 Weir 436 (3). Where rice was stolen, when it was being carried in a boat, *held*, that the accused was guilty under Section 379, and probably also under this section. 1 Weir 436. Building means some structure intended for affording protection to the person dwelling inside it. 100 Ind Cas 120 : 28 Cr LJ 284 ; 5 MLJ 143 ; *see* also AIR 1939 Sind 17 : 22 SLR 466 : 29 Cr LJ 875. A person cannot be convicted both under this section and Section 457, when house-breaking is immediately followed by theft. 96 Ind Cas 328 : 5 Pat 464 : 27 Cr LJ 976 : AIR 1926 Pat 367. A first class Subordinate Magistrate has no jurisdiction to try an offence under Section 380, IPC. 1 BHCR 88. The trustee or manager of a temple is in possession of the temple and its jewels, and if he has made away with the property his offence is criminal breach of trust by an agent under Section 409, and not theft. 6 MLJ 14 : 26 M 243 Note. Where the accused was seized while leaving a house, on an outcry being made by female inmates of the house just before sunset, with the jewels of that female, which were ordinarily kept in an earthen pot, *held*, that the accused was not guilty of house-breaking or house-trespass but was guilty of theft in dwelling house. 10 PR 1886 Cr. An accused cannot be separately convicted under Sections 457 and 380, IPC, where both the offences formed one connected act of theft. AWN 1883, 288. Recent possession is evidence of theft. 9 Ind Cas 288 : 12 Cr LJ 48 : 9 MLT 291. A person who breaks open an iron safe and removes and appropriates its contents can be safely convicted of offences under Sections 380 and 461, of the Penal Code, though the offence form part of the same transaction. AWN 1896, 194. Being enraged by slight provocation accused, a domestic servant committed murder at 9 p.m. Thereafter accused started thinking and seeking upto 4 a.m. and after that he started breaking boxes and packing stolen articles in trunk. The murder could not said to have any connection with theft and the offence fell under Section 380, and not under Section 392, 1953 Cr LJ 1665 : AIR 1953 HP 105. Theft from the person in a dwelling house is simple theft under Section 379, IPC. Section 380, is intended to give greater security only to property deposited in a house, and not to property about the person of the party from whom it is stolen. 14 PR 1876 Cr. Causing disappearance of a document is an offence under this section. 16 Cr LJ 791 : 31 Ind Cas 647. There is nothing to prevent the Court from passing separate sentences under Sections 380 and 457. AIR 1939 Pat 349 : 40 Cr LJ 751. An offender under this section can be sentenced to whipping but only in lieu of and not in addition to punishment of imprisonment of fine. AIR 1939 Oudh 222 : 40 Cr LJ 521 ; AIR 1938 Rang 112 : 39 Cr LJ 478. But double sentences of whipping are illegal. AIR 1937 Rang 310 : 38 Cr LJ 1013. Theft and house-breaking are offences for which separate punishments can be awarded. AIR 1937 Sind 11 : 168 IC 330. When a case under Section 380, was pending before a Magistrate, the Additional District Magistrate was moved and he directed the case should be treated as a preliminary register case and should be proceeded with under Section 395, of the Penal Code. *Held*, that the order was without jurisdiction. 1947 MWN 492 : 49 Cr LJ 30 : AIR 1948 Mad 95. Where accused induced the complainant to deposit her moneys in certain bank in joint names of the accused and that of the complainant and withdraw money from the bank, no offence under this section has been committed by the accused. ILR (1944) 1 Cal 398 :

45 Cr LJ 666 : AIR 1944 Cal 224. A claim of right asserted in defence against prosecution for theft must be an honest one, albeit unfounded in law or in fact and if it is not in good faith but merely a colourable pretence to obtain or keep possession of the property, it will not avail as a defence. AIR 1950 Nag 92 ; AIR 1917 Cal 648 : 44 Cal 66 : 17 Cr LJ 456.

Before convicting anybody of an offence either under Section 380, or Section 411, it is essential that the goods should be proved to have been stolen or misappropriated. Once a person is found in possession of stolen property certain presumption follow and he is on explanation at the risk of being otherwise convicted either for the theft or under Section 411. AIR 1960 MP 395 : 1960 Jab LJ 832 : 1960 Cr LJ 1620 ; *see* also Madh BLJ 1956 Cr 29 : 1956 Madh BLJ 305. In order to put the accused on his defence his possession of the stolen property must be recent; although what shall be deemed recent possession must be determined by the nature of the articles stolen *i.e.*, whether they are of a nature likely to pass rapidly from hand to hand ; or of which the accused would be likely, from his situation in life, or vocation to be come possessed innocently. 1962 Ker LJ 759 : 1963 MLJ (Cr) 401.

The offence under this section is an aggravated form of the offence of theft. The aggravation lies in the fact that theft is committed in a building. 1979 Cr LJ 446 ; 1975 Cr LJ 285. Theft of chillies from the roof of a house has been held to be a theft from building. 1974 Cr LJ 76. A railway station is a building within the meaning of this section. (1971) 75 Punj LR 440 but a railway carriage and brake van are not building.

The presumption of the accused's theft or being receiver of stolen property will depend on fact of the case. AIR 1972 SC 2501 : 1972 Cr LJ 1696 : (1982) 1 Bom LR 764 ; (1982) 2 Andh WR 444 : 1982 Cr LJ 1841 (circumstantial evidence) : 1968 All CR 417 ; AIR 1967 Ker 197 (recovery of a part of chain from the informant).

It is a settled law that where a *bona fide* claim of right exists, it can be a good defence. (1962) 1 SCR (Sep) 8. *See* also 1979 Cr LJ 446 ; 1980 Cr C 827 and 1979 Cr LJ 1195 (for proof of the offence).

Where it is not shown that the time of removal of goods from husband's house, wife had any dishonest intention or *mens rea*, then she cannot be prosecuted for offence of theft in a dwelling house. 1988 (1) Crimes 545 (Delhi).

Under Section 114 of the Evidence Act, the court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. Since both the presumptions are possible as per illustration (a) of Section 114 of the Evidence Act, it is safe to raise the second presumption in the absence of any other evidence against the accused. There is no evidence on record that the petitioner was seen near the house of the complainant on the day the theft was committed. It is also to be noticed that the recovery was made some three months after the alleged theft. The conviction of the petitioner, therefore, under Section 454 and 380. I.P.C is not sustainable. He can be convicted only under Section 411. I.P.C. *Karam Singh* v. *State of Rajasthan*, 1999 Cri LJ 1791 (Raj).

2. Sentence.—The property is involved in a sentence for an offence under Sections 380 and 457, Penal Code, is rice worth Rs. 10/-. Three month's rigorous imprisonment was held to be sufficient. (1954) 2 Mad LJ 226.

In *State of Sikkim v. Tek Bahadur Tamang*, 2001 Cri LJ 4617 (Sikkim) the Chief Judicial Magistrate awarded a sentence of imprisonment till rising of the Court. The Hon'ble High Court on the point of sentence observed as under—"The offence under Section 380, IPC is punishable with imprisonment of either description for a term which may extend to seven years and to fine. No cognet reason has been given by the learned Magistrate to justify undue leniency in the award of the sentence. The reason given is that both the accused were first offenders and villagers having no regular source of income. This was hardly a reason to justify leniency. Another reason given in respect of Tek Bahadur Tamang is that he is young boy of 22 years. But the most relevant factor. that the theft was allegedly committed of an unlicensed gun was not mentioned. Reasons given for the leniency in the award of sentence were virtually no reasons. The impugned order of the learned Chief Judicial Magistrate shows undue leniency in the award of sentence besides being contrary to the statutory provisions."

Law to be applied in respect of offence committed in 1948 in Jhebua State.—Accused can be tried and punished in respect of offences under Sections 380 and 451, in 1955. 1962 SCD 593 : (1963) 2 SCJ 372 : (1963) 2 SCWR 375 : 1964 (2) Cr LJ 64.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable—Triable by any Magistrate.

4. Charge.—I *(name and office of Magistrate, etc.)* hereby charge you *(name of the accused)* as follows :—

That on or about the.........day of...........at.......you committed theft of...... (*mention the property stolen)* in a building (or tent or vessel) used as a human dwelling (or for the custody of property) and thereby committed an offence punishable under Section 380, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

5. Conviction.—The stolen goods were found in possession of applicant soon after theft. It is presumed that he is either thief or guilty of keeping stolen property. Case is proved and hence conviction upheld. *Hom Singh* v. *State of U.P.*, (1995) 3 CCR 335 (Alld).

6. Acquittal.—There appear to be several patent and latent infirmities in instant case which are insufficient for establishing link in between accused and commission of offences charged against him. On the fact of these infirmities, while looking to all the facts emerging from record it is not proper to interfere with finding of acquittal arrived at by trial Court. *State of H.P.* v. *Raj Kumar*, (1994) 1 SLJ 193 : 1994 Cr LJ 894 : (1994) 3 CC Cases 76 (HP).

Where the appeal was heard and decided in absence of parties was liable to be set aside. Present revision being taken up after about 21 years of incidence. Feeling that remand would result in further delay revision being decided on merits and two versions about place of arrest of accused and time of filing FIR and there infirmities create doubt. Accused given benefit of doubt and acquitted. *Nanuman Kehar* v. *State of Bihar*, (1995) 2 BLJR 749 (Pat).

Where the conviction was based solely, on recoveries made. But the recoveries were factually made from open spot accessible to all. The identification parade of articles were not in accordance with law. Hence, acquitted. *Sona Ram* v. *State of Rajasthan*, (1995) 2 WLC 333 (Raj).

7. Cases.—Applicant charge-sheeted by Magistrate but discharged in revision against order of Additional Sessions Judge. It was held that the applicant is a bill clerk in District Court. Being a bill clerk his trial is necessary to find out guilt. At the stage of framing charge, evidence cannot be weighed and tested. Hence, revisional court was not justified to conclude that no case is made out against applicant. *State of U.P.* v. *Akhilesh Kumar Srivastava*, (1995) 3 CCR 783 (Alld).

The appellant was in dire need of money as established. The Accused/appellant knew that his visa had come on and that a large amount of money was required. He had also tried to arrange for loan.

According to accused in the house of the deceased, a large amount of cash and jewellery was available which could have been taken away by the accused/appellant and that he, as a conscientious man, had taken so that he could repay before his departure. The contention is devoid of any merit and has been found to be incorrect by the Courts below. It would be pertinent to mention here that the trial Court has adverted to the fact that the jewellery and cash were lying in hidden condition and thus knowledge of its existence cannot be attributed to the accused/appellant.

At the stage of recording of statement under Sec. 313 of the Code, the accused had come with another explanation that the deceased Augustine had paid him amount. No evidence at all has been adduced to show that he was present in the shop of Augustine and had been given the said amount. Furthermore, even wife of the accused/appellant has not stated that she was told at any stage by her husband that he had received amount from the deceased Augustine. The trial Court and the High Court both have disbelieved it.

The analysis of the evidence shows that the accused/appellant was in dire and urgent need of more and he had a motive for getting the said amount of money. *M.A. Antony vs. State of Kerala*, AIR 2009 SC 2549 : 2009 (6) SCC 220 : 2009 (7) JT 372 : 2009 (6) SCR 829 : 2009 (6) Scale 36 : 2009 (8) SLT 255.

Where charge was of theft, lurking house trespass, dishonestly receiving stolen property. The only charge which could be established against, the petitioners was under Section 411, IPC. The conviction recorded under Sections 457 and 380, IPC are therefore not justified on record. There is no evidence or any link to establish it. *Bedaria* v. *State of Madhya Pradesh*, (1995) 3 CCR 365 (MP).

8. Evidence.—Even with regard to offence under Section 380, if the evidence of public prosecution is excluded, which has to be done it would be difficult to sustain the conviction. *Kailash Potlia* v. *State of A.P.*, AIR 1996 SC 66 : 1995(3) SCJ 594 : 1995(4) Scale 724 : 1995(3) Crimes 514.

Plea of Alibi—When not reliable. The theatrical explanation given by the accused/appellant that he was going Perumbavoor and at Thottuva, nearly 35 kms away, the auto driver tried to snatch his money and he ran and stayed at a dilapidated house for the whole night has been rightly rejected by the Courts below. And if he was at Thottuva which is admittedly 35 kms away from the place of occurrence, he could not have been seen on the early hours, at the place of occurrence. *M.A. Antony vs. State of Kerala*, AIR 2009 SC 2549 : 2009 (6) SCC 220 : 2009 (7) JT 372 : 2009 (6) Scale 36 : 2009 (6) SCR 829.

* * * * *

Sec. 381. Theft by clerk or servant of property in possession of master.—Whoever being a clerk or servant, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Scope 2466
2. Clerk or servant 2466
3. Object 2466
4. Abetment 2467
5. Cases 2467
6. "Shall also be liable to fine" 2467
7. Procedure 2467
8. Charge 2467
9. Appeal 2467

1. Scope.—"Property is in the possession of the master or employer not only when it is in his actual manual possession but also when it is in the possession of a clerk or servant on his account. And a person employed temporarily, or on a particular occasion in the capacity of a clerk or servant, will, it seems, come within the terms of this section, if the master buys goods and sends his servant to receive them and the servant dishonestly carries them away, he may, it seems, be punished under this section. The master has the possession of the goods, when they are received by the servant on account of the master and being thus in his possession, they are within the meaning of this Code, in the master's possession".—*Morgan and Macpherson.* The fact of secret removal of an article does not prove dishonest intention. 5 Lah 56 : 81 Ind Cas 185 ; *see* also 41 Cal 433.

2. Clerk or servant.—An unpaid apprentice is a clerk or servant but an unpaid boatman is not a servant. 157 PLR 1905 : 50 PR 1905 Cr : 8 WR Cr 32. The accused, the owner of a cart was engaged to cart tamarind fruits from a forest to the complainant's house. He took certain fruits from the cart on his way to the complainant's house. *Held,* that he was guilty under this section. 1 Weir 43. Where *barkandazes* were charged with having stolen sum of money shut up in a box and placed in the police treasury buildings, over which they were placed in guard, *held,* that they should have been charged under this section 2 WR 55 ; *see* also UBR (1897-1901) Vol I, 75 : 9 WR Cr 37. Taking official papers out of custody for showing to a party's vakil is theft by servant. 27 Bom LR 1931 : 27 Cr LJ 689 : AIR 1926 Bom 122 : 94 Ind Cas 881.

3. Object.—It should always be borne in mind that, in the absence of extenuating circumstances property established, larcenies by servants from their masters are aggravated forms of offences by reason of the relation between the parties, and are intended by law to meet with more severe punishment than mere ordinary theft. AWN 1887, 54. In the absence of evidence to the ownership of stolen property, conviction under this section cannot stand. 16 Cr LJ 640 : 30 Ind Cas 464.

4. Abetment.—*Vide* 64 Ind Cas 510.

5. Cases.—Where no objection was taken before the trying Magistrate for the joint trial of a person under Section 411, with a period charged under Section 381, Penal Code, and the evidence was that the former was handling the stolen property only a few hours after the theft, *held*, that the joint trial of him with the person charged with theft had occassioned a failure of justice. 28 Cal 10. In the absence of evidence as to ownership of stolen property, a conviction under Section 381, cannot stand. 16 Cr LJ 640 : 30 Ind Cas 464.

The accused clerk or servant in furtherance of their common intention had committed theft of stamp papers kept in strong room under double lock of District Treasury office. Evidence showed that they could have no access either to keys in question of to strong room so as to commit the alleged theft. The written statement admitting the guilt purported to have been given by accused to pradhan of Gram Panchayat was not proved in accordance with law. It was held that acquittal of accused persons was proper as guilt of the accused persons was not proved beyond doubt. *State* v. *Dev Prakash*, 2003 Cr LJ 2882 (HP) : 2003(1) Cur LJ (CCR) 643.

6. "Shall also be liable to fine".—The word 'liable' means a future possibility or probability happening which may or may not actually occur. In other words the Magistrate has the power to impose the sentence of the fine under Section 381, but it is discretionary. AIR 1957 Punj 55 : ILR 1957 Punj 426 : 1957 Cr LJ 389.

7. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable—Triable by any Magistrate of the first or second class.

Triable under Section 381, by third class Magistrate is illegal. 2 Bur LJ 75 : AIR 1925 Rang 12.

8. Charge.—I (*name* and *office of Magistrate, etc.)* hereby charge you (*name* of *the accused*) as follows :—

That on or about the........day of............at........you being a servant (or clerk) of *A*, *A* (or employed in the capacity of servant (*or* clerk) of *A*, *B* committed theft by stealing certain property to wit......in the possession of the said *A*, *B* and thereby committed an offence punishable under Section 381 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

9. Appeal.—An appeal from a conviction under this section is competent even where sentence has been passed. 48 Cr LJ 963 : AIR 1948 Mad 16 : ILR 1948 Mad 434.

* * * * *

Sec. 382. Theft after preparation made for causing death, hurt or restraint in order to the committing of the theft.—Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall, also be liable to fine.

Illustrations

(a) *A* commits theft on property in *Z*'s possession, and, while committing this theft, he has a loaded pistol under his garment having provided this pistol for the purpose of hurting *Z* in case *Z* should resist. *A* has committed the offence defined in this section.

(b) *A* picks *Z*'s pocket, having posted several of his companions near him. In order that they may restrain *Z*, if *Z* should perceive what is passing and should resist, or should attempt to apprehend *A*. *A* has committed the offence defined in this section.

Synopsis

1. Scope 2468
2. Procedure 2468
3. Charge 2468

1. Scope.—"Even though there is every reason to surmise that the accused were in certain place for the purpose of committing theft this section requires that actual theft shall be committed. AIR 1923 Lah 512 : 27 Ind Cas 434 ; 25 Cr LJ 386. A mere attempt to commit theft after such preparation for causing death or hurt, etc., is not punishable under this section".—*Morgan and Macpherson*, 343. A sentence of whipping can be passed. Rat Un Cr C 527. The accused entered a cetel plantation armed with a dagger with intention to commit theft of betel bearers, but while committing theft he was met there by its owner and his wife. In the scuffic with them he did not inflict any injury on either of them. Though armed, he was over powered by the pair and tied. There was no proof of any preparation on the part of the accused to commit any of the acts mentioned in Section 382, Penal Code. *Held*, that the mere possession of the dagger did not justify a conviction under this section. AIR 1937 Rang 542. Where all the accused came together to the spot and went together with the stolen sheep, two of them came forward and carried away a sheep while others walked at a distance and there was evidence that all of them were variously armed, it was held that it could be presumed from these facts that all of them came with intend to commit theft, that all of them wanted to carry away the stolen property and thus all of them were liable for theft. AIR 1950 Kutch 29. In an offence under Section 382, so as if there was no occasion for him to wield the knife or to cause injury, the prepardness of the accused is relevant. 1980 Cr LJ 760. The guaranty having a *bona fide* claim over the truck financed by the financer company takes the truck to the police station, the prosecution of the guarantor under Section 382, is not permitted. 1977 UP Cr C 185.

2. Procedure.—Cognizable—Warrant—Not bailable—Not compou-ndable—Triable by Magistrate of the first class.

3. Charge.—"I (*name* and *office of the Magistrate, etc.)* hereby charge you *(name of the accused)* as follows :—

That on or about the.........day of.......at........you committed theft of......... *(mention the property)* the property of *AB* after having under preparation for causing death (or hurt or restraint, or fear of death, or of restraint) to........... by....... (*specially the preparation made)* in order to the committing of the said theft or in order to the retaining of the property taken by the said theft) and that you thereby committed an offence punishable under Section 382 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

OF EXTORTION

Sec. 383. Extortion.—Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits "extortion".

Illustrations

(*a*) *A* threatens to publish a defamatory liable concerning *Z* unless *Z* gives him money. He thus induces *Z* to give him money. *A* has committed extortion.

(*b*) A threatens *Z* that he will keep *Z*s child in wrongful confinement, unless *Z* will sign and deliver to A a promissory note binding *Z* to pay certain money to *A*, *Z* signs and delivers the note. *A* has committed extortion.

(*c*) *A* threatens to send club-men to plough up *Z's* field unless *Z* will sign and deliver to *B* a bond finding *Z* under a penalty to deliver certain produce to *B*. and thereby induces *Z* to sign and deliver the bond. *A* has committed extortion.

(*d*) *A*, by putting *Z* in fear of grievous hurt, dishonestly induces *Z* to sign or affix, his seal to a blank paper and deliver it to *A*. *Z* signs and delivers the paper to *A*. Here, as the paper of so signed may be converted into a valuable security. *A* has committed extortion.

Synopsis

1. Theft or extortion 2469
2. Extortion, what constitutes 2470
3. Put any person in fear of any injury 2470
4. Abetment of extortion 2472
5. To any other 2472
6. Thereby indues the person so put in fear to deliver 2472
7. Valuable Security 2472
8. Picketing 2473

1. Theft or extortion.—"Extortion, like theft, belongs to that class of offences, into the definition of which the intention of causing wrongful gain enters. The dishonest intention to obtain property is common to both these offences ; but in theft, the object of the offender is to take property which is in the possession of a person out of that person's possession, and it is a part of the definition that the offender's intention should be to take "without that person's consent". The offence of extortion is distinguished from theft by this obvious circumstance that it is committed by the wrongful obtaining of a consent and not without consent. It is distinguishable from robbery by his feature that the property is obtained by means of such fear of injury as does not amount to the fear of instant death of personal hurt which is part of the robbery".—*Morgan and Macpherson*, 243. Where a person through offers, no resistance to the carrying of his property, but does not deliver any property either to the prisoners or to any one else, the offence committed is robbery and not extortion. 5 WR Cr 9.

2. Extortion, what constitutes.—"According to this definition the offence consists in intentionally intimidating a person by threats or otherwise, and thereby causing a dishonest transfer or delivery of property from such person to any other person".—*Morgan and Macpherson*, 344. In order to constitute the offence of extortion it is not necessary that the threat should be used, and the property received by the one and the same person. It may be matter of arrangement that the threat should be used by some and property received by others : and they would be all guilty of extortion. 2 BHCR 395. Delivery by the person put in fear is essential in order to constitute the offence of extortion. 5 WR Cr 19. In order to come within this section, threat must be tortuous, and giving rise to civil action. 5 MHC App 14 ; 1 Weir 438 ; 1 Weir 440. In cases of extortion dishonesty must be present. 1 Weir 440 ; 1 Weir 441. To attract the operation of Sections 383 and 384, there must be a delivery of the property by the victim and the will to do so must be endangered by the fear which should have proceeded from the extortioner antecedent to the delivery. 1950 ALJ 711.

Section 382 requires the person to be put in fear of injury ; the injury, however not necessarily be physical. 1952 Cr LJ 1391 : AIR 1952 Pat 379.

If a person's cattle are illegally seized and the person who seizes the same refuses to release them and threatens to impound them unless he was paid some money such action on his part would amount to threat or injury to the property to the person whose cattle are thus illegally seized and would amount to extortion. (1956) 22 Cut LT 417.

3. Put any person in fear of any injury.—The wide interpretation of the word "injury" must be borne in mind (*see* Section 44). Whether a person has in fact been put in fear of injury is a matter which a court must decide. The age, sex and situation of the person threatened may properly be taken into consideration. "It seems necessary to constitute the offence that the persons threatened should be actually put in fear ; upon the whole of the facts, however, if there is reason enough to say that similar circumstances would ordinarily excite fear in persons of the same age, *etc.*, as the person threatened, the Court will not too easily listen to the suggestion or evidence adduced to show that the passion of fear was not in truth aroused. Nor, on the other hand, considering that the proof that he was put in fear will often mainly be the evidence of the person threatened, and that exaggerated if not false versions of the occurrence are not improbable, should the charge of extortion be considered as established without a cautions investigation".—*Morgan and Macpherson*, 345. The tenor of a criminal charge is fear of injury within the meaning of this section. Extortion, may be equally committed whether the charge is false or true. 7 WR Cr 28. The making use of oral or supposed influence by member of a certain establishment to induce other members of that establishment to give him money against their will, threatening in case of refusal the loss of their situation, is extortion. 18 WR Cr 17. Where there was no proof that any such fear of injury was caused as contemplated in this section, or that payment of money was induced thereby and it was shown that the accused might have demanded payment under *bona fide* claim of right, *held*, that a conviction for extortion was not sustainable. 3 BHC Cr 45. The system of arrangement by which the villagers procure exception from certain public duties by the contribution of a settled *quota* in money is purely voluntary, and perfectly legitimate bargain among the villagers. and no offence is committed by the accused accepting the *quota of* money in consideration of their discharging those duties on behalf of the villagers. UBR (1897-1901) Vol I, 340. A threat that God will punish a man for some act is not such an injury as the section refers to. AIR 1944 Sind 203 : 46 Cr LJ 149. The word "injury" according to Section 44, denotes any harm. Whatever, illegally caused to any person in body, mind, reputation or property and the harm threatened or caused to be threatened must be from something illegally done. AIR 1944 Sind 205 : 46 Cr LJ 145 : AIR 1944 Kar 146. Where the accused assaulted the victim and forcibly took his thumb impression, no offence under this section has been committed. AIR 1941 Pat 129 : 42 Cr LJ 361. But an offence under this section has been committed where a minor boy was forcibly made to execute a promissory note. AIR 1933 Pat 601 : 35 Cr LJ 123. Charge of extortion and fabricating false evidence are not private disputes as neither of these offences is compoundable. AIR 1936 Sind 146 : 37 Cr LJ 1086. The chief element in the offence of extortion is intentionally putting a person in fear of an injury to that person or to any other and thereby dishonestly inducing the person so put in fear to deliver to any person any property or valuable security, *etc.* The inducement must be dishonest. AIR 1948 Mad 513 : 50 Cr LJ 33. The threat by public servants under colour of their officer that they would report if the complainant feed more than 25 guests at his niece's wedding and obtained money from him from refraining from doing so, was no injury within the meaning of Section 44, read with Section 43, of the Penal Code and therefore, even if they obtained money thereby, they could not be held guilty of the offence under Section 384. AIR 1951 Ajmer 64 : 52 Cr LJ 873.

The charges framed against the appellant in effect said the appellant committed criminal intimidation by threatening *X* and his daughter with injury to their reputation by publication of indecent photographs of the daughter, with intent to cause alarm to them. The evidence disclosed that the real intention of the appellant was not so much as to cause alarm only as to force *X* to pay 'hush money'. The appellant was convicted under Section 506, Penal Code by the trial Magistrate (later affirmed by the High Court). *Held* by the Supreme Court that it was not un-often that a particular act in some of its aspects come within the definition of a particular offence in the Penal Code, while in other aspects or taken as a whole, it comes within another definition. There were obvious differences between the offence of extortion as defined in Section 383, and the offence of criminal intimidation as defined in Section 503. On the finding of the Magistrate, which finding was affirmed by the High Court, the appellant was clearly guilty of the offence of criminal intimidation. Though the charge as framed against the accused was held to be not as clear as it might have been but in the absence of any prejudice caused to the appellant by reason of the defect, the conviction could not be attacked as illegal. AIR 1960 SC 154 : 1960 SCJ 195 : 1960 All Cr R 104 : (1960) 1 SCR 924 : 1960 Cr LJ 177. The chief element in the offence of extortion is intentionally putting a person in fear of injury and thereby dishonestly inducing the person to deliver to any person any property or valuable security. AIR 1979 Bom 1747 : 1979 Malay LJ 115 ; ILR (1969) 19 Raj 841 (offence of extortion). The injury that a person is not necessarily physical injury. (1982) 1 Malayan LJ 32. The mere forceable taking of property from another does not come under the definition. It must proved that the person was induced to part with the property by putting him in fear of injury. AIR 1979 SC 1943 : 1979 Cr LJ 1305.

In a case, the accused, as alleged by the complainant stopped her and forced her to put her thumb impression on one blank paper and two promissory notes. After some time, one of the accused persons returned one blank promissory note and one blank paper to her. It was held that the only inference that could be drawn was that the force allegedly put on her did not in any manner amount to fear of injury and thus the offence of extortion was not made out. *Lanka Hanumantha Rao* v. *State of AP*, 2005 Cr LJ 4327 (AP) : 2005(1) ALD (CRL) 986 : 2005(3) Andh LT (Cri) Ap140.

4. Abetment of extortion.—A civic guard who was present at the time of extortion by a constable is guilty of abetment. AIR 1948 Cal 47 : 48 Cr LJ 587.

5. To any other—The injury which excites fear may be threatened to person put in fear to any other person. Elsewhere the expression usually is in similar cases "any person in whom he is interested". The Illustration (*d*) puts a threat to *Z* concerning *Z*s child. But from the generality of the expression it seems that no tie of relationship is requisite. If in fact the fear of injury is excited, it matters not that another person, be he who may, is the supposed object of such injury. And it is not apparently essential that there should be a well-founded ground for apprehending that injury will be sustained by any person. For if a person is put in fear and if this is done not by accident or without design but intentionally, that part of the definition is fulfilled".—*Morgan and Macpherson*, 345.

6. Thereby induces the person so put in fear to deliver.—"The essential ingredient in extortion is, that the offender dishonestly induces the person out in fear to deliver property. The Court must see sufficient reason to believe that in consequence of the putting in fear and in accordance with the intention of the offender, a dishonest transfer of property has been brought about that the delivery has caused by the threats, of a person who had the intention of causing wrongful loss to the person put in fear, or wrongful gain to himself or to some other person. The delivery of the property may be direct from the person threatened to the offender or to another person by his direction, or it may be by placing the property in the some place of deposit, or by otherwise putting it at the immediate disposal of the offender. The subjects of extortion are, it seems the same as the subject of theft, although the word 'movable' is not used in the definition".—*Morgan and Macpherson*, 345. It has to be shown that the person has induced to part over the property by putting him in fear of injury. 1967 Bihar LJR 539 ; AIR 1979 SC 1943 : 1979 Cr LJ 1305.

7. Valuable security.—"These words have been explained in Section 30. It is clear that any document which is denoted by these words may be the subject of the offence of extortion, even if it should be deemed not to be movable property, and therefore not to be included in the definition of theft,"—*Morgan and Macpherson*, 346. The word "property" is to be understood in a wide sense such as letters written by abducted person while in confinement would constitute property. 1982 Cr LJ 665. Notwithstanding that the relinquishment is not registered, it is valuable security. 5 DLR (All loudhia) 49.

8. Picketing.—Realising fines by picketing is an extortion under this section. 25 Cr LJ 60 ; 20 ALJ 877 ; 45 All 137.

If all that a man does is to promise to do a thing which he is under no legal obligation to do and to say that if money is not paid to him he will not do the same, this does not constitute an offence under this section. 46 All 81 : 81 Ind Cas 609 : 25 Cr LJ 961 : 21 ALJ 850 ; *see* also 75 Ind Cas 542 : 24 Cr LJ 958 : 4 Lah 179.

A *nikah khawn* is not bound to a *nikah* for a person unless he chooses to do so and it is certainly no offence for him to demand any fee he takes for doing so. 4 Lah 179. Promissory note executed by minor by force is valuable security. AIR 1933 Pat 601 : 1930 Cr C 1363.

Before a person can be said to put any person in fear of any injury of that person, it must appear that he has held out some threat to do or omit to do what he is legally bound to do in future. 21 ALJ 850. *See* also AIR 1973 SC 2200 : 1973 Cr LJ 1187 (for sentence).

* * * * *

Sec. 384. Punishment for extortion.—Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.

Synopsis

1. Criticism 2473
2. Fear of injury 2473
3. Extortion and cheating 2474
4. Robbery or extortion 2474
5. Conviction 2474
6. Procedure 2475
7. Charge 2475

1. Criticism.—"Notwithstanding the circumstances that there is nothing approaching to bodily injury (putting in fear of injury) in extortion, the punishment which may be awarded is not greater than for theft. The theft of a thing, that is, the taking of it dishonestly without consent, will not usually be an offence of such baseness as the extortion of it, that is, the causing its delivery by a person who consents to deliver it because he is put in fear and dares not withhold his consent. Extortion would appear, except from the wide range given to this offence by the expression "fear of injury to be more grave offence and to deserve in its graver form a heavier punishment".—*Morgan and Macpherson*, 346.

2. Fear of injury.—The definition of extortion requires that the person should in fact be put in fear of injury and that the object (delivery of property, *etc.*) should be accompanied. It must therefore be proved that the person was put in fear of injury, whether an injury of body, mind, reputation or property, to himself or another : that the act by which this fear was excited was intentionally done by the accused person: that the property was delivered to the accused, or according to his direction to any other person or put in any place by his orders, and that this done 'dishonestly' as to which a strong inference will arise on proof of former matter that a dishonest intention existed".—*Morgan and Macpherson*, 347. *See* also 15 ALJ 127 ; 32 Ind Cas 971 : 28 ALJ 877. Threat to omit to do some act which accused is not legally bound to do is no offence. But threat held out by accused that he would not release cattle belonging to complainant unless he was paid some money for their release does amount to extortion. AIR 1924 All 197 : 46 All 81 : 21 ALJ 154 : 25 Cr LJ 961: 81 Ind Cas 609. Where offences under Sections 161 and 384, Penal Code, are committed under colour or in excess of a duty imposed or authority conferred by the act" they are not entitled to protection under Section 80 (3). AIR 1932 Sind 28 : 33 Cr LJ 298 : 25 SLR 395. Conviction under Section 384, cannot be maintained when accused had no dishonest intention in removing property. 26 PLR 97 : 26 Cr LJ 794 : 7 Lah LJ 12 : 86 Ind Cas 424. Just as it is not an offence of deceive a person simpliciter, so it is not an offence to put a person in fear of an injury, unless it is done with a criminal intention. AIR 1942 Lah 253 : 43 Cr LJ 849. In case of offences coming within Section 161, accused can be punished under that section, though the principal offence may have been under Section 384. AIR 1944 Cal 374 : 46 Cr LJ 94. Deterrent sentence should be awarded where an offence under this section has been committed by a member of a Police force. AIR 1942 Oudh 163 : 43 Cr LJ 139. Where common object is not proved, all the accused cannot be convicted under this section. 1931 MWN 129.

In case of cattle illegally seized, the accused seizing the cattle refused to release them unless money was paid, such action would amount to an offence under Section 384, though for the same act a prosecution under Section 22 of the Cattle Trespass Act lies. (1956) 22 Cut LT 417.

3. Extortion and cheating.—Although there is a common feature between the offence of extortion and cheating yet they cannot be regarded as to aspects as one offence. AIR 1928 Bom 346 : 30 Bom LR 967 : 29 Cr LJ 1082 ; *see* also AIR 1936 Sind 29 : 57 Cr LJ 757.

4. Robbery or extortion.—"If it is doubtful whether particular act of extortion amounts to robbery or not the offender may nevertheless be convicted upon a charge of extortion. For this and other sections under the present head are not to be read, as if the word 'unless the offence shall amount to robbery', or any like words were added. The definition of the overt offence, extortion includes all cases which are within the definition of the cognate higher offence, extortion amounting to robbery. The offence does not cease to be extortion or to be punishable as such under this division, because it is shown that the extortion is of the kind which may amount to robbery. If the case is doubtful, the proper course is to convict the offender of the crimes which, without doubt, he has committed, namely, extortion and to punish him for it. In such a case there is no necessity for resorting to the provision in Section 72".—*Morgan, and Macpherson*, 347.

5. Conviction.—In the instant case the accused was related to the married sister of boy's father. He had allegedly kidnapped for extortion of money. The co-accused was arrested while accepting the money and on his information the accused was arrested. The accused pointed out to the place from where dead body was recovered. The evidence of shop-keeper from whom the jute bag containing dead body of deceased writing chits were purchased, telephone booth owner and punch was found reliable. Conviction of accused was held proper. *Rashikbhai.Popathbai Patel v. State*, 2003 Cr LJ 3278 (Guj) : 2003 (3) GCD Guj 2149: 2003(3) Guj LH 33.

The accused, who was related to the married sister of murdered boy's father, had kidnapped for extortion of money and murder. Circumstantial evidence alone was available as co-accused was arrested while accepting the money and on his information the accused was arrested who pointed to the place from where dead body was recovered. The evidence of shopkeeper from whom jute bag containing dead body of deceased and writing chits were purchased, telephone booth owner and punch was found reliable. This all showed that there was no false implication and conviction of both accused was held proper. *Rashikbhai Popatbhai Patel* v. *State*, 2003 Cr LJ 3278 (Guj) : 2003(3) GCD Guj 2149 : 2003(3) Guj L 33.

6. Procedure.—Not cognizable—Warrant—Bailable—Not compou-ndable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first or second class.

7. Charge.—"I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*), as follows :—

That on or about the............day of...........at.......you committed extortion by putting *A*, *B* in fear of a certain injury, to wit........and thereby dishonestly induced the said *A*, *B* to deliver you a certain property, to wit......and that you thereby committed an offence punishable under Section 384, of the Indian Penal Code, and within my cognizance (or the cognizance of the Court of Session, or High Court).

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 385. Putting person in fear of injury in order to commit extortion.—Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

Synopsis

1. Scope 2475
2. Procedure 2476
3. Charge 2476
4. Sentence 2476

1. Scope.—"A distinction between the inchoate and the consummated offence, is recognised. The attempt to commit extortion has proceeded so far towards completion that a persons has been put in fear of injury, or that there has been an attempt to excite such fear ; but the offence is incomplete because there has been no delivery of property, etc. The Court must be satisfied that the putting to fear is with the intention of extorting a delivery of property".—*Morgan and Macpherson*. 348. For the purpose of this section, it is necessary that the accused should have put some person in fear of injury in order to extort some property from him. "Injury" includes only such harm as may be caused illegally to a person's mind, body, reputation or property. 44 Ind Cas 973 : 19 Cr LJ 445. Further it must be one which the accused could himself inflict or cause to inflicted. 48 MLJ 190 : 28 Cr LJ 755 ; 86 Ind Cas 339. This section does not expressly provide for the punishment of an attempt at extortion. 98 Ind Cas 60 : 27 Cr

LJ 1213 : AIR 1927 Pat 89. In order to constitute an offence under Section 385, it is no necessary that the threat should be of some conduct which might either constitute an offence is criminal law or which might be made the basis of a civil action for damages. S Pat 725 : AIR 1930 Pat 593. Extortion as defined in Section 383, IPC, includes putting any person in fear of injury and covers Section 385, IPC which is a less offence punishable only with two years' imprisonment as against three years' imprisonment fo an offence under Section 384. AIR 1941 Sind 36 : 42 Cr LJ 460. The essentia ingredients of the offence is that the accused put any person in fear of any injury fo committing extortion. 1980 CWN (UC) 222.

2. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable b Magistrate.

3. Charge.—"I (*name and office of Magistrate, etc.*), hereby charge you (*name of th accused*) *as* follows :—

That on or about the......day of.......at......you put *A, B* (*or* attempted to put *A, B*) i fear of an injury, to wit.....in order to the committing of extortion and that you thereb committed an offence under Section 385 of the Indian Penal Code and within m cognizance.

And I hereby direct that you be tried on the said charge.

4. Sentence.—Substantial justice. (1972) 74 Punj LR 176. The charge was unde Section 302, but the conviction being under Section 385, was held to be bad. AIR 196 HP 11.

* * * *

Sec. 386. Extortion by putting a person in fear of death or grievou hurt.—Whoever commits extortion by putting any person in fear of death o of grievous hurt to that person or to any other, shall be punished wit imprisonment of either description for a term which may extend to te years, and shall also be liable to fine.

Synopsis

1. Scope 2476
2. Procedure 2477
3. Charge 2477

1. Scope.—"Some of those things which come within the definition of 'extortio are distinguished by a description from the remainder, and a more severe punishmen is provided for them. These are extortions by putting in fear of death or of grievous hur Such extortion is not robbery, unless the offender is at the time of committing it in th presence of the person put in fear and the fear is of instant death, etc."—*Morgan an Macpherson*, 348. *See* AIR 1957 SC 381 : 1957 Cr LJ 559 (where the accused commi the offence in pursuance of a common intention, the accused would be equally guilt the two substantive offences).

Asking an employee to either resign a face termination does not amount extortion and criminal intimedation. *Dr. Kapil Garg v. State*, 2004(1) Crimes 101 (Delhi)

A finding of acquittal cannot be altered by an appellate court for convicting him for an offence under another provision for which he was charged. 1986 Cr LJ 662 (Bom).

2. Procedure.—Cognizable—Warrant—Not bailable—Not compound-able—Triable by a Magistrate of the first class.

3. Charge.—"I, *(name and office of the Magistrate, etc.)*, hereby charge you *(name of the accused) as* follows :—

That on or about the....................day of................at..................you committed extortion by putting *A*, *B* in fear of death or grievous hurt to wit..........and thereby dishonestly induced the said *A*, *B* to deliver you a certain property, to wit.........and that you thereby committed an offence punishable under Section 386 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 387. Putting person in fear of death or of grievous hurt, in order to commit extortion.—Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Synopsis

1. Scope 2477
2. Procedure 2477
3. Charge 2477
4. Sentence 2478

1. Scope.—"The attempt to commit the aggravated extortion made punishable by the proceeding section, is here punished".—*Morgan and Macpherson*, 348. The feigning of an attempt to commit suicide in order to extort money is an offence under this section. 1 Ind Jour NS 423. *Vide* 6 LBR 160 : 16 Ind Cas 167 ; 17 Ind Cas 800.

In the case of extortion by threat it was observed that in the absence of any apparent overt act leading towards the act of extortion and thus putting any person in fear of death or grevious hurt could not be said to be an offence committed for extortion by threat. Judgment of conviction and sentence of courts below set aside. 1987 Cr LJ 137 (Pat).

2. Procedure.—Cognizable—Warrant—Not bailable—Not compound-able—Triable by Magistrate of the first class.

3. Charge.—I *(name and office of Magistrate, etc.)*, hereby charge you *(name of the accused)*, *as* follows :—

That on or about the.......day of....at........you put *AB* (or attempted to put *AB*) in fear of death or grievous hurt, to wit.......in order to the committing of extortion, and that you thereby committed an offence punishable under Section 387 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

4. Sentence.—No reduction where the accused took part in abducting and torturing a victim with a view to extortion ransom. AIR 1979 SC 1493 : 1979 Cr LJ (NOC) 169.

Death sentence—Rarest of rare. The accused persons were not criminals. They were friends. The deceased was said to have been selected because his father was rich. The motive, if any, was to collect some money. They were not professional killers. They have no criminal history. All were unemployed and were searching for jobs.

Further if age of the accused was a relevant factor for the High Court for not imposing death penalty on accused Nos. 2 and 3, the same standard should have been applied to the case of the appellant also who was only two years older and still a young man in age. Accused Nos. 2 and 3 were as much a part of the crime as the appellant. Though it is true, that it was he who allegedly proposed the idea of kidnapping, but at the same time it must not be forgotten that the said plan was only executed when all the persons involved gave their consent thereto.

It must be noted that the discretion given to the Court in such cases assumes onerous importance and its exercise becomes extremely difficult because of the irrevocable character of death penalty. One of the principles which we think is clear is that the case is such where two views ordinarily could be taken, imposition of death sentence would not be appropriate, but where there is no other option and it is shown that reformation is not possible, death sentence may be imposed.

Sec. 354(3) of the Code of Criminal Procedure requires that when the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons thereof.

We do not think that the reasons assigned by the Courts below disclose any special reason to uphold the death penalty. The discretion granted to the Courts must be exercised very cautiously especially because of the irrevocable character to death penalty. Requirements of law to assign special reasons should not be construed to be an empty formality.

We have previously noted that the judicial principles for imposition of death penalty are far from being uniform. Without going into the merits and demerits of such discretion and subjectivity, we must nevertheless reiterate the basic principle, stated repeatedly by this Court, that life imprisonment is the rule and death penalty an exception. Each case must, therefore, be analyzed and the appropriateness of punishment determined on a case-by-case basis with death sentence not to be awarded save in the *'rarest of rare'* case where reform is not possible. Keeping in mind at least this principle we do not think that any of the factors in the present case discussed above warrants the award of the death penalty. There are no special reasons to record the death penalty and the mitigating factors in the present case, discussed previously, are, in our opinion, sufficient to place it out of the *"rarest of rare"* category.

For the reasons aforementioned, we are of the opinion that this is not a case where death penalty should be imposed. The appellant, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous imprisonment for life. *Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra*, 2009 (6) SCC 498 : 2009 (7) JT 248 : 2009 (9) SCR 90 : 2009 (7) Scale 341 : 2009 (4) Supreme 235 : 2009 (5) SLT 166.

* * * * *

Sec. 388. Extortion by threat of accusation of an offence punishable with death or transportation, *etc.*—Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed or attempted to commit any offence punishable with death, transportation for life, or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ; and if the offence be one punishable under Section 377 of this Code, may be punished with imprisonment of life.

Synopsis

1. Amendment....................2479
2. Scope....................2479
3. Offence....................2479
4. Procedure....................2479
5. Charge....................2479

1. Amendment.—The words in italics have been substituted for the words transportation for life" by Act 26 of 1955, Section 117 and Sch. with effect from 1.1.1956.

2. Scope.—"Here as in Section 386, a heavier punishment is provided for extortion, when it is committed with certain circumstances of aggravation. The expression "in fear of an accusation" probably applies to threats of charging a person falsely before a judicial tribunal or some public authority with the commission of an offence".—*Morgan and Macpherson*, 349.

3. Offence.—The word "offence" denotes a thing punishable under the Code, or under any special or local law as defined in Sections 41 and 42 of the Code, (*see* Section 40, supra).

4. Procedure.—Cognizable—Warrant—Bailable—Not compound-able—Triable by a Magistrate of the first class.

5. Charge.—"I *(name and office of the Magistrate, etc.)*, hereby charge you (*name of the accused)* as follows :—

That on or about the......day of....at........committed extortion by putting *AB* in fear of an accusation against him or against........ of having committed (or attempted to commit) the offence of......which is an offence punishable with death (or with transportation for life, or with imprisonment for ten years) or under Section 377, and thereby dishonestly induced the said *AB* to deliver you......(*specify the property delivered)* and that you thereby committed an offence punishable under Section 388, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 389. Putting person in fear of accusation of offence, in orde to commit extortion.—Whoever, in order to the committing of extortio puts or attempts to put any person in fear of an accusation, against tha person or any other, of having committed, or attempted to commit, a offence punishable with death or with *imprisonment for life*, or wit imprisonment for a term which may extend to ten years, shall be punishe with imprisonment of either description for a term which may extend to te years, and shall also be liable to fine ; and if the offence be punishabl under Section 377 of this Code, may be punished with *imprisonment for life*

Synopsis

1. Amendment 2480
2. Procedure 2480
3. Charge 2480
4. Conviction 2480

1. Amendment.—The words in italics have been substituted for the word "imprisonment for life" by Act 26, of 1955, Section 117 and Sch. with effect fro 1.1.1956.

2. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Magistrate of the first class.

3. Charge.—Form will hear in Section 385, with required charges.

4. Conviction.—Where there was prosecution for offence under Section 38 Conviction which was given can be sustained on the basis of extra-judicial confession– If such confession is duly corroborated. *Debendranath Bhai* v. *State of Orissa*, (1995) Crimes 26 (Ori).

* * * *

OF ROBBERY AND DACOITY

Sec. 390. Robbery ; When theft is robbery ; When extortion i robbery.—In all robbery there is either theft or extortion.

Theft is "robbery" if, in order to the committing of the theft, or i carrying away or attempting to carry away property obtained by theft, th offender, for that end, voluntarily causes or attempts to cause to any perso death or hurt or wrongful restraint or fear of instant death or instant hurt or of instant wrongful restraint.

Extortion is "robbery" if the offender, at the time of committing th extortion, is in the presence of the person put in fear, and commits th extortion by putting that person in fear of instant death, or instant hurt, o of instant wrongful restraint to that person, or in some other person, and by so putting in fear, induces the person so put in fear then and there t deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near o put the person in fear of instant death, or instant hurt or of instant wrongful restraint.

Illustrations

(*a*) *A* holds *Z* down, and fraudulently takes *Z*s money and jewels from *Z*s clothes, without *Zs* consent. Here *A* has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to *Z*. *A* has, therefore, committed robbery.

(*b*) *A* meets *Z* on the high road, shows a pistol, and demands *Z's* purse. *Z*, in consequence, surrenders his purse. Here *A* has extorted the purse from *Z* by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. *A* has, therefore, committed robbery.

(*c*) *A* meets *Z* and *Z's* child on the high road. *A* takes the child, and threatens to fling it down a precipice, unless *Z* delivers his purse. *Z*, in consequence, delivers his purse. Here *A* has extorted the purse from *Z*, by causing *Z* to be in fear of instant hurt to the child who is present there. A has, therefore, committed robbery on *Z*.

(*d*) *A* obtains property from *Z* by saying—"Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees". This is extortion, and punishable as such ; but it is not robbery, unless *Z* is put in fear of the instant death of his child.

Synopsis

1. Robbery 2481
2. When theft is robbery 2482
3. When extortion is robbery 2483
4. Acquittal 2483
5. Confession made to Police Officer 2483

1. Robbery.—The offence of robbery is distinct from theft or extortion, but in every robbery either the offence of theft or the offence of extortion will be committed. It must not be supposed that what is robbery cannot be, or ceases to be extortion or theft. The line of separation is drawn not between the offence of robbery and the offence of extortion, but between extortion which is robbery and extortion which is not robbery. There is, in like manner, a line of separation, not between theft and robbery but between the theft which is robbery and the theft which is not robbery".—*Morgan and Macpherson*, 350. The Indian Law Commissioners observe that "in practice, it will perpetually be a matter of doubt whether a particular act of robbery was a theft or an extortion. A large proportion of robberies will be half theft and half extortion. *A* seizes *Z*, threatens to murder him, unless he delivers all his property and begins to pull of *Z*s ornaments. *Z* in terror begs that *A* will take all he has, and spare his life, assists in taking off his ornaments and delivers them to *A*. Here such ornaments as *A* took without *Z's* consent are taken by theft. Those which *Z* delivered up from fear of death are acquired by extortion. It is by no means inprobable that *Z's* right arm bracelet may have been obtained by theft, and left arm bracelet by extortion : and the Rupees in *Z's* girdle may have been obtained by theft, and those in his turban by extortion. Probably in nine-tenths of the robberies which are committed something like this, actually takes place, and it is probable that a few minutes later neither the robber nor the person robbed would be able to collect in what proportions theft and extortion were mixed in the crime, nor is it at all necessary for the ends of justice that this should be ascertained. For though, in general, the consent of a sufferer is a circumstance which very materially modifies the character of the offence, and which ought therefore to be made known to the Courts, yet the consent which a person gives to the taking of the property by a ruffian who holds a pistol to his breast is a circumstance altogether immaterial".

The crucial test is contained in the section, is in the words "for that and which distinguishes a case of theft accompanied with assault covered by the provisions of Sections 379 and 323, of IPC, from that of a case of robbery. AIR 1960 Pat 453. Where it is not theft or extortion there cannot be robbery. 1978 WLN (UC) 275 ; 1964 All WR (HC) 549 : 1969 Cr LJ 231 ; *see* also 1979 Cr LJ 1158 ; ILR(1972) 1 Ker 489 ; (1974) 1 Cr LJ 107 ; see also 1973 Cr LJ 647 (where the assault was not made for the purpose of achieving the object of theft or carrying away the stolen property).

It is not necessary that the extortion should follow immediately upon the restraint in order to constitute robbery, provided that there is fear or restraint at the time. 99 Ind Cas 596 : 25 LW 86 Cr LJ 164 : AIR 1927 Mad 307. The essence of a charge of dacoity or robbery is the *animus fernandi* 1929 MWN 185. "Restraint" implies abridgment of the liberty of a person against his will. Where he is deprived of his will-power by sleep or otherwise he cannot, while in that condition be subject to any restraint. 29 PLR 90 : 109 Ind Cas 682 : 29 Cr LJ 602-AIR 1928 Lah 445.

The hurt if caused for preventing the pursuit is within the purview of the section. AIR 1979 SC 1430 : 1976 Cr LJ 1168 : 1976 Cr LR 176 ; *See* also AIR 1980 SC 2127 : 1980 Cr LJ 1477 ; AIR 1980 SC 788 : 1980 Cr LJ 313. In 1981 Cr LJ 218 : 1981 Cr App R (SC) 215, the facts and circumstances pointed to grave improbation, and acquittal was upheld.

2. When theft is robbery.—"Theft aggravated by actual or attempted violence as by causing fear of violence, is robbery. Whether this aggravation proceeds the commission of the theft or accompanies it, or follows it, if the end in view be theft, the offender has committed the kind of theft which is robbery. But the definition requires violence (actual or attempted) or a causing of fear of present instant death or violence".—*Morgan and Macpherson.* 351. 1 Weir 442. And the violence or fear whether it is offered or caused to him whose property is stolen or to another must immediately be connected with the theft. "If *A* is carrying away stolen property from the place of theft and meets upon the road and hurts a police officer or private person who suspects and desires to detain him, this does not make his offence of theft a robbery but he commits a distinct offence".—*Morgan and Macpherson*, 351. Dishonest intention is the main ingredient in a robbery. 5 MHC App 39 ; *see* also AIR 1933 All 620 : 1933 Cr C 992 : 1933 ALJ 917. Grievous hurt when inflicted during theft makes it robbery. 6 WR Cr 86. Theft becomes robbery, when in the course of committing it, there is an intention and an attempt to cause hurt. 5 WR Cr 45. In order that theft may amount to robbery hurt must be caused for committing theft and must be quite separate and distinct from act of theft. AIR 1933 Lah 407. Thief attacking pursuers after having stolen property is not guilty of robbery. 19 Cr LJ 27 : 42 Ind Cas 987. In case of murder during retreat after dacoity, all the members of a gang are liable for punishment. 12 Cr LJ 687 : 2 Lah 275 : 63 Ind Cas 623. Theft is robbery under various conditions which do not involve the causing of hurt. The theft may be robbery, because in committing the theft the offender attempts to cause hurt, or causes wrongful restraint, or fear of death, hurt or wrongful restraint. 1 LBR 232. To constitute the offence of robbery it is necessary that death, or hurt or wrongful restraint or fear of such instant evils should be caused by the offenders not only in order to committing of the theft or in carrying away property obtained by the theft, but also for that end. "For that end" does not mean "in those circumstances". 38 Ind Cas 730 ; *see* also 12 PR 1896 Cr ; 1 Weir 446, see also (1961) 2 Guj LR 678 : 1962 (2) Cr LJ 415, where the three ingredients were catalogued. Firstly the offender must have voluntarily caused or attempted to cause to any person death or wrongful restraint or fear of instant death or instant hurt or of instant wrongful restraint. Secondly, that it must be in order to the committing of theft or in committing theft or in carrying away or attempting to carry away property obtained by theft and thirdly that the offender must voluntarily cause or attempt to cause any person etc. for that end ; *see* also AIR 1959 Orissa 171 : 24 Cut LT 70 : ILR 1958 Cut 169 : 1959 Cr LJ 1203 ; 1958 BLJR 238 ; 1956 BLJ 478 ; 1956 Pat LR 108 ; AIR 1955 All 128 : 1954 All WR (HC) 510 : 1954 All LJ 670 : 1955 Cr LJ 336 ; 1955 All LJ 455 : ILR (1956) 2 All 714 : 1955 All WR (HC) 414 ; 1953 BLR 465. To words "for that end" used in this section clearly mean that the hurt caused by the offender must be with the express object of facilitating the committing of the theft or must be caused while the offender is committing the theft or is carrying away or is attempting to carry away the property obtained by the theft. It does not mean that the assault or the hurt must be caused in the same transaction or in the same circumstances. AIR 1941 Oudh 476 : 42 Cr LJ 530. *See* also (1962) 2 Cr LJ 415 (which in amounts to robbery) ; 1969 Bihar LJR 539 (assault must be to facilitate the commissioner of theft).

3. When extortion is robbery.—Extortion aggravated by causing fear of instant death *etc*, is robbery. The definition requires, and the expression "instant death", *etc*, implies the presence of the person who is put in fear. 'The explanation and the Illustrations (c) and (d) mark the distinction thus made between the extortion which is robbery and the extortion which is not robbery".—*Morgan and Macpherson*, 352. It is necessary to convict accused of robbery, that hurt or wrongful restraint should have been caused for effecting theft. 1930 MWN 1142.

4. Acquittal.—The majority of witnesses gave self-contradictory statements and did not support prosecution-version. Hence, not reliable. Time and place of occurrence not fixed and found doubtful. The medical evidence did not support the same. Hence, offence was not proved beyond doubt. Conviction is set aside. *Bhagwati Prasad* v. *State*, 1994 Cr LJ 2310 (All).

5. Confession made to Police Officer.—The confession made to a Police Officer relating to the commission of crime is not admissible in evidence under Ss. 25, 26 and 27 of the Evidence Act, but at the same time, the ban against admissibility would stand lifted if the statement distinctly related to a discovery of fact. A fact can be discovered by the Police (Investigating Officer) pursuant to an information elicited from the accused if such disclosure was followed by one or more of a variety of causes. Recovery of an object is only one such cause. Further the pointing out of places to the Police Officer where the offence was committed is relevant and would be admissible as conduct under Sec. 8 of the Evidence Act.

In the instant case of car robbery not only the recovery of currency were effected on basis of confession of accused persons but all of them had also led the police party to the place of occurrence in the area of same Police Station and on their pointing out, Fard Nishandehi (marking of the place) was prepared. In that behalf, site plan of the place of recovery has been proved. Further, they are also proved to have led the police party at the place where they had abandoned Maruti Car after commission of the crime and then, they pointed out the said place where upon Fard Nishandehi was prepared by the Investigating Officer and the said car had also been taken into possession by the Police after preparing the site plan of the place where the said car was abandoned. All the aforesaid recoveries are proved to have been effected in pursuance of the respective disclosure statements made by the accused persons. Thus, the part of the aforesaid statement relating to their conduct and recoveries got effected by them i.e. the accused persons are admissible in evidence under Ss. 8 and 27 of the Evidence Act. Further, it appears that in this case, the prosecution witness who was the driver of the said Maruti Car at the time of commission of the crime intentionally failed to identify the accused in the trial Court because of fear. However, he has proved all other contents of his statement made by him before the police on the date of occurrence itself. In that, he categorically stated while appearing that on the date of occurrence, 3-4 persons had stopped their vehicle in front of his Armada Jeep. He further stated that one of the complainants since deceased, had withdrawn money from the Bank. Moreover, the accused immediately after their arrest in this case were also produced in muffled faces before Sub Divisional Judicial Magistrate, for seeking their consent for test identification parade, but they had refused to do so vide their joint statement and as such, an adverse inference has to be drawn against them. Besides that the medical evidence consisted the statement of Medical Officer who proved the post mortem report also strengthens the genesis of the occurrence of this case. In the aforesaid circumstances, conviction of accused for robbery and murder was proper. *Anupam and etc. v. State of Haryana*, 2006 CriLJ 852 (P&H).

* * * * *

Sec. 391. Dacoity.—When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery and persons present and aiding such commission or attempt, amount to five or more, every person to committing, attempting or aiding, is said to commit "dacoity".

Synopsis

1. Scope of 2484
2. Conjointly 2486

1. Scope of.—"This word 'dacoity' (gang robbery) is used in the Bengal and Madras Regulation, and is retained in the Code for the purpose of denoting not only actual gang robbery, but the attempting to rob when such an attempting is made or aided by a gang".—*Morgan and Macpherson*. 352. In a case of dacoity, the Judge should direct the jury to convict only if they find that all the prisoners had the intention of causing wrongful loss to the prosecutor or wrongful gain to themselves. WR 1864 Cr. The offence of robbery cannot be convicted into dacoity, where there is simple allegation but not adequate proof on the part of the prosecution that five or more persons have taken part in committing or attempting to commit the crime. 26 PWR 1915 Cr : 15 Cr LJ 634 : 30 Ind Cas 458. Where there were six robbers of whom three were acquitted, and the rest were convicted of dacoity under Section 391, IPC, and where the Sessions Judge nowhere, in his charge to the jury directed their attention to the evidence as to the number of the robbers so as to show that there were five or move offender and that the offence amounted to dacoity. *Held*, that the conviction under Section 391, was not sustainable and the same case altered into one for robbery under Section 392. 7 MLT 340 : 5 Ind Cas 797 : 11 Cr LJ 249 : 1910 MWN 52.

The definition of dacoity in this section is so wide as to extend to what would have been treated as cases of plunder under the old law. 3 WR Cr 60. In view of the definition of dacoity, it cannot be said that because the dacoits were unsuccessful in removing any article no dacoity was committed. 1951 AWR (HC) 589 : 52 Cr LJ 1514 : AIR 1951 All 835 : 1951 ALJ 567. However, erroneous a claim of right may be, if in fact the conduct of the accused was solely induced by a *bona fide* belief in such claim, a charge of robbery cannot be maintained. 1 Weir 443 : 3 MHC 264. Three known persons were charged with dacoity along with two other unknown men. The jury acquitted one of the three and convicted the other two of the offence of dacoity. *Held*, that it was quite open to the jury, while holding that one of the accused who was supposed to have been known to the witnesses had not been properly identified, to find that the total number of dacoits was five. 1927 MWN 853 : 53 MLJ 732. Where three out of six men were acquitted, a conviction under this section is not maintainable. 39 All 848 : 28 Cr LJ 547 ; 11 Cr LJ 249. In a dacoity, theft must have been perpetrated by actual violence or threatened violence. 10 Bom LR 632 ; *see* also 38 Ind Cas 730 ; 18 Cr LJ 346 ; 6 CWN 72 ; 5 CWN 762. Where a conviction of dacoity is based on the application of Section 34, or Section 149, IPC and there was no charge that the assembly as a whole had for its common object the committing of dacoity, the conviction is bad. 1924 MWN 238 : 77 Ind Cas 444 : 25 Cr LJ 396 : 46 MLJ 311. Accused need not know or have personal grievance against their victims, before committing offence. AIR 1929 Mad 135. Evidence of identification must be looked with caution. AIR 1932 Oudh 317 : 33 Cr LJ 920 : 7 Luck 511.

The assault was held to be not for facilitating the commission of theft. 1970 Cr LJ 647. The section contemplates actual participation by every one of the five or more persons in the commission of robbery, whether as aider or as major actors. AIR 1973 SC 760 : 1973 Cr LJ 599 ; *see* also 1982 Cr LJ 665 : 1982 MPLJ 7 ; AIR 1979 SC 850 ; 1979 All J 633 (disputes of civil nature beyond the purview of the section).

From the perusal of FIR it appears that the opposite parties, namely, Asgar Mian, Jagdish Yadav, Bhuju Yadav and Harihar Yadav, were not named in the FIR subsequently, they were named by one co-accused Bauja Yadav. Bhuju Yadav was put on Test identification parade and he was identified by the informant in T.I. parade conducted by P.W. 8 on 25.4.82. However, P.W.8 did not mention in TIP chart that opposite party No. 4 was having small pox mark on his face. It appears from the record that other opposite parties except Bhoju Yadav were not put on T.I. Parade. As such only one opposite party, Bhoju Yadav was identified by the informant and that too who was known to him from before and, if actually had be participated crime, his name should have been given initially by the information in his FIR. *Tapeshwar Yadav and Others v. State of Bihar and Other*, 2002 Cri LJ 698 (Pat.) : 2001(2) East Cri C 22.

The accused absconded and was not traceable as he belonged to inter state gang and had no permanent residence. Apart from this no evidence against accused was sufficient for conviction even if traced. Moreover it is not permissible to try the accused in absentia. In the circumstances acquittal of accused is proper. *State of Karnataka* v. *Vaddi Yerra*, 2004 Cr LJ 329 (Kant) : 2004 AIR Kant HCR 23 : 2004(1) All Cri LR 892 : 2003(12) All Ind Cas 942 : ILR (KANT) : 2003(12) All Ind Cas 942 : ILR (KANT) 2003 (4) KAR 3958.

Where none of witnesses identified appellants accused in Test Identification Parade and ingredients of "dacoity" not satisfied then conviction of accused not sustainable. *Musku Pentu* v. *State of AP*, 2005 Cr LJ 1355 (AP) : 2005(1) Andh LT (Cri) AP 504 : 2005(2) Rec Cri R 770.

The material showed that accused was in dire need of money for his business which prompted him to rob deceased who was last seen in company of the accused. The articles seized from the accused were proved to be belonging to the deceased and weapons of offence were recovered from bamboo bush near the house of accused on the basis of disclosure statement made by him. It was held that conviction of accused under Section 302/392 was proper. Considering it rarest of rare cases death sentence was also confirmed. *State* v. *Dayanidhi Bisoi*, 2003 Cr LJ 123 (Orissa) : 2002(94) Cut LT 642 : 2002(23) OCR 564 : 2002(2) Orissa LR 495.

2. Conjointly.—The word "conjointly" in Section 391, is the most important word bearing on the liability of the persons accused of an offence of dacoity. While it may be true to say that the intention is no part of the offence of dacoity, the word "conjointly" used in the section manifestly refers to united or concerted action of the persons participating in the transaction. If individual acts of persons cannot be reasonably be referred to a united or concerted action of such person, there cannot be any question of any conviction for an offence of dacoity of the group of persons concerned. It is only where their individual actions can 'be properly referred to their concerted action that the question of a conviction under Section 395, IPC, can arise. 52 Cr LJ 1380 : AIR 1951 Assam 143.

Where five persons were charged under Section 395, and it was not the prosecution case that there were any more persons who took part in the dacoity and one of the accused was acquitted, the remaining four cannot be convicted under Sec. 395. AIR 1958 AP 510 : 1958 CrLJ 1001. All persons must have common intention. AIR 1956 VP 18 : 1956 CrLJ 1021. Only for acts committed by the members of the unlawful assembly in pursuance of the common object could all of them be found guilty. But if the act is dissociated from the common object, it cannot be brought home to the other members. (1954) 2 MLJ (Andh) 248; 1978 KerLJ 714 : 1977 CrLJ (NOC) 227.

The element of jointness is essential to the offence of the dacoity. AIR 1965 Cal 598; *see* also 1977 XLIV Cut LT 311 (for meaning of the word conjointly"). *See* also AIR 1956 VP 18 : 1974 Ker LJ 328.

* * * * *

Sec. 392. Punishment for robbery.—Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine ; and, if the robbery be committed on the highway between sunset and sunrise prisonment may be extended to fourteen years.

Synopsis

1. Scope 2487
2. Evidence and proof....................2488
3. Robbery and murder 2493
4. Procedure....................2495
5. Charge 2495
6. Sentence 2495
7. Acquittal 2496
8. Conviction....................2496
9. Indentification of accused 2496
10. Motive. 2497

1. Scope.—Whether Sections 392 and 397, does not create different offences. Section 392, deals with the punishment of robbery and Section 397, is applied where robber either uses deadly weapons or causes or attempts to cause grievous hurt. *Jagan Ramsingh Nepali* v. *State of Maharashtra*, (1994) 2 Bom CR 156 (DB).

The evidence of witnesses clearly establish use of choppers by appellants during commission of robbery and escaped in a taxi of PW-6. The accused were identified by witnesses in test identification parade. The offences were proved beyond all reasonable doubts. Hence, conviction and sentence of court below upheld. *Dildar Peer Mohammad Khan and another* v. *State of Maharashtra and others*, 1994 B Cr C 403 (Bom).

Where there was exercise of jurisdiction under Section 401, Cr PC and—No glaring defect was found in procedure neither manifest error on point of law in judgment of court below.—There was no misappreciation of evidence. Hence, it was held that in absence of miscarriage of justice, revision dismissed. *Mohon Lal* v. *State (Delhi Admn)*, (1995) 3 CC Cases 29 (Del).

When there is unimpeachable evidence that knives were used by accused, then merely because knife used was not recovered offence could not be treated as one only under Section 392, IPC. *Pravin Kumar Kailash Chandra Shukla* v. *State of Maharashtra*, 1997 Cri LJ 577 (Bom).

This section contemplates that the accused should have, from the very start, the intention to deprive the complainant of the property and should for that purpose either hurt him or place him under wrongful restraint. Where the inception of the struggle was only a quarrel and it was at the end that the accused found a chance of taking the *chaplie* and the sheet of the complainant in order to ensure the payment of money due to him. *Held*, that the offence was under Section 379, and not under Section 392. 155 Ind Cas 952 : 36 Cr LJ 894 : 1935 Cr C 350 : AIR 1935 Pesh 49. Under this section a sentence of imprisonment is quite essential and hence a mere sentence of fine is illegal.

44 All 538 : 20 ALJ 388. In cases of robbery the Legislature has provided three different of punishment which may be inflicted under this section. The punishment may be extended to fourteen years' imprisonment under Section 394, to transportation for life and under Section 397, the imprisonment cannot be for less than seven years. This section is a general section and the two other sections specify the same offence under aggravated circumstances. 1 Weir 448. Where the accused committed house-breaking in the house of the complainant and abstracted from it a *chamber* and when the complainant attempted to catch him and recover his property, the accused in order to carry away this property caused him hurt. *Held*, that the accused committed offence under Sections 457. 392nd 394. 21 LW 37 : 86 Ind Cas 715 : 26 Cr LJ 859 : AIR 1925 Mad 466. A person who is setting up *bona fide* assertion of claim of right in defence to a charge of robbery will have to prove that he had no dishonest intention in acting as he did. 83 Ind Cas 899. A person who commits robbery being armed with a sword for which he had no licence, can be convicted of robbery and of carrying arms without a licence and sentenced separately. AWN 1896, 181. It is not open to a Court to base a conviction under Section 392, on insufficient evidence coupled with the mere fact that accused in his statement admitted to have taken the property from the complainant for some other purpose, which was not believed by the Court. 30 Cr LJ 1135 : AIR 1929 Sind 255. Where the accused an ex-convict has been charged with an offence under Section 392, read with Section 75, the sentence of seven years' rigorous imprisonment inflicted upon him is by no means too severe. 35 Cr LJ 566 : 11 OWN 202 : AIR 1934 Oudh 122. A person convicted under this section cannot again be convicted under Section 411. 4 DLR (Simla) 267 : 3 AI Cr D 627 ; 2 WR Cr 12 ; 2 WR Cr 63 ; 18 PR 1884 ; 2 NWPHCR 312. The offence of dacoity is made up of certain ingredients some of which, taken together constitute offence of theft ; while others taken together constitute an offence of robbery. If robbery is committed by five or more persons acting conjointly in would constitute an offence of dacoity. AIR 1950 All 471 ; *see* also AIR 1950 Nag 214 ; 1950 Mad 639 ; AIR 1950 Mad 76 (FB). Where murder and robbery are committed in the course of the same transaction by the same person the offence would fall under Section 392, and not under Section 404. 1962 Jab LJ 876 : 1962 MPLJ 1064. Where the accused persons in the begining only intended to cause hurt to the complainant but when they left they took away his *merkis* and *bhakla* by snatching the same from the person of the complainant, they in committing theft voluntarily caused hurt to the complainant. AIR 1955 Raj 147 : ILR (1955) 5 Raj 510 : 1955 Cr LJ 1285 (held on a consideration that it was a pre-planned robbery, three years' rigorous imprisonment would be sufficient). When the attachment was void *ab initio* the accused persons in taking their father's property committed no offence of theft. 1964 Raj LW 617. *See* 1978 Cr LJ 797 and 1977 ALJ 960 (for sentence). In 1981 UP Cr LJ 116, if the complainant has failed in the first attempt to secure a conviction, it was not open to him to have a second round in the Sessions Court on the ground that the Magistrate had no jurisdiction.

2. Evidence and proof.—*See* AIR 1956 SC 400 : 1956 Cr LJ 790 (unexplained possession of property after a suspected robbery and murder is only presumptive evidence) ; 1976 Cr LJ 1480 : 1983 Cr LJ (NOC) 23 (evidence strengthens other evidence, hence no question of presumption). AIR 1983 SC 367 : 1983 Cr LJ 689 : AIR 1978 Cr LJ 1107 : AIR 1978 SC 1183 (circumstantial evidence and value of identification evidence).

Where witnesses knew accused, their testimony not dependent for corroboration on test identification parade. *Umesh* v. *State of M.P.*, 1997 (1) Crimes 261 (MP).

The accused were known from before. Therefore even in absence of any light, they could be identified easily and corerectly. Not only this, both the withnesses alleged that there was electric light caused by the tubelight as well as electric bulb, which were burning at the time of occurrence and they remained stand still so long as the robbers remained there. Therefore, in this light, the rebbors could be easily identified. Not only this, the robbers came in very close physical touch with the complainant and his servant. It was alleged that both the witnesses were known from before but they had not taken any steps to conceal their faces. Therefore, normally such persons would not come to rob at the house of known person. This is no longer a corrrect law. In these days robbers have become dare devils and they go on challenging each and everyone who might try to take objection to their activities. They are further encouraged by the fact that nobody is prepared to appear as witness against them due to fear. Under these circumstances, it cannot be said that known persons will not commit robbery or dacoity without trying to conceal their identity these days even during day time known people commit murder and dacoity. The witnesses had correctly identified them and the robbers had not made any effort to conceal their identity. Therefore, this factor does not make any dent in the prosecution case in any way at all, evidence is absolutely correct and justified and accepted by the Court. *Kharag Singh* v. *State of U.P.*, 1999 CriLJ 82 (All).

Sufficient evidence. Rape and murder of a girl aged 2 years. The evidence of PW-5 and PW-6 reveals that appellant had been seen around the complainant's house on the previous day and as he was not a resident of this area, he had been quickly singled out. These witnesses further stated the appellant had been seen in the vicinity again after the rape and murder and he had accordingly been apprehended and handed over to the police and two chains worn by deceased had been taken from his pockets. PW-13 also identified the chains in Court. It is true that in the cross-examination of these two witnesses, several improvements *vis-a-vis* their statements under Sec. 161 of Criminal Procedure Code had been pointed out by the defence Counsel, but the fact that the appellant had been present in the vicinity of the house and had been arrested, soon after the incident has been admitted even by the defence.

Another significant piece of evidence is the statement of PW-7 who testified to the fact that about 2:30 a.m. on the night of the murder he had gone out of the house to urinate and had seen the appellant outside and on being questioned, the appellant had threatened him with dire consequences with the result that he had not informed anybody till the third day after the police had come to the village to verify the facts. He too stated to the fact that two chains had been recovered from the pocket of the appellant. It is true that several improvements have been made by the three primary witnesses but there is absolutely no reason as to why they would involve the appellant in a false case as admittedly he was a stranger to the locality and they bore him no ill will.

We have also gone through the evidence of PW-12 relating to the recovery of the frock pursuant to a disclosure statement made by the appellant under Sec. 27 of the Evidence Act. Nothing could be spelt out from the cross-examination of this witness except that the recovery had not been made from a closed place, though he explained that there was very little movement of human beings in that area as no one was residing close by. This witness also identified the frock that had been recovered. It is equally significant that the strands of fibre recovered from the place of incident had been matched with the material of the frock and were found to be from the same source.

It is true that in a criminal matter the onus of proof lies almost exclusively on the prosecution. As already mentioned above, however, the appellant has not been able to give any explanation in his statement under Sec. 313 of Criminal Procedure Code as to what he had been doing in that locality. On the contrary he admitted his presence by stating that he had been caught by the neighbours on suspicion of the murder and beaten up, and had suffered several injuries in the process. The medical evidence on the contrary reveals that these injuries could also have been sustained while raping and killing the young child.

The evidence that the appellant was a paedophile with extremely violent propensities also stands proved on record in that he had been convicted and sentenced for an offence punishable under Sec. 354 in the year 1998 and later for offences punishable under Secs. 363, 376, 379, 302 and 201 of the IPC for the rape and murder of a young child and had been awarded a sentence of imprisonment for life under Sec. 302, and several other terms of imprisonment with respect to the other Secs., though, an appeal in this connection was pending as on date. It is also extremely relevant that the appellant, had, in addition, been tried for the murders of several other children but had been acquitted on the 28.07.2005 with the benefit of doubt. The present incident happened three days later. We accordingly dismiss the appeals but modify the sentence of death to one for the rest of his life in terms of the judgment in *Shraddananda's* case. *Sebastian vs. State of Kerala*, 2010 (1) SCC 58 : 2009 (4) Crimes 121 (SC) : 2009 (13) JT 136 : 2009 (13) Scale 210 : 2009 (7) Supreme 8 : 2009 (8) SLT 96.

Where one of the three accused persons was already known to the witnesses on account of having white washed their house, absence of prior test identification parade would not affect the credibility and truthfulness of the witnesses and moreso the accused persons entered the house and remained for quite some holding victims at ransom. *Ashfaq* v. *State (Govt. of NCT of Delhi)*, (2004) 1 Crimes 117 (SC) : (2004) 3 SCC 116 : 2004 SCC (Cri) 687 : AIR 2004 SC 1253 : 2004 Cr LJ 936.

Where the evidence of the complainant and a witness is consistent with the allegation that the accused had threatened the complainant to kill him and put, the *bhujaliat* his neck and took away Rs. 2000/- from him by putting him to instant fear of death, offence of Section 392, IPC has been proved. *Dinbandhu Mahapatra* v. *State*, 2004 Cr LJ 1931 at p. 1932 (Ori) : 2004(27) OCR 228.

Simply because knife used in robbery was not recovered, offence cannot be treated as one only under Section 302, IPC. *Pravin Kumar Shukla* v. *State of Maharashtra*, 1977 Cri LJ 577 (Bom).

In cases where the recovery has been immediately affected, the court can draw an inferance under Section 114 (a) of the Indian Evidence Act and convict the accused for the substantive offence of theft or robbery or dacoity or of dacoity with murder *etc.* as the case may be, but where the recovery was not immediate and it was effected six days after the incident the offence of robbery would not be established and only one under

Section 411, IPC would be made out against him—*Bala Pandurang Kesarkar* v. *State of Maharashtra*. 2000 Cri LJ 693 (Bom). In *Shiv Nath* v. *State of U.P.*, AIR 1970 SC 535 : 1978 Cri LJ 601, where three days after the incident recovery of looted properly was affected. the supreme court reversed the judgment of the Allahabad High Court upholding the conviction and sentence of the accused for the offence under Section 396, IPC and instead convicted him for one under Section 411 IPC.

Gulab Chand v. *State of M.P.* (1955) 3 SCC 574 : AIR 1955 SC 1598 where ornament of the deceased were recovered from the possession of the accused immediately after the occurrence, the court held in para 4 of AIR :

> "It is true that simply on the recovery of stolen articles no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability of the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced. It has been imdicated by this court in *Sanwal Khan* v. *State of Rajasthan*, AIR 1956 SC 54 : 1956 Cri LJ 150 that no hard and fast rule can be lord down as to what inference should be drawn from certain circumstances. It has also been indicated that where only evidence against is recovery of stolen properties. then although the circumstances may indicate that the theft and murder might have been committed at the same time. It is not safe to draw an inference that the person in possession of the stolen property had committed the murder. A note of caution has been given by this court by indicating that suspicious should not take the place of proof."

In *Tulsiram kanu* v. *State*, AIR 1954 SC 1 1954 Cri LJ 225 the apex court has indicated that the presumption permitted to be drawn under Section 114 Illustration. (a) Evidence Act has to be drawn under the "important time factor". If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilt only be permitted. But if several months had expired in the interval, the presumption cannot be permitted to be drawn having regard to the circumstances of the case.

In *Sanjay* v. *State (N.C.T.) of Delhi*, 2001 Cri LJ 1231 (SC) : AIR 2001 (SC) 979 : 2001(2) JT 461 : 2001(1) Scale 695 also the dis closure statements who made by the accused persons on the next day of the commission of the offence and the property of the deceased was recovered at their instance from the places where they had kept such properties on the same day. To the same effect are the judgements an *Mukund alias Kundu Mishra* v. *State of MP.*, (1997) 10 SCC 130 : AIR 1997 SC 2622 : 1997 Cri LJ 3182 and *Ronny alias Ronald James Alwaris* v. *State of Maharashtra* (1998) 3 SCC 625 : 1998 Cri LJ 1638 : AIR 1998 1251. In the latter case the court held :

> "Aprop the recovery of articles belonging to the Ohol framily from the possesion of the appellants soon after the robbery and the murder of the doceased which possession has remained the explained by the appellants the presumption under illustration (a) of section 114 of the Evidence Act will be attracted. It needs no discussion to conclude that the murder and the robbery of the articles were found to be part of the same transaction. The irresistible conclusion would, therefore be that the appellants and no one elre had committed the three murders and the robbery."

Where there was material to conclude that robbery had taken place but there was no proper and reliable identification of the accused since identification parade was held a month after the incident and the PS 1 was present in the immediate vicinity of the place where the identification parade was being made and the dummies were not identical to the accused person and the accused were not asked to change, the clothes, the order, the trial in acquitting the accused cannot be said to be perverse. *State* v. *Arun Umaji Bansode*, 2004 Cr LJ 3706 (Bom) : 2004 All MR (Cri) 2683 : 2003 (2) Bom CR (Cri) 722.

Eye witness—Circumstantial evidence. Accused murdered deceased and committed robbery her gold ornaments. Eye witness who saw violent death of deceased, kept quite about incident. Delay in recording his statement. We would take up the first circumstance. The witness Alwarsamy (PW-4), in his evidence, very clearly admitted that he was not on the talking terms with Thilagavalli, who was none else, but his own sister. At the time when he saw the accused, he (Alwarsamy) was accompanying his real elder brother, namely Ramasubbu. The prosecution did not bother to examine Ramasubbu, though his statement was also recorded. It has come in the cross-examination of this witness that he attended the funeral, though he was on cross terms with the family of the deceased and during the whole funeral, the accused was actually present.

What surprises us is that in spite of this, this witness did not say anything either to the husband of Thilagavalli or even to the Police and his statement was not recorded for good long three days. Now, if the witness had seen the accused following Thilagavalli and he also knew about the violent death of Thilagavalli, and had seen the accused at the funeral, one wonders as to why the witness kept quiet without telling it to anybody. As if this is not sufficient, the Investigating Officer was specifically asked the question as to why these witnesses were not examined by him. The Investigating Officer has admitted that he could not give any reason for not examining any of these witnesses on the same day. He also claimed that the Investigating agency had suspected the accused only after the examination of Alwarsamy and Ramasubbu. It is an admitted position that the statement of these witnesses were not recorded. It was obvious, therefore, that the delay in recording the statement of these witnesses and the stony silence maintained by Alwarsamy would make him an extremely unreliable witness. In our opinion, the Trial, as well as, the Appellate Court have not given the due weight to this weighty circumstance. The Appellate Court has almost apologetically observed that the prosecution would have done better by examining Alwarsamy without any waste of time. However, the Appellate Court chose to accept his evidence. Unfortunately, the Appellate Court has not even applied its mind to the circumstance that according to this witness, the accused was present in the funeral. That crucial circumstance seems to have been escaped the notice of the Appellate Court. Ordinarily, we would not discuss the evidence in our appellate jurisdiction, however, when it is found that the crucial circumstances have escaped the notice of the Appellate Court and/or the Trial Court, this Court would consider the evidence lest any injustice is caused. In our opinion, the evidence of Alwarsamy should not have been believed. This takes care of the first circumstance.

When we see the Inquest Panchanama it is apparent that there was one ear stud on the body of the deceased. Therefore, this gives a shattering blow, firstly to the evidence of Subbiah and secondly, to the credibility of the investigating agency. As if this is not sufficient, when the accused was arrested about 12 days after the incident he is said to have confessed that he had sold "one" ear stud in the shop of Shankar. When we see the evidence of Shankar it comes out that the witness said that the accused had come to sell an ear stud, but he had refused to buy, as it was only one piece of ear stud out of the pair that accused had offered to sell. He, therefore, says that he gave one pair of ear stud to the investigating agency, which pair ultimately has come up before the Court as Material Object.

This slip-shod evidence, therefore, is very hopelessly insufficient in establishing the fact that the so-called ornaments belonged to and were on the person of Thilagavalli. We do not know what was the public prosecutor doing at the time of the examination-in-chief and why he did not confront the witness on these ornaments. We do not know as to how the Trial Court permitted these questions in re-examination. The purpose of the re- examination is only to get the clarifications of some doubts created in the cross examination. One cannot supplement the examination-in-chief by way of a re-examination and for the first time, start introducing totally new facts, which have no concern with the cross examination. The Trial Court has obviously faulted in allowing such a re-examination. Be that as it may, even if we accept that the Trial Court was justified in allowing the re-examination, the evidentiary value of the contents of the re-examination, in our firm opinion, is nil.

As regards the fourth circumstance, we think that it was for prosecution to explain the fracture suffered by the deceased. Even otherwise that circumstance is extremely insignificant.

It has also come in evidence that the accused was a known person to his family members. One wonders as to why would the accused whom the deceased knew would venture to rob her. Motive of robbery does not seem to be present in the present case. The absence of motive in a case which depended on circumstantial evidence is more favourable to the defence.

The jacket on the person of the accused was said to have had human blood. In our opinion, this circumstance is insignificant, particularly because the blood group is not tested upon and secondly, it is actually absurd thing that the accused would keep on wearing the same blood stained clothes for 12 days. In short, we are of the clear opinion that both the Courts below have erred in convicting the accused of the offences under Secs. 302 and 392 read with Sec. 397 of IPC. *Pannayar vs State of Tamil Nadu by Inspector of Police.*, 2009 AIR SCW 5608 : 2009 CrLJ 4454 (SC) : AIR 2010 SC 85.

3. Robbery and Murder.—We would take up the first circumstance. The witness Alwarsamy, in his evidence, very clearly admitted that he was not on the talking terms with Thilagavalli, who was none else, but his own sister. At the time when he saw the accused, he (Alwarsamy) was accompanying his real elder brother, namely Ramasubbu. The prosecution did not bother to examine Ramasubbu, though his statement was also recorded. It has come in the cross-examination of this witness that he attended the funeral, though he was on cross terms with the family of the deceased and during the whole funeral, the accused was actually present.

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4. Procedure.—Cognizable—Warrant—Not bailable—Not compoun- dable—Triable by any Magistrate of the first class, but dacoity and all offences connected therewith by Court of Session alone.

5. Charge.—I (*name* and *office of the Magistrate, etc.*) hereby charge you (*name of the* accused) as follows :—

That on or about the...........day of.........at..........you committed robbery of........ (*specify the property*), which was the property of *AB* then in his possession and which you robbed him of in......street (*specify the highway*), at about....between the hours of sunset and sunrise, and thereby committed an offence punishable under Section 392, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

6. Sentence.—Robbery of a gold ring and wrist watch—Occurrence being 10 years old—Accused has already spent 1-1/2 years in jail. Appeal against conviction was filed.—Sentence was reduced to period already spent in jail. *Mukhtiar Singh and Mukha* v. *State of Haryana*, (1995) 4 Crimes 324 (P&H).

Where the accused was arrested on the spot and a bag containing Rs. 21,000/- and two pistols recovered—Conviction of both the accused and sentenced to R.I. for 10 years and a fine of Rs. 3,000/- each, which was challenged in appeal. The appellants underwent agony of trial and their appeal remained pending for a long time, the sentence is reduced to R.I. for 7 years. The sentence of fine is maintained. *Brahmanand* v. *State of Haryana*, (1994) 1 Recent CR 358 (P&H).

Plea of bargaining cannot be adopted to by-pass minimum sentence presented by law. In *Kripal singh* v. *State of Haryana*, 1999 Cri LJ 5031 (SC) "the offence found against the appellant is under Section 392 of the Indian penal code for which the maximum punishment imposable is 14 years and perhaps on the facts of this case the maximum punishment is imprisonment for 10 years. But section 392, IPC has to be read with Section 397 in certain cases as the section bridles the powers of the court regarding the extent of sentence. The court cannot award a sentence less than 7 years of imprisonment when in a particular case section 397 is to be read along with section 392 of the Indian Penal Code."

Section 397, I.P.C does not create a separate offence. It has to be read with the principal offence and with the aid of S. 397. I.P.C. conviction should be not less than 7 years otherwise it has no other meaning. So the sentence passed by the trial court has to be modified as are under Section 392/397, I.P.C. *Kharag Singh* v. *State of U.P.*, 1999 Cri LJ 82 (All).

7. Acquittal.—When incident occurred in dark night—Complainant deposed that he identified accused when accused focussed torch light on face of witness—Complainant identified accused petitioner in court after one year of incident and such identification cannot be relied upon in absence of any special mark of identification or physical feature of accused either in FIR or before Magistrate conducting identification parade—Further no explanation given about holding of TIP late after two and half months of occurrence and after a month of arrest. Conviction was held not be sustainable. *Basant Samal* v. *State*, (1994) 1 Crimes 98 : (1994) 1 East Cr C 360 (Ori).

Where property which was recovered not found to be stolen. There was delayed identification parade—Circumstantial evidence not corroborative—Accused entitled to the benefit of doubt. *Vijay Sharma* v. *State of M.P.*, (1994) 1 CCR 339 (MP).

When there was appeal against conviction and—Delay in FIR was not properly explained—Recovery was after arrest—Co-accused acquitted—Conviction was not justified.—Offence not established beyond doubt. *Virendra Singh* v. *State of U.P.*, 1994 JIC 344 (All).

8. Conviction.—The evidence of these witnesses shows that a gang of four persons using a taxi had robbed the three persons within a span of 30 to 40, minutes. The wrist watches recovered were also identified. Hence, conviction not interfered. *Rajkumar Bhikam Dhobi* v. *State of Maharashtra.* (1994) 2 Crimes 467 (Bom).

In a case of robbery with murder circumstantial evidence showed that accused person caused the death of deceased and robbed him of money possessed by him. He could not satisfactory explain as to how he came to be in possession of articles belonging to deceased. Guilt of accused persons established beyond doubt and his conviction was held proper. *Kanti Lal* v. *State of Rajasthan*, 2004 Cr LJ 2487 (SC) : AIR 2004(SC) 2536 : 2004(2) Crimes 420 : 2004(2) East Cri C 335 : 2004(4) Scale 795 : 2004 SCC SCC (Cri_ 1760 : 2004(3) Supreme 377.

The accused allegedly waylaid the complainant while he was proceeding to his house on his scooter and snatched his wrist watch. The complainant identified the wrist watch when it was produced before the Court. Evidence on recovery from accused remained unshaken despite cross-examination. Confessional statement by accused pursuant to which recovery of watch and knife was made conviction of accused was held proper. *R. Shan Mugam* v. *State*, 2003 Cr LJ 873 (Mad).

9. Identification of accused.—When there is no test identification parade the identification of the accused for the first time at trial and that too after a period of more than 3 years is of no assistance to the prosecution. (1988) 34 DLT 79 (Del).

The accused refused to join the identification parade which is a weak type of evidence. *Held*, in the circumstances of the case, his refusal was justified and no adverse inference can be drawn from it. 1986 Cr LJ 253 (Del) : (1985) 25 Del LT 120.

When the complainant failed to identify the accused in court, mere refusal of accused to participate in test identification parade is not sufficient to convict accused under Section 392, IPC. *Narender Singh* v. *State of Punjab*, 2000 LJ 1890 (P&H).

Failure to hold test identification parade—In FIR, appellant was not named. In view f the fact that other accused are not before us, we are of the opinion that it is difficult o uphold the judgment of conviction and sentence against the appellant herein. The lace where the assault took place was said to be at a distance of 400 to 500 meters rom the factory. Not only the place of occurrence was agricultural fields as stated by itness but the crop had also been standing thereon.

If accused No. 5 was arrested first and accused No. 3 one month thereafter, it does ot stand to any reason as to why witness would be called to identify accused No. 3 first hich according to him took place 20 days after his discharge from the hospital and 15 ays thereafter he was again summoned to identify accused No. 5.

We have noticed hereinbefore the respective dates of arrest of accused No. 5 and ccused No. 3 respectively. It is difficult to conceive that accused No. 5 would still be vailable so that the Investigating Officer could ask the witnesses to come to the Police Station. There is nothing to show that she was in custody of the police for more than 30 days. A presumption must be drawn that by that time, she was in judicial custody. It is also wholly unlikely that names of all the accused person would be disclosed during commission of the offence by one another. It furthermore appears to be somewhat unusual that although witness and accused No. 5 were caught while they were indulging in illicit sex and all of them came from behind and the first attack was on the back of his neck, still conversations would not only took place by and between witness and the accused persons; the former even in that condition would be able to follow the same.

As identification of witness is highly doubtful, in our opinion, having regard to the nature of other evidences brought on record by the State, *i.e.*, purported recovery of a tarpaulin by itself cannot be said to be sufficient to convict the appellant for a charge of such grave offence. *Ramesh vs. State of Karnataka*, 2009 (3) Crimes 349 (SC) : 2009 (12) JT 284 : 2009 (10) Scale 131 : 2009 (6) Supreme 41 : 2009 (6) SLT 485 : 2009 (11) SCR 367.

When identity of accused persons and stolen articles not established, conviction for robbery improper. *Jahagir* v. *State of Haryana*, 1997 Cri LJ 48 (P&H).

Where witnesses know accused, their testimony is not dependent for corroboration on test identification parade. *Umesh* v. *State of M.P.*, 1997(1) Crimes 261 (MP).

In cases resting on identification evidence, the burden is on the prosecution to prove that there was sufficient light wherein the victim and witnesses identified the miscreants. No presumption can be raised about the sufficiency of light. *Bala Pandurang Kesarkar* v. *State of Maharashtra*, 2000 Cri LJ 693 (Bom) : 2000(1) Crimes 38 : 2000 Cr Lr (Mah) 172 : 1999(3) Bom LR 334.

10. Motive.—Accused attacked deceased and injured with chopper and removed ornaments from body of deceased. The ferocious attacks on the victims, the number of injuries inflicted and the manner in which it was inflicted and the gravity of those injuries would clearly reveal the intention or motive of the accused. At any rate his acts cannot escape falling either under Clause 3 or Clause 4 of Section 300 IPC. The Court below is, therefore, perfectly justified in holding him guilty of offence punishable under Section 302 IPC. *Rijo vs. State of Kerala*, 2010 (2) CriLJ 1315 (Ker).

* * * * *

Sec. 393. Attempt to commit robbery.—Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Scope 2498
2. Procedure 2498
3. Charge 2498
4. Cases 2498
5. Additional fine 2499
6. Sentence 2499
7. Attempt to commit robbery 2499

1. Scope.—"A present intention to rob combined with an act in execution of such intention which fall short of the offence intended is an attempt to rob. The attempt should be proved by some act which is a commencement of the execution of the purpose, or which in the judgment of the Court sufficiently manifests the intention of the accused. If the proof should not merely an attempt to rob, but that the offence of robbery has been committed, or if it is uncertain whether the offence is robbery or only an attempt to rob, the accused may nevertheless be convicted under this section".—*Morgan and Macpherson*. 354. In a charge and finding under Section 398, the substantive Section 398, should be mentioned as well as the supplementing Section 398. Charges under Sections 393, 394 and 397 cannot be joined unless they form part of the same transaction. AIR 1933 Lah 512 : 1933 CrC 771 : 34 PLR 498 : 34 CrLJ 402.

2. Procedure.—Cognizable—Warrant—Not bailable—Compoun-dable—Triable by a Magistrate of the first class.

3. Charge.—"I *[name and office of the Magistrate, etc.]*, hereby charge you (name *of the accused)* as follows :—

That on or about the............day of............at.............you did an act, to wit...... (mention *the act,)*, and which was an attempt to rob *AB* and thereby committed an offence punishable under Section 393, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

4. Cases.—Where intention to cause death was established—Offence of murder was made out—Using of deadly weapons shows clear-cut intention of causing death. *Shivaji Dattu Patil* v. *State of Maharashtra*, (1994) 2 Bom CR 310 : 1994 Cr LJ 1189 (Bom).

Only identification in court in dock—At time of incident both accused-appellants were wearing masks and during scuffle masks fell down and thus they were recognised—Appellant No. 1 under Section 313, Cr PC admitted to be employee of mill of complainant. *Held*, conviction of appellant No. 1 is upheld—Appellant No. 2 not known to complainant from before the date of incident—Hence, in absence of test identification parade conviction of appellant No. 2 is set aside. *Preetam* v. *State of M.P.*, Cr LR 234 (MP).

When the victim made hue and cry when she was being looted and the police constables came running who after chasing the accused peitioners caught hold of them and produced them at the police station where on search the golden ornaments of victim snatched by them as well as chilly powder were recovered, it was not necessary to hold test identification parade. The accused were so desperate that when the police constables caught hold of them they tried to run away after they were apprehended by the police constables. The victim fell down and she suffered injuries as proved by prosecution. In this way a robbery was committed by both the accused. *Tara Singh* v. *State of Rajasthan* 2000 Cri LJ 1982 (Raj).

5. Additional fine.—Coupled with the fact that he has already been in jail for three months and 17 days, the ends of justice would be amply satisfied if the sentence of the respondent under Section 392/34, IPC is enhanced from a period of 3 months and 17 days R.I. the period already undergone by him in a manner that an additional fine of Rs. 8.000/- and one year in its default is imposed on the respondent. *State of Maharashtra* v. *Mahipal Singh*, 1996 Cri LJ 2485 (Bom).

6. Sentence.—As far as offence under Section 393, IPC is concerned, the accused was in jail from the date of his arrest till the judgments was produced by the trial Court and the period works out to be about 15 months. During the pendency of this appeal, he was taken into custody which works out to be 3-1/2 months, this appellant is aged about 18 years of age. There are no criminal antecedents against him. There is nothing to show that he was a previous convict. In these circumstances, the sentence of the appellant should be confined to the period of imprisonment already undergone. *Sanjay* v. State *of Maharashtra*, 1996 Cri LJ 2172 (Bom).

7. Attempt to commit robbery.—Before the trial court it was submitted that he was poor and he had to maintain his old parents and he was the only earning member of his family. These are no grounds for imposing lesser sentence. The accused was only 19 years at the time of the offence. He came from another state for committing the crime. In our country lakhs of people are living below the poverty line, but they do not indulge in these acts. True that in this case, the appellant accused had not fired his *Tamancha* nor he was able to loot a paise, but that could not be a ground for imposing lesser sentence. In such type of cases where the trial Court has exercised its discretion and imposed seven years RI, then the court cannot interfere with such order of sentence only on the ground that the appellant accused was poor. *Avinash Shobhasing v. State of Gujrat*, 2002 Cri LJ 3476 : 2002(2) Cur Cri R 278 : 2002(1) GCD Guj 681.

Accused persons at the point of dagger attempted to loot informant. All the witnesses, who were present and chased and caught hold of the accused have identified them that he was caught red handed while he was committing road robbery and seeing the police he attempted to run away along with his co-accused, but he was arrested on the spot and as such his conviction under Sections 393 and 397 of the Indian Penal Code is well founded and requires no interference by this Court. *Rabindra Chaurasia vs. State of Jharkhand*, 2010 (3) CriLJ 3349 (Jhar).

* * * * *

Sec. 394. Voluntarily causing hurt in committing robbery.—If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished witl *imprisonment for life*, or with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine.

Synopsis

1. Amendment 2500
2. Scope 2500
3. Jurisdiction 2501
4. Doubt 2501
5. Procedure 2501
6. Charge 2502
7. Recovery 2502
8. Conviction 2502
9. Causing heart attack during robbery 2504
10. Sentence 2505
11. Evidence and Proof 2506
12. Acquittal 2507
13. Murder and robbery—Appreciation of evidence 2507

1. Amendment.—The words in italics have been substituted for the word "transportation for life" by Act 26, of 1955. Section 117, and Sch. with effect fron 1.1.1956.

2. Scope.—The offence of robbery or of attempting robbery is aggravated by hurt The guilty act of one is imputed to all who are joined with him, provided the act is don in committing the offence of robbery. Violence or hurt entirely unconnected with tha offence or used to gratify a personal spite or passion is not contemplated ; as if one o the robbers should commit murder or rape, while the others are occupied witl plundering of searching for property. To support this charge, there should be proof o the robbery or attempt, and of the hurt ; that the hurt was caused voluntarily, that is not accidentally but intentionally or knowingly, may fairly be presumed in the absenc of any circumstances to show that it was accidental".—*Morgan and Macpherson.*

The test of Section 394, is whether hurt has been caused in committing o attempting to commit robbery. 1953 BLJR 465.

Accused were convicted under Section 394. The victim when he was returnin home was robbed of his money after having been hit on the head with a rod. It wa observed that causing hurt for preventing possible or anticipated resistance in order t commit theft and for that end and then committing theft was nothing less than robbery *Held*, that in this case evidence was that as a result of hurt victim was lyin unconscious. Hurt was caused in order to committing the theft and for that end an therefore what was established was the offence under Section 394, itself. 1987 Cri L 1257 (Ker).

Attempt to murder and dacoity.—On perusal of the statement of the complainan though he had not stated anything against the co-accused but by his statement for th involvement of the appellant/accused is found to be proved that he is the person who armed with a country-made pistol tried to cause injury to the complainant and also commit robbery by forcibly taken away the motor-cycle belonging to him. Moreover, the prosecution as discussed herein above also proved the seizure of the looted property, the motor-cycle from the possession of the appellant/accused and in such circumstances offence punishable under Section 307 of IPC and 394 read with 397 of the IPC is fully proved by the prosecution against the appellant.

In such circumstances, for the offence of robbery, the minimum sentence provided with the aid of Section 397 of IPC is of seven years and no grounds are available for any reduction of the aforesaid sentence. *Hariballabh K. Rawat vs. State of M.P.*, 2010 (2) CrLJ 2309 (Gwalior).

3. Jurisdiction.—A Magistrate, having jurisdiction to try a prisoner for an offence under this section has not his jurisdiction taken away by the mere fact that the prisoner might also have been charged under Section 397. 1 Weir 449.

4. Doubt.—If there is an element of doubt as to the identification of the accused in a robbery, the accused should be given the benefit of the doubt and conviction and sentence should be quashed and set aside. UBR (1892-1896), Col. 1, 245 ; *see* also AIR 1934 All 569.

An offence under this section cannot be said to be minor offence so far as dacoity is concerned. AIR 1928 Mad 207. Highway robbery is a serious offence and is a great menace to the travelling public. In order to put a stop to it and ensure the safety of the persons travelling by the road a deterrent sentence is necessary. 1956 All WR (HC) 89. Where the beating was primarily for the purpose of theft which took place immediately after the assault. *Held*, that it was but one transaction viz., robbery. AIR 1955 Cal 527 : 1955 Cr LJ 1346. A sentence of whipping can be passed where the robber has himself caused hurt. 1928 Rang 112. Where in a robbery two present out of four armed with weapons committed murder, each is guilty of murder. AIR 1926 Lah 63 : 26 Cr LJ 1406 : 89 Ind Cas 718. Consecutive sentences under Sections 394, and 397 are illegal. AIR 1926 Lah 47 : Cr LJ 1850 : 89 Ind Cas 390. If the act of that had taken place while the person murdered was alive it would have been robbery (Section 394, read with Section 397), but removing ornaments from a dead body is not taking ornament out of the possession of a person. AIR 1958 MP 192 : 1958 Cr LJ 902 : 1958 All Cr C 282.

The mere fact that the recovery a steel trunk was reported to the police by the accused cannot constitute offence under Section 394. 1959 Cr LJ 581. No conviction will lie under the section where ears have been chopped before the death of the victim. 1974 Cr LJ 204 ; but *see* AIR 1978 SC 148 ; 1983 (2) Crimes 285, 1983 (1) Crimes 597 ; 1980 Cr LJ 1270 ; AIR 1980 SC 1753 ; 1983 Cr LR 177 (conviction would not be justified where there is nothing to connect the appellant with the murder or with the assault). Unless the hurt is caused for the purpose of committing the theft or for carrying away the property obtained by the theft, there would be no robbery and no scope for application of this section. 1974 Cr LJ 204 : 1974 BLJ 239 ; 1984 Cr LJ (NOC) 103 ; 1982 Cr LJ 714 (dispossession of moveables against his consent still will not be robbery ; AIR 1973 SC 468 : 1973 Cr LJ 314 (police constable held guilty).

5. Procedure.—Cognizable—Warrant Not bailable—Not compoun-dable—Triable by any Magistrate of the first class.

6. Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That on or about the. . . . . day of....at......you committed or attempted to commit or were jointly with *XY* concerned in committing or attempting to commit robbery of the property of *AB* and that as such you (or *XY*) voluntarily caused hurt to *AB* (or any other person as *the case may be*), and that you thereby committed an offence punishable under Section 394, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Charge under Section 384, was converted under Section 394. (1963) 3 SCC 727.

7. Recovery.—Stolen gold was recovered as melted-Link between stolen chain and melted gold—Recovery is a relevant piece of evidence to establish the offence of theft.—Conviction was fully justified. *Charles Cardozo* v. *State*, (1994) 1 Crimes 491 ; 1994 Cr LR (Mah) 6 (Bom).

The charge was of murder and robbery and stolen jewels were recovered from the possession of the accused after a lapse of one month but no explanation could be given by the accused for possession of said articles. It was held that mere lapse of one month would not result in conclusion that presumption against accused cannot be drawn. The conviction was, hence, proper. *Thavaraj Pandian* v. *State*, 2003 Cr LJ 2642 (Mad) : 2003(2) Cur Cri R 54 : 2003(1) Mad LW (Cri) 413.

8. Conviction.—When petitioners caused hurt to the complainant and then alleged to have taken away gold chain and ring—FIR and evidence not disclosing any intention of theft—Parties was having factional rivalry in village—Theft was not proved—Petitioners were acquitted of robbery and one petitioner who inflicted injuries liable to be convicted under Section 323, IPC. *Dharmindhar Rana* v. *State*, (1994) 1 Crimes 114 : (1994) 1 East Cr C 278 (Ori).

Robbery with attempt to cause grievous hurt. *Conviction under Section 397 only.* Mistake to mention Section 394, effect of.

The High Court held that since he was acquitted in the said case the arrest of Ilyas becomes doubtful and the defence version that he was not arrested as stated by the prosecution but was arrested from his house is believable. It was, therefore, concluded that the accused was shown to the witnesses. It was also pointed out that Section 397 is not a substantive offence and the accused could not have been convicted under Section 397 only but could have been convicted under Section 394 read with Section 397. As the conviction has been recorded under Section 397 and the use of the weapons was not fully established, the respondent is entitled to acquittal.

The conclusions arrived at by the High Court are absolutely sketchy. It came to abrupt conclusion that the accused must have been shown to the witnesses. There is no foundation to such a plea. First Information Report was lodged under Section 394 IPC and charge was accordingly framed. Because of the use of deadly weapon, the trial Court convicted the accused under Section 397 IPC. The trial Court have altered the charge, but that was not done. The High Court could have altered the conviction and imposed adequate sentence. There was no prejudice involved.

Since the High Court's reasonings were perverse the impugned judgment is set aside. However, the respondent is convicted for offence punishable under Section 394

IPC for which he was originally charged. He is sentenced to undergo rigorous imprisonment for 5 years. He shall surrender to custody forthwith to serve the remainder of sentence. The appeal is allowed to the aforesaid extent. *State of Uttar Pradesh vs. Ilyas*, AIR 2009 SC 1145 : 2009 (1) SCC 365 : 2008 (13) JT 197 : 2008 (15) SCR 142 : 2008 (15) Scale 142 : 2008 (9) SLT 717.

When conviction order was passed—Appeal against the same was filed—Light created by burning hut—Factum of robbery not held disputed—Conviction was fully justified. *Sonal* v. *State of U.P.*, 1994 JIC 838 (All).

Where there was appreciation of evidence of prosecution—Accused not participating in Test Identification Parade when ample opportunity existed for eye-witnesses to identify accused—By such non-participation evidence value of prosecution is not detracted and—No other ground to doubt prosecution-evidence—Recovery of pistol and firearm from accused fully corroborated—Conviction was fully affirmed. *Sunil* v. *State of Haryana*, 1994 Cr LJ 1381 (SC) : AIR 1994 SC 1536.

Where there was stabbing by knife while committing robbery—Witness participating in identification parade was not examined and—Other vital witnesses also not examined at the trial. There was discrepancies in evidence of two other witnesses.—Conviction not sustainable in absence of evidence of vital witnesses. *Basappa* v. *State of Karnataka*, (1995) 3 Kar LJ 649 (Karn).

Where there was corroborating evidence which laid support to version of injured complainant therefore conviction on basis of solitary statement of complainant not improper. *Jogender* v. *State*, 2005 Cr LJ 1400 (All) : 2005 All LJ 485 : 2005 (51) All Cri C 128 : 2005(1) All Cri R 152.

Where the evidence clearly shows that the accused were employees of the brother-in-law of the victim old lady and since fact itself indicates that an old lady ventured to go out of her house to the toilet there must certainly some light, the evidence tendered by the said victim of identification of accused persons who alleged to have gagged her and taken away her gold chain and gold studs does not deserved to be approached with any amount of inherent doubt, suspicion or distrust and the recovery of the stolen ornaments at the instance of the accused corroborates the testimony of the victim, conviction of both the accused is proper. *Girish* v. *State*, 2004(2) Crimes at p. 9 (Ker) :AIR 2004(SC) 1933 : 2004 Cr LJ 1791 : 2004(1) DMC 586 : 2004(3) JT 560 : 2004(2) Rec Cri R 330 : 2004(4) SCC 470 : 2004 SCC (Cri) 1306 : 2004(2) Supreme 478.

In a case four accused during night time came to petrol pump in a car and robbed cash worth Rs. 53000/- by showing revolver to complainant. In the meantime hearing the sound of electric danger bell the mob chased and accosted the accused on spot. His conviction under Section 394/397 was held proper. The accused under Section 25 of Arms Act was acquitted and only Rs. 500 was recovered from him. The Court held that the facts would be no consequence for his conviction under Penal Code. *Kashmira Singh Mohan Singh Lathi* v. *State*, 2003 Cr LJ 3497 : 2003(2) UC 1156.

Since prosecution can prove its case on the basis of recovery of looted articles from possession of accused and identification of accused in Test Identification Parade hence non mentioning of name of victim in FIR not fatal. *Lal Singh* v. *State of UP*, 2004 Cr LJ 378 (SC) : AIR 2004 (SC) 299 : 2003(4) Crimes 482: 2003(8) JT 488 : 2004(1) Rec Cr R 209: 2003(9) Scale 256: 2003(8) Supreme 93.

Where substantive evidence of eye-witnesses identifying accused was supported b corroborative evidence in form of recoveries of looted articles from possession accused, conviction of accused was held proper. *Lal Singh* v. *State of UP*, 2004 Cr L 378 (SC) : AIR 2004 (SC) 299 : 2003(4) Crimes 482 : 2003(8) JT 488 : 2004(1) Rec Cri 209 : 2003(9) Scale 256 : 2003(8) Supreme 93.

The eye-witness in a case stated that accused assaulted deceased with tabbal an other accused forcibly took off ornaments from her person. So common intention cause death was not established. Therefore person assaulting and causing death deceased by tabbal was convicted of murder but co-accused were held guilty of offen of robbery. *Kaushal* v. *State*, 2003 Cr LJ 3458 (All) : 2003 All LJ 1799 : 2003(46) All C C 401 : 2003(2) All Cri R 1790.

The identification of the accused by an independent and natural witness coupl with recovery of two robbed items of jewellery at his behest two days after the inciden clinchingly established his participation in the commission of his crime. The tw murders were committed for facilitating the commission of the robbery and as such th conviction of the accused under Section 394, IPC was held proper. *Balbir Singh* v. *Sta of UP*, 2005 Cr LJ 2747 (All). *See also Mushtaq Abdul Maj Shaikh* v. *State Maharahstra*, 2006 Cr LJ 628 (Bom).

9. Causing heart attack during robbery.—The statements of the complainant duly corroborated by the FIR as well as medical report (Ex. P/8) and his participation established on the basis of the statements of the complainant and other witnesse Learned counsel for the applicant has relied upon a decision reported in AIR 195 Madh Pra 55: 1958 Cri LJ 190 : *State of Madhya Pradesh v. Babulal Ramratan*, an pointed out that when the investigation was tainted the whole prosecution case shou be discarded. There cannot be denial for this proposition propounded in this judgmen but on facts the courts below have not found any illegality, irregularity or concoction the investigation. The investigation was also not tainted one. Therefore, the question f disbelieving the prosecution witnesses would not arise. A very crucial point required be answered by the applicant that as to why the complainant who is a foreigner to hi would implicate the applicant a police constable. *Jalamsingh v. State M.P.*, 2002 Cri 2586 (M.P.) : 2002 Cri LR (SC&MP) MPI 372 : 2002(3) MPHT 537.

Murder and robbery—Appreciation of evidence—In her cross-examination, witne stated that she had seen the accused sitting at the "Kheli" and that she had turned h back towards accused because accused was washing his hands. If that witness wa present in the field near the place of occurrence, there was no occasion as to why sh would not have seen the alleged actual occurrence.

There is also no explanation from witness as to why she turned her back when sh saw accused washing his hands. She does not state that she had seen the deceas with the accused nor does she state that she had seen the accused smeared with mud.

There is not even a single statement coming from any of the witnesses that th had seen any water being smeared with blood of the deceased or any soil of the fie being smeared with human blood. Some of the witnesses have stated that accused wa smeared with mud when he was returning from the field whereas Mathura (PW-4) do not say so. She only states that she saw him running from the fields. It is also n known why the said witness had turned her back towards the accused only because th ccused was washing his hands. If accused was washing his hands as stated by lathura (PW-4) there is no likelihood of body of the accused being smeared with mud s alleged by some of the prosecution witnesses.

On scrutiny of the evidence, we do not find any such direct evidence that the strap f wrist-watch belongs to the watch of the accused. None of the witnesses stated that uch strap of wristwatch belongs to the accused nor any wristwatch has been recovered rom the accused. So far the time of occurrence is concerned there is also no unanimity nd the evidence is scanty regarding the time of occurrence. In our considered opinion, ne evidence regarding commission of offence by the accused in the field and also mputation of legs of the deceased is neither cogent nor reliable, and therefore, those ircumstances cannot be relied upon for basing conviction of the respondent.

So far recovery of "Khurpi" is concerned the same admittedly did not contain any loodstains on it and it was recovered from an open place. Since there was no loodstain on it, the police also did not send it for chemical examination. Therefore, it annot be said that the said weapon was used for committing murder of the deceased. here could be some suspicion regarding the conduct of the accused at the time of ccurrence but the same cannot in any manner conclusively prove and establish that he accused has committed the murder of the deceased.

The view that is taken by the High Court is found to be a plausible view, and herefore, the benefit must always go to the accused and not to the prosecution. If the rosecution wants to prove the fact, the same must be proved by leading evidence, vhich is reliable and trustworthy, which pinpoints and conclusively proves the guilt of he accused. This is not a case where we can safely hold that the evidence led was rustworthy and conclusively establishes that it is the accused only, who had ommitted the offence. Considering the entire facts and circumstances of the case we re not inclined to interfere with the order of acquittal. *State of Rajasthan vs. Naresh @ Ram Naresh*, 2010 (2) CrLJ 1928 (SC).

10. Sentence.—Where there was consistency in evidence of witnesses found egarding opening of back-door and then carrying away utensils. When chased by illagers accused gave blows with stones and arrows and stolen articles recovered at the nstance of accused—Prosecution case was fully established. Guilt proved and appeal lismissed however—Sentence reduced from seven years' to half of its imprisonment. *Gula* v. *State of M.P.*, 1994 Cr LR 323 (MP).

When the offence was proved—Appellant was a Government servant– Lenient view an not be taken—Since the offence was injurious. *Yogendra Kumar* v. *State of U.P.*, 1994 All Cr C 426 : 1994 UP Cr R 227 (All).

Where stolen articles recovered at the instance of accused and article was duly dentified—Injuries on prosecution-witness also proved—Conviction was fully justified. *Nyasingh* v. *State of M.P.*, (1994) 1 Crimes 233 (MP) : 1994 Cr LR (MP) 10.

When the appellants entering the house of complainant armed with bows and arrows and taking away ornaments and household goods. Hence, convicted which was challenged in appeal. The recovery of goods were found to be properly made. The statement of witnesses does not suggest that articles were shown to them before dentification. The guilt was found proved. Hence, conviction and sentence recorded by court below is confirmed. *Nyasingh* v. *State of M.P.*, 1994 Cr LR (MP) 10 (N).

Where the conviction was under Section 394, read with Sections 397 and 394, IPC.—Which was challenged in revision petition. Offence falls either under Section 394 or 397, IPC, is made out. No overt act is alleged against the appellant No. 2 hence acquitted of all the offences so far as appellant No. 1, is concerned, his conviction under Section 394, read with Section 397, IPC, is converted into one under Section 323, IPC, and his sentence is reduced to period already undergone. *Dellu* v. *State of M.P.*, 1994 Cr LR (MP) 103 (N).

11. Evidence and Proof.—Where the accused belonged to the neighbouring village at a distance of less than a mile from the police headquarters and the witnesses who came to identify the accused had seen the accused from behind while escaping and the victim knew one of accused from before yet he did not name him in FIR, and went to identify him when he fully knew that accused and identification of the two of the accused took place after a gap of four days after the arrest without explaining the cause for delay, it was held that conviction under Section 394, could not be sustained. AIR 1981 SC 389 : 1983 Cr LJ 434.

There was no evidence on record to prove that the accused had prior meeting of minds and intended to commit murder of accused. The evidence on record was that when two of the robbers could not succeed in robbing gun from deceased co-accused penetrated knife in his stomach. From the above evidence, it could only be inferred that the accused was to commit robbery of gun and not to commit murder of accused whom the accused were not knowing from before and had no ill will, grudge or motive to finish his life. There may be no prior intention and it may develop subsequently on the spot but in this case there was also no such evidence. Penetrating knife in the stomach of deceased by one of the co-accused was individual act of said particular accused simply to facilitate the other accused in snatching the gun from him. The plan of all the accused was to rob the gun and not to murder the deceased. Piercing of knife was thus solitary act of co-accused as there was nothing on record to show that prior to piercing knife the other accused had exhorted, motivated or instigated him to do so. It was held that accused was liable to be convicted under Section 394, IPC. He had no common intention with the co-accused to commit murder of deceased and therefore, his acquittal of the offence under Section 302/94, IPC was held proper. *State of U.P.* v. *Tek Chand*, 2000 Cri LJ 3821 (All) : 2000(40) A Cri C 251 : 1999(26) A Cri R 2050 : 2000 all LJ 1704 : 2000(1) C CrJ 178 (All).

Conviction based on identification. In view of the accepted position that the accused persons were brought to the hospital to be shown, grievance that the test identification parade was really of no consequence because they had already been shown to the witnesses has substance. That being only piece of material which was used for conviction of Mahabir, same cannot be sustained. The same is set aside. He is released forthwith unless required in any case. So far accused Jalvir is concerned, complainant had categorically stated that she knew him six years prior to the incident. He had come to their house many times. Therefore, there was no difficulty in identifying accused Jalvir and naming him in the first information report. It is of significance that in the first information report name of Jalvir was specifically noted. The plea that Jalvir's name could not have been given at the first instance, because the witness was unconscious is without any substance. As a matter of fact, the witness has categorically stated that after the information was lodged, she became unconscious. Above being the osition, the conclusions of the Trial Court in holding accused Jalvir guilty does not uffer from any infirmity. *Mahabir v. State of Delhi*, AIR 2008 SC 2343 : 2008 (6) SCR 361 (SC) : 2008 (5) JT 308 (SC) : 2008 (6) Scale 52 (SC) : 2008 (3) Supreme 111 (SC) : 2008 (4) SLT 127 (SC) : 2008 (5) SRJ 412 (SC) : 2008 CrLJ 3036 (SC) : 2008 (2) Crimes 80 (SC) : 2008 (2) JCC 1244 (SC) : 2008 (3) Recent CR 5 (SC).

Chance finger prints lifted from place of crime matched with finger prints on dozier. o compare chance-finger prints with sample finger prints no permission of competent uthority has been taken and there is no evidence that finger prints on dozier were that f appellant. Even though gold bangles and silver glasses were recovered at instance of ccused and co-accused. They were neither subjected to any test identification roceedings nor having any identification mark. Witness, who identified gold bangles nd silver glasses as that of deceased, has not presented any cash memo or receipt of it. Ield, appellant is entitled to be acquitted. *Mehmood Ali vs State*, 2010 (4) CriLJ 3985 Del).

12. Acquittal.—Where there was robbing of Rs. 200/- on public road by showing nife. On recalling of eye-witnesses for cross-examination, they changed their version nd indicated another person of same name as that of present accused. Such change in ersion being unsafe for conviction and Accused was not caught on spot nor any ecovery of money or knife made from him. Hence, appellant accused was acquitted of harge. *Narendra Pandit* v. *State of M.P.*, 1995 Cr LR (MP) 209.

The law requires joining of two witnesses of the locality and not one. Hence, ecoveries are doubtful and cannot be stated to have effected at the instance of the ppellant. Hence, circumstances have not been established beyond reasonable doubt. *aivir Singh* v. State, (1995) 1 CCR 663 (Delhi).

Where the medical evidence does not corroborate the statements of two eye-vitnesses who are brothers of the deceased and statement of one eye-witness is not orroborated by the evidence of another eye-witness and the case put forward in the FIR ndergoes complete change during trial and the written FIR itself is highly suspicious nd the post-mortem report as to injury is incompatible with the story put forward by he prosecution it is held that the prosecution has not been able to prove the guilt of the ccused and therefore the accused would be entitled to acquittal. *Sheo Prasad Tiwari* v. *tate*, (2004) 2 Crimes 88 (All).

The accused was charged of robbery by causing hurt and there was proof of ecovery of money from the accused who had confessed to police that they had robbed he money from victim. Basing the conviction on this much evidence were not proper nd accused was held entitled to acquittal. *Anil Sharma* v. *State*, 2003 Cr LJ 3497 Uttranchal) : 2003(2) UC 1156.

13. Murder and robbery—Appreciation of evidence.—In her cross-examination, vitness stated that she had seen the accused sitting at the "Kheli" and that she had urned her back towards accused because accused was washing his hands. If that vitness was present in the field near the place of occurrence, there was no occasion as o why she would not have seen the alleged actual occurrence.

There is also no explanation from witness as to why she turned her back when she aw accused washing his hands. She does not state that she had seen the deceased vith the accused nor does she state that she had seen the accused smeared with mud.

There is not even a single statement coming from any of the witnesses that they had seen any water being smeared with blood of the deceased or any soil of the field being smeared with human blood. Some of the witnesses have stated that accused was smeared with mud when he was returning from the field whereas Mathura (PW-4) does not say so. She only states that she saw him running from the fields. It is also not known why the said witness had turned her back towards the accused only because the accused was washing his hands. If accused was washing his hands as stated by Mathura (PW-4) there is no likelihood of body of the accused being smeared with mud as alleged by some of the prosecution witnesses.

On scrutiny of the evidence, we do not find any such direct evidence that the strap of wrist-watch belongs to the watch of the accused. None of the witnesses stated that such strap of wristwatch belongs to the accused nor any wristwatch has been recovered from the accused. So far the time of occurrence is concerned there is also no unanimity and the evidence is scanty regarding the time of occurrence. In our considered opinion, the evidence regarding commission of offence by the accused in the field and also amputation of legs of the deceased is neither cogent nor reliable, and therefore, those circumstances cannot be relied upon for basing conviction of the respondent.

So far recovery of "Khurpi" is concerned the same admittedly did not contain any bloodstains on it and it was recovered from an open place. Since there was no bloodstain on it, the police also did not send it for chemical examination. Therefore, it cannot be said that the said weapon was used for committing murder of the deceased. There could be some suspicion regarding the conduct of the accused at the time of occurrence but the same cannot in any manner conclusively prove and establish that the accused has committed the murder of the deceased.

The view that is taken by the High Court is found to be a plausible view, and therefore, the benefit must always go to the accused and not to the prosecution. If the prosecution wants to prove the fact, the same must be proved by leading evidence, which is reliable and trustworthy, which pinpoints and conclusively proves the guilt of the accused. This is not a case where we can safely hold that the evidence led was trustworthy and conclusively establishes that it is the accused only, who had committed the offence. Considering the entire facts and circumstances of the case we are not inclined to interfere with the order of acquittal. *State of Rajasthan vs. Naresh @ Ram Naresh*, 2010 (2) CrLJ 1928 (SC).

* * * * *

Sec. 395. Punishment for dacoity.—Whoever commits dacoity shall be punished with *imprisonment for life*, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

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1. Amendment.—The words in italics have been substituted for the words transportation for life" by Act 26, of 1955, and Sch. with effect from 1.1.1956.

2. Scope.—In the case of dacoity in the running train, though some of witnesses vere not able to identify the appellant and each one of the dacoits, one of the witnesses ad recognised and identified all the accused. His testimony in the court identifying the ppellant was corroborated by his testimony identification at the parade. *Held*, that here was no reason to take a different view. Appeal accordingly dismissed. 1987 Cri LJ 95 (SC) : AIR 1987 SC 1.

Enmity. Appellants variously armed entered into room of informant's wife and ommitted dacoity. The evidence of the witnesses that the indentification of the ppellants in the facts stated aforesaid are doubtful. All the three appellants are co-illagers, were all known to the villagers and thus it appeared that their names have een dragged in this case due to enmity. Surprisingly not a singly person was arrested, nor the Investigating Officer investigated and tried to find out who were the unknown acoits who had participated in the alleged crime. These three appellants were found in he village immediately after the occurrence which also leads this Court to doubt their articipation in the said dacoity. Therefore, this Court finds that the evidence of the witnesses does not inspire confidence and as such held that the prosecution has not been able to prove beyond doubt that the appellants participated in the said dacoity and as such their conviction and sentence are set aside. *Lalo Mandal & Anr. vs State of Bihar & Anr.*, 2010 Cri LJ 941 (Patna).

The accused were convicted for the offence of committing dacoity. The accused were identified in test identification parade. It was stated by the proprietor of the shop in which dacoity took place that there was enough light inside the shop and he had ample opportunity to see the dacoits from a very close distance. It was thus observed that identity of the appellants as culprits who committed dacoity in the shop had been fully established by identifying witnesses. *Held*, that on careful consideration of circumstances and evidence conviction of all appellants was to be upheld. 1987 Cri LJ 1320 (Pat).

Where there was display of force by overt act. It is not necessary to establish dacoity. *Madan Kandl* v. *State of Orissa.* (1995) 9 OCR 210 (Ori).

3. Proof.—"It will be borne in mind that this offence as defined does not always involve robbery. The proof should be of a robbery or attempt to rob by five or more persons who are either joint actors, or some of whom actually commit the robbery, etc, while the others are abettors, being present but not actually participating in the commission of robbery or the attempt to rob."—*Morgan and Macpherson*, 335. An offence under this section can be committed if the number of persons concerned in the robbery is not less than five. 6 Lah 24 : 26 PLR 139 : 88 Ind Cas 513 : 26 Cr LJ 1153 ; 1958 Raj LW 527 ; There is no distinction between a dacoity and an attempt to commit dacoity. Any overt act by the accused for preparation of dacoity would immediately make liable under Section 395. AIR 1969 All 727 : 1959 All Cr R 312 : 1959 Cr LJ 1274. In order to sustain a conviction under Section 395, it must be proved that violence had been used for the act of committing theft. 25 Cut LT 433 : 1959 1 Ori JD 460.

While informant was returning home with his brother on motor cycle they were accosted in the way by five miscreants, of them two were identified by the informant as well as by his brother and their names were also disclosed by informant.

When they were asked to stop, they tried to flee from there by accelerating the speed of the motor cycle and then as per the fard-beyan, some of the miscreants fired shot which hit brother, as a result of which, they fell down and then they again tried to flee from there and again someone fired shot causing another injury and then they took away the Motor Cycle.

Though occurrence took place in night, none of witnesses had sufficient time to note physical features of other accused persons. It was quite obligatory on part of Investigating Officer to put those other accused persons on test identification parade, but they were never put on test identification parade. Taking entire facts and circumstances into consideration there was no reason for disbelieving evidence of informant and his brother.

Accused who were named in FIR, were ordered convicted, held proper. *Laltu Sardar and Ors. vs. State of Jharkhand*, 2010 (3) Cri LJ 2955 (Jhar).

No incriminating article was recovered from any of the accused persons except the gun. *Held*, that the charge under Section 395, IPC, was not established. 1982 Cr LJ 1156 ; 1983 Cr LR (SC) 258 ; AIR 1981 SC 1388 ; *see* also 1975 Cr LJ 83 ; 1980 Bih Cr C 65.

The prosecution has not been able to prove the exact statement made by two appellants individually. Hence, the stated confession is not admissible as it does not appear to be voluntary and appears to have been made to person in authority. The same could not be made a basis for supporting the conviction of appellants as there was complete absence of any evidence of an independent character to corroborate the same. *Ashish Singh* alias *Ram Kishore Singh* v. *State of Bihar*, (1995) 1 East Cr C 339 (Pat).

Inconsistent and uncorroborated evidence of a single witness is unsafe and can not be relied upon. *Bharthan Kurmi* v. *State of Bihar*, 1997 (2) East Cr C 451 (Pat).

Where evidence of eye-witnesses, related to informant victim not corroborated from independent witnesses on identification of accused and no looted article was recovered from accused therefore conviction not sustainable. *Aziz Mian* v. *State of Bihar*, 2005 (2) Crimes 567 (Pat).

The accused who were 15 to 20 in number armed with weapons committed dacoity but witnesses who claimed to have identified the dacoits were later declared hostile and other witnesses also changed their stand and stated that they had learnt the names of dacoits from male members. It was held that practically there was no identification against the accused and their participation in crime was not proved. The accused was held entitled to benefit of doubt. *Bhuneshwar Singh* v. *State*, 2003 Cr LJ 1008 (Pat).

The accused were charged for committing dacoity and robbery but identification parade was held in a room within the premises of crime branch of Police Mumbai and no precaution was taken to see that the witnesses were given no opportunity to see the culprits before Test Identification Parade. The witnesses were frightened and were being examined after lapse of some years. This evidence was considered not sufficient for basing the conviction and the same was set aside. *Syed Mohd. Owais* v. *State of Maharashtra*, 2003 Cr LJ 303 (Bom) : 2003(1) Bom LR 513 : 2002(4) Cur Cri R 383 : 2003(3) Mah lJ 261.

Where, the articles recovered were not identified by the complainant and recovery memo was prepared without any witnesses, conviction was held not proper. *Pappu* v. *State*, 2003 Cr LJ (NOC) 45 (Raj) : 2003(1) Raj Cr C 272 : 2002(2) Raj LR 354 : 2003(3) Rec Cri R 333.

Where the test identification parade was held after more than five months of the date of the commission of dacoity, and services of the jail constables were utilized to secure non-suspects, descriptive particulars of the accused has not been mentioned in the FIR lodged by the victims, the entire discovery evidence is against the provisions of Section 27 of the Evidence Act because of the turning hostile of the mediators and in absence of proof of the handwriting of C.I. regarding mediatornama which was not prepared in the presence of the I.O. assisting him in the investigation, the identification of the accused in Court has been made during trial after 9 years of the incident, and there is contradictory evidence relating to recovery of properties, the accused persons cannot be convicted. *Bommidi Malli Kharjuna* alias *Malka* v. *State*, 2004 Cr LJ 2162 (AP) : 2004(1) ALD (CRL) 391 : 2004(3) All Cri LR 561 : 2004(2) Andh LT (Cri) AP 128 : 2004(3) Rec Cri R 655.

The gang indulged in commission of dacoities in different districts of States of Andhra and Maharashtra in an organized manner. Taking the advantage of sensitivity of area accused had declared themselves either as Naxalities or police to gain entries into the houses of victims. Investigation as well as prosecution was done in meticulous and systematic manner and every step was taken strictly in accordance with requirements of law. The conviction of accused under Section 395, 412 399, 400 and 402 was held proper. Though offences were committed in different places and at the different times, the sentences were directed to run concurrently in interest of justice. *Bandamedi Shanker* v. *State*, 2003 Cr LJ 2242 (AP) : 2003(1) ALD (CRL 518 : 2003(2) Andh LT (Cri) AP 266.

Where there exists enmity between the accused persons and the informant's family and there are contradictory statements of the witnesses as regards availability of source of light, manner o occurrence, and number of the accused persons, non concealing of the faces of the accused when they are well-known to the informant's family casts doubt about their alleged participation in the crime of dacoity and Test Identification parade which was held after two months of the commission of the dacoity suffers from legal infirmities and the failure to seize the lantern allegedly carried by the accused persons casts serious doubt on the prosecution case and, therefore, the accused persons cannot be convicted for offence under Section 395, IPC. *Chhaku Lal Thakur* v. *State*, (2003) 3 East Cri C 160 : 2004 Cr LJ (NOC) 146 (Jhar) : AIR 2004 Jhar HCR 1252 : 2003(3) East Cri C 160 : 2003(3) JLJR 674.

Where two accused persons were acquitted for offence under Section 395, IPC by giving them benefit of doubt then remaining 3 accused persons would fall short of 5 persons in order to constitute offence under Section 395, IPC and therefore remaining accused were entitled to benefit of doubt. *Rapani Laxaman* v. *State of AP*, 2004 Cr LJ 136 (AP) : 2004(1) ALD (CRL) 425 : 2004(1) Cur Cri R 176.

In a case a dacoity was committed in the house of the informant by dacoits holding gun, *lathi*. On alarm raised by inmates of the house the villagers came there and chased the dacoits and one gun was recovered from a dacoits which was handed over to the police. The informant and the family members claimed to have identified the accused in the torch-light and same persons were later on arrested by police and in Test Identification parade they were identified by the witnesses. The doctor examined the injured inmates of the house of the informant, the trial Court was justified in convicting the accused persons under Section 395, IPC. *Jaddu Choudhary* v. *State*, 2004 Cr LJ 2144 (Jhar) : AIR 2004 Jhar HCR 1178 : 2004(01) East Cr C 631 : 2004(3) Rec Cri R 639.

The conviction held proper where the evidence showed that the accused trespassed forcibly into bank armed with deadly weapon and decamped with body. *Mohd. Safiulla* v. *State*, 2003 Cr LJ (NOC) 292 (Orissa).

The miscreants entered the house of victim Sub-Inspector, looted ornaments, cash and service revolver and fled away. The accused were subsequently apprehended on suspicion and on basis of their confessional statements stolen articles were recovered. There was nothing on record to disbelieve seizure of articles from the accused and informant had identified the accused persons and recognized gold ornaments. The conviction of accused under Section 395/457 was held proper. *Lalu* v. *State*, 2003 Cr LJ 1677 (Orissa).

The allegation was that some accused persons robbed passer by of the road and accused was one of them but only he was caught red handed by the public. All the victims supported the prosecution case consistently. Though there were contradiction with regard to identification of accused but witnesses were consistent with regard to one fact that accused was really caught red handed and he and witnesses were residents of the some village, conviction was held proper. *Munshi Mahto* v. *State*, 2003 Cr LJ 4177 (Jhar) : AIR 2003 Jhar HCR 1169 : 2003(3) Cur Cri R 655 : 2003(2) East Cri C 301.

In Bombay case the foreign nationals were waylaid and robbed of their belongings and thereafter two of them were raped also. The evidence produced was cogent and reliable and accused were identified in the Court and this fact was corroborated by circumstantial evidence according to which various robbed articles were recovered from their possession. It was held that conviction of accused under Section 395/376 was proper. *Thambi Nair* v. *State*, 2003 Cr LJ 493 : 2002(1) All MR (Cri) 615.

Conviction can be based on solitary witness who clearly stated to have identified the accused persons in the light of lantern and identified the accused in Test Identification parade also. *Sadique Ansari* v. *State of Bihar*, 2006 Cr LJ 1592 (Uttra).

In a case where the accused allegedly entered into the house at mid night and assaulted deceased and looted the ornaments of gold and silver, it was held that in view of the fact that huge quantity of ornaments was made at the instance of accused persons duly identified by prosecution witnesses, the possibility of planting case against accused persons by police, and, therefore the conviction of accused persons under Sections 395 and 396 was proper. *Narayan Prasad* v. *State of MP*, 2006 Cr LJ 123 (SC).

4. Recent possession of dacoited property.—The recent possession of property stolen at dacoity even when there is no evidence identifying him as one present at the dacoity. will, in the absence of any evidence to the contrary gives rise to the presumption that the accused participated in it. IOCI ; *see* also AWN 1898, 203 ; Rat Un Cr C 312. The mere fact that the accused produced the property obtained by the commission of dacoity from under a tree in a certain field not belonging to him is not legally sufficient to justify his conviction under Section 395, IPC, when there is no other evidence to convict him with the commission of dacoity. 161 Ind Cas 271 : 37 Cr LJ 454 : 1936 OWN 295 ; *see* also AIR 1944 Cal 39 : 45 Cr LJ 468. The circumstance that the actual articles removed by looting have not been ultimately recovered from any of the accused persons or that the details of the property removed or stolen were furnished to the police until some time after the occurrence is of no consequence and cannot justify the rejecting of the prosecution evidence as regards looting or robbery a false. 18 Cut LT 188 ; *see* 1954 RLW 404 : ILR (1954) 4 Raj 476. The circumstance of mere recovery of an unusual quantity of opium from a deserted house without any proof or possession of any of the accused cannot lend support to a charge of dacoity. 1964 Raj LW 171.

The recovery of the property at the instance of the appellant which were the subject matters of the dacoity and have been properly identified. The presumption is that the appellant was a receiver of the property transferred to him in the course of the dacoity. The conviction would be under Section 412, and not under Section 397, IPC. (1979) 1 SCC 131.

Mere recovery of the stolen articles from the accuseds—Does not make them dacoits—Unless there is a recent possession—However the accuseds can be convicted for the possession of stolen property. *Narayan Singh and Man Singh* v. *State of M.P.*, (1994) SCC (Cri) 232 : 1994 Supp(1) SCC 62.

There is complete evidence of legal and satisfactory evidence that articles including cash recovered from possession of the appellants were articles and cash looted in course of dacoity. Hence, charge under Sections 395 and 412, IPC, is not sustainable *Ashish Singh* alias *Ram Kishore Singh* v. *State*, (1995) 1 East Cr C 339 (Pat).

5. Dacoity and retaining of looted articles.—Where the prosecution has established the only fact that the dacoity was committed in the house of the informant but the prosecution case is full of doubt about the participation of the accused and retaining the articles which common house hold articles are found in each and every house which were alleged to have been looted in the course of commission of dacoity, the accused cannot be convicted for offences under Sections 395 and 412, IPC. *Ashrafil Seikh* v. *State*, 2004 Cr LJ 3716 at p. 3720 (Jhar) : 2004 AIR Jhar HCR 2210 : 2004(4) Rec Cri R 880 : 2004 AIR Kant HCR 2638.

6. Punishment.—Under this section a sentence of transportation for life can be passed, or by applying Section 59, a sentence of transportation from seven to ten years can also be passed ; but a term of transportation, between ten years and life, does not seem to be legal. 4 CrLJ 385. Where dacoity is committed with cruelty additional sentence of whipping is appropriate. AIR 1921 All 408 : 22 Cr LJ 397 : 19 ALJ 610 : 61 Ind Cas 525 ; *see* also 21 Cr LJ 515 : 56 Ind Cas 771. Dacoity is a most serious crime which it is difficult to detant in the sense of bringing home the offence to the culprits, and in ordinary circumstances, a sentence of rigorous imprisonment for a period of 7 years is the least sentence which should be passed. 1936 ALJ 739 : 162 Ind Cas 499 : 37 Cr LJ 595 : 1936 A Cr C 74 : 1936 Cr C 477 : AIR 1936 All 311 ; but *see* AIR 1943 Cal 32 : 44 Cr LJ 386 : 1952 AWR (HC) 10. In ordinary cases same sentence should be passed. AIR 1942 All 339 : 43 Cr LJ 867. AIR 1942 Pat 156 ; AIR 1942 Rang 49 : 43 Cr LJ 525 ; AIR 1942 Oudh 221 : 43 Cr LJ 416 : AIR 1941 All 359 : 43 Cr LJ 97 ; AIR 1938 All 625 : 40 Cr LJ 132 ; 1952 Cr LJ 986 : AIR 1952 VP 42 (the actual sentence has to depend upon the section applicable and the circumstance of each case irrespective of whether Section 397, also applies).

Appellants alongwith four others have committed dacoity of temple properties. Dacoity is a dare-devil act. Most of the time, a serious crime like dacoity is committed by unknown persons and it is very difficult to trace them and still difficult to secure their conviction. As a matter of fact, looking to the nature of crime and the manner in which the appellants looted temple properties, graver punishment was warranted. In any case, sentence of five years' rigorous imprisonment awarded by the trial Court and confirmed in appeal by the High Court for the offence under Section 395, IPC calls for no interference. *Ram Babu vs. State of U.P.*, 2010 (3) CrLJ 2856 (SC).

7. Sections 395 and 397.—As Section 397, does not create a substantive offence a conviction under that section is not correct, it ought to be under Section 395, read with Section 397. AIR 1957 Trip 48 : 1957 Cr LJ 1457.

In absence of any grievous hurt or even minor injury during dacoity operation, sentence of 10 years imprisonment reduced to seven years. *Subhaya Perumal Pilley* v. State, 1997 Cri LJ 922 (Bom).

The accused were amongst others accused, who committed dacoity at the residence of Lallukhan and looted property from his house. The prosecution witnesses identified the accused appellants came at the residence of Lallukhan and committed dacoity. Witnesses stated that Liyakat snatched wrist watch and Rs. 2,500/- from him. Wrist watch recovered from Liyakat was identified by Lallukhan belonging to him. From the bare perusal of the statements of the prosecution witnesses mentioned above, it is clear that the prosecution has been able to prove the case against the accused appellants beyond reasonable doubt for the offences charged against them. Accused Liyakat was arrested and on the basis of information given by him under Section 27 of the Evidence Act wrist watch was recovered from him Lallukhan proved and identified that the wrist watch recovered from Liyakat belonged to him. The arrest memo and recovery memo were proved by the independent witness.

The prosecution has been able to prove case beyond reasonable doubt against the accused for the offences under Sections 3 and 25 of the Arms Act. and they have been rightly convicted and sentenced under Section 3/25 of the Arms Act. I am in agreement with the findings recorded by the trial Court for the offences under Sections 395, 397, IPC against the accused and for Sections 3 and 25 Arms Act against the accused appellant. *Ramzan and Anr. vs. State of Rajasthan*, 2010 (3) CrLJ 2607 (Raj).

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8. Sections 395 and 412.—There is no statutory prohibition for a conviction under both Sections 395 and 412. On principle if the criminal act is only a single act coming within the definition of two distinct offences, there should not be conviction for both the offences but the conviction should be under one of them or in the alternative. 1956 Andh LT 915 : AIR 1956 All 336 : 1956 Cr LJ 662 ; 29 Cut LT 455 (benefit of doubt).

Dacoity and *receiving stolen property—Simultaneous conviction* for both offences not possible. In Section 114 Illustration (a) of the Evidence Act the words "either the thief or has received goods" and more particularly, the word "or" postulates that both the presumptions cannot be drawn simultaneously. This appears to be a pointer to the proposition that one cannot be convicted with both theft and for receiving or retaining stolen property. Section 411 nor Section 414 of the IPC can be applied to the original theft of the property concerned. No person can receive for himself nor does a person assist himself in concealing. Thus, it appears that simultaneous conviction for dacoity and receiving or retaining stolen property by commission of dacoity is not permissible. Moreover, the act of dishonest removal constitutes dishonest reception and so the thief does not commit the offence of retaining stolen property merely by continuing to keep possession of the property he stole. The theft and taking and retention of stolen goods form one and the same offence and cannot be punished separately. *Rafikul Alam and Ors. v. The State of W. B.*, 2008 CriLJ 2005 (Cal).

9. Sections 395, 396 and 302.—Where the accused and his companions who numbered five or more than five attempted to commit robbery at the house of *A*. but on a hue and cry being raised took to their heels without committing robbery, the offence of dacoity was completed the moment they took to their heels without any booty. There was attempt to commit robbery and the accused be guilty of an offence of dacoity and would be punishable under Section 395. AIR 1957 SC 320 : 1957 Cr LJ 416.

In view of the proved enmity, delayed submission of FIR, flimsy means of identification of dacoits covering their faces and the witnesses all related to one another it was held not safe to convict the accused. *Tapeshwar Yadav v. State of Bihar*, 2002 Cri LJ 698 (Pat).

10. Section 398.—Where the accused are charged and convicted of an offence punishable under this section they cannot be punished under Sec. 398. RatUnCrC 921.

11. Cases.—Where the sole evidence against a person charged with an offence under Section 395, Penal Code, consisted of the fact that the accused had pointed out the place where some remains of the stolen property were found. Held, that the above circumstantial evidence was not sufficient to show that the accused had committed the offence inasmuch as it did not exclude other thieves compatible with his innocence. 15 Cr LJ 404 : 23 Ind Cas 1004. Where Hindus acting under a religious motive attacked a party of Muhammadans driving cattle in a public road and take forcible possession of the cattle, they are guilty of dacoity under Section 395. 15 All 299 : AWN 1893 : 142. In cases of dacoity the Judge should explain to the injury with sufficient clearness that, unless they are satisfied that there were five or more persons committing the robbery or that the persons present and aiding in the commission of the robbery numbered five or more persons, there could be no dacoity 1 Weir 446 : 2 Weir 519. A body of men who attack and plunder a house by the mere fact of the proprietor's family having been able to make their escape a few minutes before the robbers forced and entrance are not taken out of the purview of Section 395. 7 WR Cr 35. The presumption where persons are found within six hours of the commission of a dacoity with some of the plundered property in their possession is that they are participators in the dacoity and not merely receivers. 3 WR Cr 10 ; 5 WR Cr 66. Less than five persons cannot be convicted of dacoity unless it is proved that at least five persons took part in it. 15 ALJ 205 : 18 Cr LJ 491 : 39 All 348 : 39 Ind Cas 331 ; *see* also AIR 1922 Mad 195 : 24 Cr LJ 269 : 71 Ind Cas 877 ; AIR 1927 Lah 519 : 28 Cr LJ 547. Where five are charged with dacoity but one is acquitted, others can be convicted. AIR 1928 Mad 144 : 53 MLJ 732 : 29 Cr LJ 5 : 106 Ind Cas 341. Association with dacoits is no proof of participation. 19 Cr LJ 79 : 14 NLR 192 : 43 Ind Cas 111. But persons supplying food to dacoits can be guilty of abetment. AIR 1934 Rang 30 : 1934 Cr C 243 : 35 Cr LJ 863, *see* also AIR 1931 Oudh 74 : 31 Cr LJ 1017. Conviction cannot be sustained where there is want of requisite criminal intention for charge under Section 395. 146 Ind Cas 195. Dacoity does not become theft even where there is no resistance and no violence. 1932 ALJ 1017 : 1933 Cr C 209 : AIR 1933 All 144.

Where no stolen property was found in the possession of the accused and it was also admitted on behalf of the prosecution that their names were not entered in the first information report and it further appeared that no identification proceedings in respect of them were conducted in jail by any Magistrate and that they were convicted solely on the testimony of two complainants. *Held*, that the conviction under Section 395, I.P. code, should be set aside. 112 Ind Cas 109. In cases of offence under Section 395, I.P.C. Judge should explain to jury what is necessary to constitute a robbery. AIR 1924 Oudh 367 : 11 OLJ 356 : 81 Ind Cas 597. Case against and for each accused should be dealt with in detail. 2 Bur LJ 199 : 25 Cr LJ 205 : 76 Ind Cas 573. Evidence of identification should be taken cautiously 18 Cr LJ 456 : 4 OLJ 83 : 39 Ind Cas 296 ; *see* also AIR 1923 Lah 161 ; 81 Ind Cas 949 . 90 & AIR 561. Identification made at either description for a term which may extend to three years and shall also be liable to fine ; and if the offender at the time of such person's decree was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration

Z dies in possession of furniture and money. His servant *A*, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. *A* has committed the offence defined in the section.

Synopsis

1. Scope 2567
2. Procedure 2568
3. Charge 2568

1. Scope.—"This section is intended on to the punish servants and strangers who could possibly have no right to or interest in, the effects of a dead man, and who misappropriated such effects, but not to punish near relations who take possession of and deal with the effects under a claim of independent ownership or as heir to the deceased. 25 Ind Cas 514. It is not necessary for a conviction under this section that the accused should misappropriate it to his own use. 12 WR Cr 39 ; 11 WR Cr 1. Under this section all the elements are required to constitute the offence which would be required to constitute the offence of criminal misappropriation in respect of a person who is alive. 12 WR Cr 39. The essential ingredient of offence under Section 404 was the knowledge on the part of the accused that the property in question was in possession of the deceased person at the time of that person's death and had not since been in the possession if any person legally entitled to such possession. 1961 MPLJ (Notes) 130. This section does not apply to immoveable property. 6 BHC Cr 33 ; AIR 1956 Madh Pra 49 : 1956 Cr LJ 224 : Madh BLR 1955 Cr 328. This section relates to a description of property peculiarly needing protection. The offence consists in pillaging of moveable property during the interval which elapses between the time when the possessor of the property dies and the time when it comes into the possession of some person or officer authorized to take charge of it. The proof should be that the property belonged to or was in the possession of the deceased person at the time of his death, and that it has since been misappropriated or converted to his own use by a person who knew or had reason to know that it belonged to the deceased."—*Morgan and Macpherson.*—This section is expressly limited to moveable property alone and criminal misappropriation or conversion is easily possible of the moveable property where the materials which have been secured from the building are removed. LR 6 All 200 Cr : AIR 1925 All 673 : 24 ALJ 153 : 27 Cr LJ 7. Under this section the prosecution must prove not only misappropriation or dishonest conversion to his own use of the property by the accused. The prosecution must also prove that the property was in the possession of a deceased person at the time of his death and that it has not since been in the possession of any person legally entitled to such possession. AIR 1949 Cal 171 : 50 Cr LJ 241.

There is no reason to restrict the property to moveable property. AIR 1962 SC 1823. Removal of ornaments from a dead body amounts to dishonest misappropriation of property possessed by the deceased and is an offence under Section 404, I.P.C. AIR 1959 MP 192 : 1958 MPLJ 398 : 1958 Cr LJ 90 : 1958 All Cr R 282 ; AIR 1973 SC 448 : 1973 Cr LJ 344. The accused must have done the act of misappropriation or conversion dishonestly. AIR 1956 MB 49 : 1956 Cr LJ 224.

2. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Magistrate of the first class.

3. Charge.—"I, (*name and office of the Magistrate, etc.*) hereby charge you, (*name of the accused*) as follows :—

That on or about the .... day of .... at .... you dishonestly misappropriated (or converted to your own use) certain property, to wit .... knowing such property was in the possession of *A.B.*, a deceased person, at the time of his death, and had not since been in the possession of any person legally entitled to such possession ; (and that you were at the time of the death of the said *A.B.* employed by him as a clerk or servant) and that you thereby committed an offence punishable under Section 404 of the Indian Penal Code and within my cognizance (or the cognizance of the Court of Session or High Court).

And I hereby direct that you be tried on the said charge.

OF CRIMINAL BREACH OF TRUST

Distinguishing of the offences.—"This offence like the offence of criminal misappropriation is characterised by an actual fraudulent appropriation of property. There is not originally a wrongful taking or moving as in theft, but the offence consists in wrongful appropriation of property, consequent upon a possession which is lawful. The offence is distinguishable from criminal misappropriation because the subject of it is not property, which by some casually or otherwise, but without criminal means, comes into the offender's possession ; but the property, which is entrusted to the offender by the owner or by other's lawful authority and which the offender holds subject to some duty or obligation to apply it according to the trust"—*Morgan and Macpherson.*

* * * * *

Sec. 405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

Explanation 1.—A person, being an employer, [1][of an establishment whether exempted under Section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) or not] who deducts for

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[1] *Added* by Act 33 of 1988, Section 27 (w.e.f. 1.8.1988).

12. Cases.—It is a possible view that an accused is guilty of criminal breach of trust between the misappropriation and the repayment, but Courts should be slow when repayment is at once made on demand to assume guilt in accused person. Criminal liability is not the same as civil liability. 97 Ind Cas 1041 : 27 Cr LJ 1217. It cannot be laid down as an absolute rule applicable to all cases that if a man cannot move a thing away, he cannot dishonestly convert it to his own use. 92 Ind Cas 747 : 27 Cr LJ 331 : 50 MLJ 94. Where a Sub-Inspector of Police who came across a stray bullock advertised for the owner but as none turned up had it sold after 20 days, he is not guilty of any offence under this section. 91 Ind Cas 37 : 23 ALJ 128. Where it is proved that a certain sum of money for which a Hindu father was accountable was not accounted for him and in a scheme sent he was ordered to pay the amount it will not amount to misappropriation. 1926 MWN 194 : 23 LW 714 : 94 Ind Cas 634 : 50 MLJ 353. Where a post master opened a V.P. article addressed to himself and extracted a railway receipt from it without paying for it for six days and made false entries in the P.O. books it amounts to technical misappropriation under Section 403. AIR 1928 Lah 92 : 8 Lah LJ 662 : 29 PLR 151 : 19 Cr LJ 598 : 109 Ind Cas 236 ; *see* also 68 Ind Cas 157 : AIR 1923 Nag 146 : 23 Cr LJ 557. In case of receiving money to be handed over at another place with dishonest motive offence is committed at the place of receipt. Failure to hand over is not an ingredient of the offence nor is it a consequence. AIR 1921 Pat 85 : 1921 PHCC 31. Where the allegations made in a complaint are that the complainant paid certain sums of money to the accused (which moneys were to be used for the purpose of bribery to certain officers) on the undertaking of the accused to obtain for the complainant a certain post, that complainant does not make out a case of criminal misappropriation, for in order to constitute this offence the property must have come into the possession of the accused innocently in the first instance. 165 Ind Cas 596 : 1936 Cr C 961 : AIR 1936 Rang 471. Withdrawal by employee of sum deposited by him as security without permission of employer and prior to adjustment of accounts amounts to criminal misappropriation. AIR 1938 Cal 451. A commission agent advanced a sum to a grower of potatoes upon the mortgage of his crop. The mortgage was not security for repayment of money advanced but to secure to the commission agent the sale of crop and his commission. The grower in breach of this agreement sent the potatoes for sale to another agent. *Held*, that the grower could not be said to have committed criminal misappropriation, criminal breach of trust or cheating. AIR 1938 Sind 48. Where on settling the marriage of his daughter with the complainant, the accused took from the latter certain ornaments, and clothes of female wear, meant either as a present to the future bride or as a part of the *pan* but in any case given and taken in contemplation of marriage, but later on he married his daughter to some other persons and on being questioned by the complainant, denied both the agreement for marriage and the receipt of the articles. *Held*, (1) that he had dishonestly misappropriated or converted to his own use the articles in question and an offence under Section 403 has been committed. 42 CWN 783. In the above case *Mukherjee, J.*, remarked : "If the accused had disputed his liability in law to return the articles instead of denying their receipt, there would have been a complete answer to the criminal prosecution." The accused an employee of the post office was supplied with postal stamps for sale to the public. *Held*, that the transaction was not a loan but an entrustment. 1960 All Cr R 261 : 1960 All WR (HC) 415.

An owner of the joint property cannot be guilty of misappropriation of his own property. The principle will apply to joint members and partners. AIR 1965 SC 1433 : 1965 (2) Cr LJ 431 : 1979 Cr LJ 738 : 1972 Cr LJ 945 : 1961 (2) Cr LJ 453 (managing member of Hindu joint family). But *see* AIR 1964 Ori 1198 : 1964 (1) Cr LJ 525 and the earlier case reported in (1904) 1 Cr LJ 757, where the partner was found to be guilty of breach of trust. *See* also 1976 Chand LR (Cr) 67.

The complainant lent a jewel to the accused who dishonestly retained it and converted it to his own use, it was held that there was a *prima facie* case under Section 403 or Section 406. 1951 ALJ 631 : 1951 AWR (HC) 521.

The principal cannot be held liable for misappropriation committed by the agent. (1967) 8 Guj LR 552. For liability of corporate bodies. *See* AIR 1964 Bom 195 : 1964 (2) Cr LJ 276. There are some facts which constitute offences to be under the section and under a Special Act. AIR 1971 Cal 93 : 1971 Cr LJ 361.

In the instant case, the averments made in the complaint petition show that money was handed over by the opposite party to the petitioners to supply levy cement with the abolition of the control on cement the system of supply of levy cement was abolished. Therefore, the money given by the opposite party No. 1 to the petitioner No. 1 for the purpose cannot be fulfilled. It was the duty of the petitioners to refund the money as requested by the opposite party as well as the Government of India. In spite of that the money was not refunded. In view of the above, it cannot be said that the averments made in the complaint petition even if it is taken to be true, do not make out a case of criminal breach of trust or misappropriation or simple misappropriation. This is dependent upon the intention of the parties. The petitioners stated that there were outstanding balances as per the accounts and if the accounts are taken into consideration the petitioners would not be liable to pay. All these matters require full dress trial. It can be ascertained only after recording evidence of the witnesses for the complainant and the petitioners. *(M/s.) Modi Cement Ltd.* v. Assam *State Co-operative Marketing and Consumer's Federation Ltd.*, (1994) 1 Gau LR 226.

13. Procedure.—Cognizable—Warrant—Not bailable—compoun-dable with permission of the Court—Triable by any Magistrate.

14. Charge.—"I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*), as follows :—

That on or about the .... day of .... at ....you dishonestly misappropriated (*or converted to your own use*) certain moveable property, to wit ....belonging to *A. B.*, and thereby committed an offence punishable under Section 403 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 404. Dishonest misappropriation of property possessed by deceased person at the time of his death.—Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of

2. Civil and criminal liability.—In dealing with a case of criminal breach of trust the jury should bear in mind the difference between civil and criminal liability. AIR 1940 Mad 329 : 41 Cr LJ 824. But civil proceedings is no bar to criminal prosecution. AIR 1939 Lah 340 : 40 Cr LJ 910. Criminal proceedings cannot be started for civil wrong AIR 1939 Sind 48 : 40 Cr LJ 278 ; AIR 1939 Sind 21 : 40 Cr LJ 246. Every breach of trust is not criminal. It may be intentional without being dishonest or may appear to be dishonest without being really so. AIR 1955 Trip 35 : 1955 Cr LJ 1636. Where in the allegations contained in the plaint, it is manifest that the complainant's age was that the accused acted dishonestly, it is a circumstance which distinguishes a civil from a criminal liability. 1957 All WR (HC) 255. In every case of criminal breach of trust a breach of contract is implied. The determining factor is judging whether a case is one of criminal breach of trust or a criminal breach of contract is whether the person proceed against and acted dishonestly. 1976 Cr LJ 449. It must be proved that the accused in an offence under Section 405 was entrusted with the property or with any dominion over the property and the same was dishonestly misappropriated or converted to his own use. 1977 Cr LJ 1416. Merely because there is a civil remedy a complaint for criminal breach is not to be entertained. 1978 Cr LJ 609 ; 1984 Cr LJ 261 : 1984 Raj Cr C 41 : 1960 BLJR 145 ; 1980 BBCJ 136 but *see* (1951) ILR 3 Assam 63 ; (1984) 1 Gau LR 28 ; (1984) 25 Del LT 146 ; (1983) 2 Crimes 109.

There was a business dealing between parties in which complainant had been supplying goods and the accused had been making the payments of goods supplied to them by cash/draft on different intervals. The complainant supplied goods to accused also and accused No. 2 being proprietor of accused issued cheque in favour of the complainant for the goods supplied to the accused. The cheque was dishonoured by the Bank. The complainant filed a complaint for cheating and criminal breach of trust. The Court held that it was a business dealing between two concerns between whom, there had been business dealings earlier also and no dispute arose. Criminal prosecution under Section 406 and 402 IPC by the complainant was abuse of the process of law. *Sneh Lata v. M/s Swastika Agro Industrial Corporation, Jalandhar* 2001 Cri LJ 4432 (P&H).

3. Applicability of.—In the case accused were charged of criminal breach of trust for having disposed of pledged goods with dishonest and fraudulent intention. Ingredient of the offence of criminal breach of trust are (1) accused must have been trusted with property or domain over it, and (2) accused must have misappropriated property or disposed of that property in violation of such trust. Goods pledge by pledger constitute entrusted of property. There may be circumstances where alleged breach is so gave and wanton as to warrant an inference of dishonest and fraudulent intention on part of pledge in disposing of pledged goods in which case it will constitute criminal breach of trust. It was observed that the act of pledge disposing of jewel ornaments pledged by debtor without notice to pledger for a price for below the real value might constitute criminal breach of trust. 1987 Cri LJ 447 (Del).

Requirement for Applicability. The terms of the section are very wide. They apply to one who is in any manner entrusted with property or dominion over property. The section does not require that the trust should be in furtherance of any lawful object. It merely provides, *inter alia*, that if such a person dishonestly misappropriates or converts to his own use the property entrusted to him; he commits criminal breach of trust. This section requires, (1) Entrusting any person with property or with dominion over property; (2) That person entrusted (a) dishonestly misappropriates or converts to his own use that property; or (b) dishonestly uses or disposes of that property or willfully suffers any other person so to do in violation – (i) of any direction of law prescribing the mode in which such trust is to be discharged, or (ii) of any legal contract made touching the discharge of such trust.

The most essential ingredient of proof of criminal breach of trust, therefore, is misappropriation with a dishonest intention. *R. Venkatakrishnan vs. Central Bureau of Investigation*, 2009 (11) SCC 737 : 2009 (10) JT 597 : 2009 (12) SCR 762 : 2009 (11) Scale 102 : 2009 (6) SLT 375.

4. Scope.—"The offence, as here defined, appears to include any dishonest misappropriation by persons in whom confidence is placed as to the custody or application of particular property whether it be by legal authority or private contract or consent. Persons as clerks, agents, servants or otherwise, under whatsoever name have a confidence reposed in them by their employers and are, whether in the ordinary course of their employment or only occasionally entrusted with the property and persons whose employment does not extend beyond the particular occasion on which they are so entrusted, seem to be within this section. Those who technically called trustees if they commit a breach of trust are responsible as criminals for acts done by them dishonestly for their own gain to the despoiling of the persons for whom they are in trust, or for acts causing wrongful gain to themselves or wrongful loss to such persons. Sections 407-409 make special provisions for various cases in which property is entrusted to agents or contractors who commit this offence.

'This definitions includes those who are entrusted in any manner with property, as warehouse-keepers, *etc.*, are entrusted only with the possession or custody of property. Persons who are empowered to take or deliver possession of property whether such power is derived from the owner or from any other person, and persons who are entrusted with any dominion over property are also included. Property which is bulky or which cannot, for other reasons be delivered from hand to hand, is usually represented by some writing or other thing. Thus the key of the warehouse or place where goods are lodged, the bill of lading, delivery order, or other document however called, which is used in the ordinary course of business to show the possession or control of property and which enables the holder to transfer or receive or otherwise deal with it, are made to represent the property itself. A person entrusted with such a document or thing has a dominion over the property thereby represented."—*Morgan and Macpherson*, 365. Evidence of trust and dishonest misappropriation are sufficient to constitute an offence under this section. 1 Weir 460 ; 16 WR Cr 39 ; 9 All 666 ; 3 WR Cr 44 ; 1914 MWN 894 : 16 MLT 505 : 15 Cr LJ 688 ; AIR 1957 All 122 : 1957 All LJ 147 : 1957 Cr LJ 170 ; AIR 1955 Pat 338 : 1955 Cr LJ 1096. The value of property is immaterial. 27 All 28 ; AWN 1881-82.

"Negligence or other misconduct causing the loss of the entrusted property may make the person entrusted civilly responsible, but will not make him guilty of this offence. There must be the intention so cause wrongful gain or wrongful loss to constitute a criminal breach of trust."—*Morgan and Macpherson. See* also 106 Ind Cas 682. To constitute an offence of criminal breach of trust there must be an entrustment, there must be misappropriation or conversion of one's own use or use in violation of credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount for the contribution so deducted by him and if he makes default in the payment of such contribution to the said fund in violation of said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

[1][*Explanation* 2.—A person, being an employer, who deducts the employee's contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employee's State Insurance Act, 1948 (34 of 1948) shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.)

Illustrations

(a) *A* being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will. and appropriates them to his own use. *A* has committed criminal breach of trust.

(b) *A* is a warehouse-keeper. *Z*, going on a journey, entrusts his furniture to *A*, under a contract that it shall be returned on payment of a stipulated sum for warehouse room. *A* dishonestly sells the goods. *A* has committed criminal breach of trust.

(c) *A*, residing in Calcutta, is agent for *Z*, residing at Delhi. There is an express or implied contract between *A* and *Z*, that all sums remitted by *Z* to *A* shall be invested by *A*, according to *Z's* direction, *Z* remits a lakh of rupees to *A*, with directions to *A* to invest the same in company's paper. *A* dishonestly disobeys the directions and employees the money in his own business. *B* has committed criminal breach of trust.

(d) But if *A*, in the last Illustration, not dishonestly but in good faith, believing that it will be more for *Z*s advantage to hold shares in the Bank of Bengal, disobeys *Z's* directions, and buys shares in the Bank of Bengal for *Z*, instead of buying company's paper, here, though *Z* should suffer loss, and should be entitled to bring a civil action against *A* on account of that loss yet *A*, not having acted dishonestly, has not committed criminal breach of trust.

(e) *A*, a Revenue Officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. *A* dishonestly appropriates the money. *A* has committed criminal breach of trust.

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[1] *Inserted* by Act 38 of 1975. Section 9 (w.e.f. 1.9.1975).

(f) *A.* carrier is entrusted by *Z* with property to be carried by land or by water, *A* dishonestly misappropriates the property. *A* has committed criminal breach of trust.

Synopsis

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1. Amendment.—Explanation added by the Employees Provident Funds and Family Pension Fund (Amendment) Act, 1973 (40 of 1973) (with effect from 1.11.1972).

Existing Explanation I thereof and after the explanation as so renumbered Explanation 2 inserted by the Employees State Insurance (Amendment) Act. 1975 (38 of 1975) (with effect from 1.9.1975).

master of some of money due to that latter and the fraudulent misappropriation as included by such mental act or intent to deprive the master of his property without any outward or visible trespass in the fraudulent mental distinction between a civil wrong arising out of a breach of trust and the offence of criminal breach of trust..... Every offence of criminal breach of trust involve a civil wrong in respect of which the complainant may seek his redress for damages in the Civil Court but every breach of trust, in the absence of *mens rea*, cannot legally justify a criminal prosecution", 1957 MPWN 495. A deprivation even for a short time is within the meaning of the criminal breach of trust. If the Managing Director of a Bank entrusted with securities owned by the pledger disposes of their securities against the stipulated terms of the contract entered into by the parties, with the intents of causing wrongful loss to the pledger and wrongful gain to the bank, there can be no question but that the Managing Director has necessary *mens rea* required by Section 405. AIR 1956 SC 575 : 1956 SCA 941 : 1959 SCJ 613 : 1956 SCR 483 : 1956 Cr LJ 1116 ; (1961) 2 Guj LR 262 : (1961) 1 Cr LJ 654.

Where the accused is able to establish that due to incessant rain the paddy supplied to him by Government for milling it into rice was damaged resulting in short delivery of rice, than there is no *mens rea* on the part of this accused and hence an inference regarding dishonesty of the accused will not be justified. AIR 1955 Trip 35 : 1955 Cr LJ 1636.

6. Property.—The property referred to in this section must, as in Section 403, be moveable property and criminal breach of trust cannot be committed in respect of immoveable property. 23 Cal 272 ; AIR 1930 Rang 158 : 8 Rang 13. Cancelled cheques are property. 27 All 28 : 1 Cr LJ 603. No criminal breach of trust can be committed in respect of immoveable property. AIR 1926 Lah 428 : 27 Cr LJ 760 : 95 Ind Cas 280 : 56 Punj LR 521 : ILR 1955 Punj 710.

The word "property" is used in the Penal Code in a much wider sense than the expression 'moveable property'. There is no good reason to restrict the meaning of the word 'property' to moveable property only when it is used without any qualification in Section 405 or in other section of the Penal Code. AIR 1962 SC 1821 : (1962) 32 Com Cas 699 : 1962 (2) Cr LJ 805 (funds amount to property). The property 'must belong to person other than the accused. *Ibid* : 1964 (2) Cr LJ 496 : 1961 Jab LJ 731 : 1962 MPLJ 765. The property includes things purchased with money entrusted. AIR 1965 TC 271 : 1955 Cr LJ 1539 : 1955 Ker LT 509 ; 1957 Cr LJ 265 ; 1956 All WR (HC) 583 (money paid to share broker specially for purchase a share is not, property of the person to whom it is paid but he is a mere trustee). The word 'property' appearing in Section 406, I.P.C., is comprehensive enough to include the sale proceeds of property entrusted to a bailee. 1961 Raj LW 347 : ILR (1960) 10 Raj 1527 : AIR 1932 Sind 169 : 54 Cr LJ 57. The word "property" is wide enough to include a chose in action. 1980 Cr LJ 388 : AIR 1980 SC 439. The cognate section commencing with Section 403 relate only to moveable property. 36 Cal 758 *contra* 27 Cr LJ 331 ; 1932 Mys 1353 : (1897) BUC 928. The view that the offence under the section only relates to moveable property was not approved in AIR 1962 SC 1821.

After hearing the parties complaint was dismissed—Revision against dismissal who filed case was remanded—Revision against remand was held—Allegation that dowry was handed over to the accused—Pleaded that it was given to husband, mother and father of the accused—Hence, order was not held illegal. *Lakhbir Singh* v. *(Smt.) Paramjit*

Kaur. (1994) 1 CC Cases 194 : (1994) 1 SLJ 528 : (1994) 1 Recent Cr R 188 : (1994) Cr LT 64 : (1994) 1 Crimes 285 (P&H).

7. Entrusted.—The term "entrustment" is not necessarily a term of law. It may have different implications in different context. In its most general signification, all it imports is the handing over the possession for some purpose which may not imply the confessing of any proprietary right at all. 1935 Cr 1210 : AIR 1935 Rang 453. The words "in any manner" in the section show that the entrustment of property with the accused may be brought about in various ways. 159 Ind Cas 656 : 1935 MWN 914 : 42 LW 923 : 1935 Cr C 1314 : 69 MLJ 681. Sub-ledge by pledgee of goods pawned to him to the extent of his interest therein is not criminal breach of trust. AIR 1938 Mad 551. Moneys due to a customer from a banker are simply due to a customer as debts and are fully at the disposal of the banker. The latter is not, therefore, guilty of criminal breach of trust in using them for his own purpose. 32 PR 1901 (Cr). Failure to account for money by the person to whom it has been entrusted may constitute the offence of criminal breach of trust under this section. UBR 1909, 1st Qr. Penal Code. Where the accused, to whom silver had been entrusted for making an ornament, introduced copper, *held*, that an offence under this section has been committed. 4 BHC Cr 16. In a case under this section trust is essential. 75 Ind Cas 89 ; 72 Ind Cas 172 ; 1923 Lah 321 ; 25 CWN 838 ; 1928 Sind 106 : 1953 Cr LJ 1289 : AIR 1923 Pat 225 ; AIR 1953 SC 478 : 1954 Cr LJ 102, where it was held that to constitute the offence of criminal breach of trust it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. *See* also 1964 MPLJ 750 : 1964 Jab LJ 724 (*contra* the offence of criminal misappropriation, where no entrustment is required for the offence to be constituted). Entrustment need not be in furtherance of a lawful object. AIR 1927 Nag : 10 NLJ 72 : 28 Cr LJ 506 : 23 NLR 106 : 101 Ind Cas 890. Where property attached is given for sale custody, deliberate refusal to produce it is repudiation of trust and accused is guilty of criminal breach of trust. AIR 1934 Lah 31. Advances made to brokers on pronote creates no trust. 6 LBR 62 : 17 Ind Cas 834 : 13 Cr LJ 888 (FB) ; *see* also 14 Cr LJ 145 : 19 Ind Cas 145 : 7 LBR 16 : 6 Bur LT 209 (FB) ; 15 Cr LJ 452 : 24 Ind Cas 332 : 7 Bur LT 139 (FB) : 15 Cr LJ 452 ; 6 LBR 46 : 13 Cr LJ 269 : 14 Ind Cas 658. An auctioneer cannot be said to be liable for criminal breach of trust if he does not punctually carry out every term in the agreement, *e.g.*, if he did not hold the sale on the agreement date, or if there was delay in payment. 41 Cal 844 : 15 Cr LJ 683 : 26 Ind Cas 141. The word "entrusted" in this section is used in its legal and not in its figurative or popular sense. The sentence makes no distinction between different kinds of moveable property. 108 Ind Cas 663 : 29 Cr LJ 431 : AIR 1928 Sind 106 ; *see* also 30 Bom LR 1270 : AIR 1928 Bom 521 ; ILR 1949 Nag 620 ; AIR 1950 Ker 52. Where there is no dispute as to title and property entrusted for a particular purpose is converted to the use of the holder the offence of criminal breach of trust is clearly made out. 3 Luck 494 : 112 Ind Cas 103 : 29 Cr LJ 983 : AIR 1928 Oudh 277. The question whether the property in the goods has or has not passed to the purchaser under a trust receipt is relevant to the decision of cases under Section 406 or Section 409, but it is not necessarily decisive. The decisive test is whether there was an entrustment within the meaning of Section 405 and the necessary criminal intention. AIR 1939 Sind 1 ; *see* also AIR 1939 Sind 27 ; AIR 1957 Ori 268 : 23 Cut LT 410 : 1957 Cr LJ 1431 (not only entrustment but also dishonest misappropriation has to be made out). When goods are received by a partner of a firm, any legal direction or of any legal contract and thirdly the misappropriation or conversion or disposal must be with a dishonest intention. AIR 1940 Mad 329 : 41 Cr LJ 824. The accused, a receiver of a cotton mill appointed by the High Court. In the exercise of his discretion demanded and received payment over and above the market rate in respect of bales allotted to a shopkeeper. The accused however failed to account for the extra- payment. *Held*, as the sum was paid by way of illegal gratification, there could be no question of entrustment in such payment. The criminality of the act consisted in illegal payment of the money and the subsequent misappropriation or conversion of the same did not arise. AIR 1953 SC 478 : 1954 Cr LJ 102. Where a Court trying a person for an offence of criminal breach of trust finds that the case is not covered by Section 84, I.P. Code. It should consider another aspect of the case namely whether even if Section 84 did not cover the case. The state of mind in which the accused did not exclude the existence of a dishonest intention which is an essential ingredient of the offence of criminal breach of trust. AIR 1939 Mad 407 : 40 Cr LJ 642. To constitute an offence under this section, the prosecution must prove entrustment. AIR 1951 *A*jm 15 ; AIR 1951 Cal 206.

But for the purposes of this section it is not necessary that the entrustment should be express. *A*n implied entrustment will suffice. AIR 1950 *A*jm 76. *A*lthough the burden of proving entrustment of money rests on the prosecution, if it is proved that the accused was not in possession of the amount entrusted to him, it is for the accused to prove satisfactorily that he had not embezzled or misappropriated the amount but the amount had been stolen or that he had been robbed of it. It is not for the prosecution to prove how he disposed of it. AIR 1950 Sau 13. This section does not apply to partners. 146 Ind Cas 416 : 37 CWN 982 : 1933 Cr C 953 : 34 Cr LJ 958 : AIR 1933 Cal 582 ; but *see* 35 Bom LR 1518. This section does not enforce case of a person taking on hire. AIR 1932 All 324 : 33 Cr LJ 866 : 1932 *A*LJ 213.

When a person allows others to misappropriate the money entrusted to him, that amounts to a criminal breach of trust as defined by Section 405, 1952 Cr LJ 46 : 1952 BLR Kut 7 : AIR 1951 Kut 81. The section consists of property is a positive part and a negative part. The positive part deals with criminal misappropriation or conversion of the property and the negative part consists of dishonestly using or disposing of the property in violation of any direction of law or any contract concluding the discharge of trust. AIR 1966 All 619 ; 1956 Cr LJ 1165 ; *see* also 1960 Cr LJ 1250 ; AIR 1960 SC 889 (in a charge of criminal breach of trust the prosecution is not obliged to prove the presence page of conversion). There must be an entrustment and dishonest misappropriations in an offence under this section. AIR 1961 SC 761 : (1961) 3 SCR 519 ; AIR 1965 All 233 ; AIR 1970 Goa 7. In the absence of proof of entrustment of property or of dominion over the property of another, the section will not be applicable. 79 CWN 538 ; 74 CWN 782 ; 1979 Chand LR (Cr) 43. The expression "entrusted" is used in a wide sense and includes all cases in which the property of voluntarily handed over for a specified purpose and is disposed of dishonestly contrary to the purpose. AIR 1972 SC 1490 : 1973 Cr LJ 897 ; AIR 1968 SC 709 : 1968 Cr LJ 803 : (1983) 1 Crimes 385 ; 1978 Cr LJ 1379 : 1967 Cr LJ 1599 : AIR 1967 Cal 568 ; AIR 1981 SC 81 : 1980 Cr LJ 1329 (misappropriation of provident funds) ; AIR 1961 SC 751 : 1961 (1) Cr LJ 773 (currency notes handed over to the Police Sub-Inspector or during search). But power to operation funds in bank in entrustment. 1962 (2) Cr LJ 805 : AIR 1962 SC 182 ; *see* further discussion under the head "entrusted" supra.

Requirement for. This section classes together public servants, bankers, merchants, factors, brokers, attorneys and agents. The duties of such persons are of a highly confidential character, involving great powers of control, over the property entrusted to them and a breach of trust by such persons may often induce serious public and private calamity. High morality is expected of these persons. They are to discharge their duties honestly.

The following are the essential ingredients of the offence under this section : (1) The accused must be a public servant; (2) He must have been entrusted, in such capacity with the property; (3) He must have committed breach of trust in respect of such property. *R. Venkatakrishnan vs. Central Bureau of Investigation*, 2009 (11) SCC 737 : 2009 (10) JT 597 : 2009 (12) SCR 762 : 2009 (11) Scale 102 : 2009 (6) SLT 375.

Petition against complaint was devoid of essential ingredients—*Prima facie* no offence made out against accused order of Magistrate taking cognizance was quashed. *Manoranjan Tripathy* v. *Ganesh Prasad Singh*, 1994 Cr LJ 204 (Ori).

According to Section 405, I.P.C. a dishonest misappropriation or conversion to his own use or dishonest use or disposal of property in violation of any direction of law or of any legal contract is a necessary ingredient of offence of criminal breach of trust. *Jugal Kishore Saraf* v. *State of Assam*, (1994) 2 GLR 174 (Gau).

To make out offence under Section 405, I.P.C. it must be established that he was either entrusted with or entrusted with domain over property. *Alagiri* v. *State*, 1996 Cri LJ 2978 (Mad).

Where complainant was allotted a plot measuring 3,600 square feet by society—Society renumbered the plots at request of allottee—Plot measuring 1,800 sq. ft. was only handed over—Offence under Section 405, I.P.C. was made out and the members of managing committee have not discharged the trust reposed by the complainant and wilfully sold half of the plot to some third party and thus satisfied the ingredients of Section 405, I.P.C. *Madhosingh* v. *Kamla Devi*, 1994 (1) Bom CR 165.

5. Criminal Breach of Trust—Proof of mens rea.—In *Kanhaiya Lall* v. *Emperor*, 168 Ind Cas 58 : 38 Cr LJ 491 : 1937 OLR 202 : 1937 OWN 505 : AIR 1937 Oudh 331, the Court observed : "My principal reason for holding that the facts of this case do not constitute the offence of criminal breach of trust is that there is no satisfactory evidence on the record which convinces me that the accused, *B. Kanhaiya Lall*, at the time when he is said to have misappropriated certain sums of money had guilty of knowledge or *mens rea* as to convert what at best amounted to a civil wrong or tort into a penal offence' amounting to criminal breach of trust by a servant. The distinction between a civil wrong, which gives rise to a suit for damages for that wrongful act or tort, and a criminal offence punishable under the Penal Code is very clear. Every breach of trust gives rise to a suit for damages, but it is only where there is evidence of a mental act of fraudulent misappropriation that a commission of embezzlement of any sum of money becomes a mental offence punishable as criminal breach of trust under Sections 408 and 409, I.P. Code. It is the mental act of fraudulent misappropriation that clearly demonstrates an act of embezzlement which is a civil wrong or tort from the criminal breach of trust punishable under Section 408, I.P. Code. This is clearly brought out in the observations of *Coleridge. J.*, in *R.* v. *Williams Sarah*, 7 C & P 338 and in *R.* v. *Lynch*, 6 Cox CC 445. This malicious intent on the part of a servant to deprive his and cannot be regarded as a trustee under Section 405. The essence of the offence under Section 405 is the dishonest conversion of the property entrusted, but the act of cheating itself involves a conversion. Conversion signifies the depriving of the owner of the use and possession of his property. When the cheat afterwards sells or consumes or otherwise uses the fruit of his cheating he is not committing an act of conversion, for the conversion is already done, but he is furnishing evidence of the fraud he practised to get hold of the property. Therefore cheating is a complete offence by itself. 162 Ind Cas 592 : 37 Cr LJ 637 : 1936 Cr C 637 : 43 LW 548 : 1936 MWN 281 : AIR 1936 Mad 353 : 70 MLJ 635 (FB) in the same case *Lakshman Row, J.*, observed : "More offences than one were committed, *viz.*, obtaining delivery of property by cheating under Section 420, I.P. Code, and criminal breach of trust under Section 406, I.P. Code, and as stressed by the Crown Prosecutor, acts constituting the offence of obtaining property by cheating cannot by themselves constitute the offence of criminal breach of trust. The ingredients of the offences are different and so is the evidence requisite to establish them. There can be a breach of trust independently of cheating and the offences are distinct and separate. The offence under Section 420 is complete as soon as delivery is obtained by cheating, and without further act of misappropriation there can be no breach of trust." *See* also 159 Ind Cas 656 : 1935 MWN 914 : 42 LW 923 : 1935 Cr C 1314 : 69 MLJ 681. The offence of criminal breach of trust may be broadly defined as the fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come. It is akin to cheating, theft and criminal misappropriation but differs from them in important respects. In criminal breach of trust the property is lawfully acquired or acquired with the consent of the owner, but dishonestly misappropriated by the person to whom it is entrusted. In cheating the property is wrongfully acquired in the first instance by means of a false representation. In theft the property is taken without the consent of the owner and the dishonest intention to take property exists at the time of such taking. In criminal misappropriation the property is innocently acquired, often equally by chance, but by a subsequent change of intentions and the retaining becomes wrongful and fraudulent. The expression "entrusted" has a corresponding meaning and embraces all cases in which goods are entrusted. AIR 1951 Punj 103 : 54 PLR 18. To constitute a breach of trust the property must in the first instance have come into the hands of the accused in a lawful manner or with the consent of the owner. (1977) 4 Cr LJ 244. Criminal intention is necessary in cheating at the time of entrustment. 1978 Cr LJ (NOC) 33. Proof of entrustment is sufficient in criminal breach of trust but in cheating the dishonest or the fraudulent intention must be shown to be present from the very inception. 1970 Pat LJR 600.

10. Dishonestly.—The word "dishonestly" means the doing of an act with the intention of causing wrongful loss or wrongful gain, and wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled. For either in wrongful loss or gain, the property must be lost to the owner or the owner must be wrongfully loss or gain, the property must be lost to the owner or the owner must be wrongfully kept out of it. 1 Weir 416 : 3 MHC App 6. Great caution ought to be used in drawing the inference of dishonesty from a breach of duty imposed by civil law. 1 Weir 461 : 6 MHC App 28. In an offence under this section the dishonest intention is an essential ingredient. 30 PR 1879 Cr ; 50 MLJ 94 : 27 Cr LJ 331 : AIR 1926 Mad 99 : 92 Ind Cas 747 ; AIR 1933 Lah 235. A taking under a colour of right under a *bona fide* claim would not be an offence however much the claim turns out to be unfounded. 1933 MWN 246 ; *see* also 38 CWN 474 : 35 Cr LJ 537 : AIR 1934 Cal 425. Loss not essential for an offence under this section. Intention to cause wrongful loss is enough. AIR 1924 Lah 353 : 69 Ind Cas 631. Too narrow interpretation of the word "dishonest" should not be placed leading to substantial injustice. AIR 1933 Pat 554. Mere retention of money is not an offence under this section. 2 CPLR 161 ; 1 Weir 462 ; 17 MLJ 413 ; 16 Cr LJ 543. In a case of criminal breach of trust the over act of the accused showing his dishonesty is essentially necessary to be proved to establish the offence and till the time arrives when the act is done it cannot be said with certainty that the offence was committed. *Lanter* v. *The King*, 1913 *AC* 221 ; *see* also 41 CLJ 280 : 29 CWN 492 : 86 Ind Cas 213 : 26 Cr LJ 725 : AIR 1925 Cal 613. *A* public servant who being entrusted with Government funds for the purpose of constructing a building obtains the materials free of cost, from somebody and appropriates a certain amount to himself as their price, is guilty of criminal breach of trust. 4 Pat 488 : 6 PLT 154 : 86 Ind Cas 459 : 26 Cr LJ 811. In order to establish a charge of dishonest misappropriation or criminal breach of trust it is not necessary that the accused should have actually taken tangible property such as cash from the possession of another and transferred it to his own possession. AIR 1926 Lah 385. Where an agreement is a wager and void under the contract law, a person cannot be convicted under the 2nd part of this section for dishonest use and disposal of entrusted property in violation of express or implied contract if based on such agreement. 100 Ind Cas 989 : 28 Cr LJ 381 : AIR 1927 Mad 425. But in such a case he may be convicted under 1st part of this section. *Ibid.* The trust contemplated by this section & Sec. 406 need not be in furtherance of a lawful object. 23 NLR 106 : 101 Ind Cas 899 : 28 CrLJ 506 : AIR 1927 Nag 225. Where goods are entrusted to the accused for selling and obtaining money which he was to hold for complainant subject to certain deduction the accused was entrusted with the money received. 1928 Bom 521.

Dishonest misappropriation might sometimes be inferred from the circumstances without direct evidence. 2 Cr LJ 478. Where a person makes use of money belonging to another with latter's consent, and contrary to the purpose for which possession thereof has been given by the latter to the former the intention of the person so making use of the money must *prima facie* be dishonest within the meaning of Section 24. AIR 1935 Rang 453 : 1935 Cr C 1210. It is only from the circumstances that intention can be inferred. In case of criminal breach of trust failure to render a satisfactory account on the part of the accused is a circumstance pointing to the guilt of the accused ; AIR 1949 Pat 69 ; AIR 1958 Pat 272 : 1958 Cr LJ 66. Presumption of dishonest intention was made in case of failure to account regarding money received or giving false accounts in AIR 1954 Madh B 21 : 1954 Cr LJ 448 ; Madh BLR 1955 Cr 504 : 1956 Madh BLR 111: Madh BLR 1954 Cr 280 ; Madh BLR 1954 Cr 382 ; Madh BLR 1954 Cr 382.

A matter is *ex facie* a civil dispute should not be entertained by the Criminal Court unless the prosecution is able to prove clearly and beyond doubt that the accused acted dishonestly and with a view to enrich himself clandestinely at the expense of those with whom he was working and with whom he was found by a fiduciary relationship 55 Ind Cas 409. It is not a criminal offence in every case for a pleader to retain fee the legal recovery of which is time-barred. 6 NLJ 119.

Dishonest intention is one of the essential ingredients of the offence of criminal misappropriation and also of the offence of criminal breach of trust. AIR 1959 SC 1390 :

they are received by him on his own behalf and as agent of the firm. They are received by him personally and it does not matter for the purpose of Section 405, that he received them also as agent of the firm. AIR 1951 Kut 66 : 52 Cr LJ 814. The nature, character and incident of partnership property are such that during the subsistence of the partnership there cannot be any entrustment or dominion ; for the partnership property is not a specific ascertainable property and is of so equivocal and problematic nature that it is not suspectible to be used in a manner to bring in to operation Section 405 of the Penal Code. 55 CWN 541 : 52 Cr LJ 723 : AIR 1951 Cal 69.

The distillers who worked under licences granted to them required molasses as raw material, for movement of molasses they obtained permits from the Excise Commissioner ; they paid for molasses as also for the transport of the molasses to the distillers ; they manufactured spirit out of the molasses and sold their spirit to the warehouses or licensed vendors under the terms of the licences granted to them. *Held*, that the property in molasses or any dominion over them was not entrusted to the distillers. 1953 Cr LJ 1289 : AIR 1953 Pat 225 (a mere breach of contract or a breach of the conditions of a permit is not necessarily synonymous with criminal breach of trust). There is no entrustment with the meaning of Section 405, when a payee or the mortgagee receives payment from his debtor or the mortgagor. 1955 *A*ndh LT (Cr) 224 : 1955 *A*ndh WR 537.

There is nothing either in the complaint and/or in the sworn statement of the complainant and the three witnesses that any property was entrusted to any of the appellants at all or the appellants had dominant over any of the properties of respondent No. 2 which they dishonestly converted to their own use so as to satisfy the ingredients of Section 405, IPC punishable under Section 406, IPC. Further the agreement also did not require entrustment of any property to the appellants. Taking the complaint and the statements of the witnesses as they are, it cannot be said even *prima facie*, that the appellants committed any offence punishable under Section 406 IPC, since the ingredients of that offence were not satisfied. *S.N. Palanitkar v. State of Bihar* 2001 Cri LJ 4765 (SC) AIR 2001 (SC) 2960 : 2001(9) JT 151 : 2001(7) Scale 430 : 2001(3) Supreme 216.

Directors are not only agents but in some sense and to some extent are in the position of trustees. AIR 1962 SC 1821 : (1962) 32 Com Cas 699 : 1962 (2) Cr LJ 805.

Once *T* made an application to the Superintendent of Police that one *L* and one *B*, a police sub-Inspector met him on the way and *L* said to *B*, the sub-Inspector that though *T* appeared to be clad in rags he had considerable money after this the person of *T* was searched and the sub-Inspector having opened the bundle of currency notes with *T*, handed them over to L, one by one, for being returned to *T*, but out of the same the amount of Rs. 250/- was not returned. *Held*, as the currency notes were taken by the Sub-Inspector in discharge of his duty for inspection and return he was certainly entrusted with the notes within the meaning of Section 405. 1961 SC 751 : (1961) 1 SCA 593 : (1961) 2 SCR 679 : 1961 (1) Cr LJ 773 ; *see* also AIR 1957 Cal 148 : 1957 Cr LJ 367 (power of police officer to seize property).

For proof of entrustment *see* (1961) 2 Guj HCR 117 : (1961) 2 Guj LR 296 : 1961 (1) Cr LJ 654 ; AIR 1957 Ori 268 : 23 Cut LJ 410 : 1957 Cr LJ 1431 : AIR 1957 Cal 148 : 1957 Cr LJ 367 ; AIR 1957 Madh B 33 : 1957 Cr LJ 179 : AIR WR (HC) 255 ; AIR 1956

Bom 314 : 1956 Cr LJ 979 (a dealing between bank and customer) ; 1957 MPC 334 : 1957 Jab LJ 706 (receipt of money by son on behalf of father an office-bearer of the society) ; AIR 1956 Raj 20 : ILR (1955) 5 Raj 907 : 1956 Cr LJ 107 (giving money to goldsmith for preparing ornaments) ; AIR 1956 Mad 6 : 1956 Cr LJ 71 (employer investing provident fund money in his own business).

For entrustment *see* notes under "scope" *ante.* In criminal breach of trust of property by one spouse against the other, the essential requisite under Section 406 would be wanting. 1983 Chand LR (Cr) 638 : AIR 1982 Punj 372. Entrustment need not be express, it may be implied. 1964 MPLJ 750 : 1978 Cr LJ 1379. The term "entrusted" govern not only the words "with the property" but also the words "or with a dominion over the property. AIR 1965 SC 1463 : (1965) 2 SCR 429 ; *see* also 1974 Cr LJ 413. A mere transaction of sale cannot amount to transaction. AIR 1968 SC 700. In 1956 SCR 483 : AIR 1956 SC 375, it was stated that an entrustment need conform to all the technicalities of the law of trust. *See* also (1967) 70 BLJR 280 ; AIR 1953 SC 478 ; 1972 MLJ (Cr) 656 ; AIR 1961 SC 751 ; 1977 Cr LJ 309 ; 1978 Cr LJ 1379 (being entrusted with the doing of a job is not the something as being entrusted with the property) ; AIR 1953 SC 478 : 1953 Cr LJ 102 : ILR 1953 SC 181 (no question of entrustment of property and he had no subsequent misappropriation or conversion of the property) ; 1981 Cr LJ 259 (entrustment of the property or same kind of trust is required).

Deduction from the wages of the employees for the purpose of crediting the deducted amount to provident fund or a family pension fund, it amounts to entrustment. *State of Gujarat* v *Shyamsunder Radhakisan Mungata,* (1995) 2 GLH 677 (Guj).

When wife driven out from matrimonial home without her *stridhan* property as same not returned to her by husband, it is *prima facie* case of entrustment. *Rashmi Kumar* v. *Mahesh Kumar Bhada,* 1997 (2) SCC 397 : 1996 (11) JT 175 : 1996 (9) Scale 388.

8. Actual abandonment or destruction.—If an article is abandoned it becomes *res nullius,* and there can be no theft or breach of trust. But a very clear distinction is to be drawn between an intention to destroy and to abandon and an actual destruction and abandonment. The very fact that the owner of the property intends to destroy or abandon that property and hands it over to some person to effect those purposes is a clear indication that he still maintains his right as owner of that property and those right subsist until the abandonment or destruction is completed. As long as the destruction or abandonment is not fulfilled and so long as it is still in the hands of the owner to countermand such destruction or abandonment the property is still the property of the owner and taking it out of his possession is theft and improper use of it is breach of trust. AIR 1951 Nag 150. Rice which had become rotten and which had been ordered to be destroyed is not property. 2 CWN 216. *See* (1904) 1 Cr LJ 903 (purchase of the thing is immaterial) but *see* 1894 All WN 197 (condemned pony).

9. Sections 405 and 415.—Property obtained by cheating cannot be capable of being fraudulently converted under Section 405, I.P. Code. The notion of a trust is that there is a person trustee or entrustee, in whom confidence is reposed by another who commits property to him ; this again supposes that the confidence is freely given. A person who obtains property by a trick from another bears no resemblance to a trustee

Accused persons at the point of dagger attempted to loot informant. All the witnesses, who were present and chased and caught hold of the accused have identified them that he was caught red handed while he was committing road robbery and seeing the police he attempted to run away along with his co-accused, but he was arrested on the spot and as such his conviction under Sections 393 and 397 of the Indian Penal Code is well founded and requires no interference by this Court. *Rabindra Chaurasia vs. State of Jharkhand*, 2010 (3) CriLJ 3349 (Jhar).

Where robbers exhibit dangerous weapons in such manner as to intimidate persons robbed and to facilitate robbery, they can be punished under Section 397, even if blows were not actually inflicted. AIR 1938 Mad 477. A robber cannot be convicted under this section merely because one of his associates carried a deadly weapon. 20 Ind Cas 416 : 16 CPLR 97 ; 22 MLJ 186 ; 28 All 404 ; 1 Weir 450 ; 3 LBR 121 : Where no robbery or dacoity has been committed an accused cannot be convicted under this section. 23 All 78 : AWN 1900, 202 ; 2 WR Cr 49. This section applies to a person who himself uses a deadly weapon or causes grievous hurt and when there is no proof that the accused personally used any deadly weapon or caused any grievous hurt, he cannot be convicted under this section. 28 Cr LJ 520 : 102 Ind Cas 216 : 4 OWN 459 ; *see* also 26 Cr LJ 1144 ; 47 All 69. It is only the offender who actually uses the deadly weapon that can be convicted under Section 397. 99 Ind Cas 412. This section can only be used in connection with the appropriate robbery or dacoity section. 98 Ind Cas 181 : 27 Cr LJ 1284 : 5 Bur LJ 103. The word "uses" should be construed with a wide sense so as to include not merely cutting, stabbing, *etc.*, but also carrying the weapon for the purpose of overawing the person robbed. 205 LR 46 : 92 Ind Cas 750.

Where several persons together commit robbery but only one of them carries and uses a revolver he alone can be convicted under this section. 97 Ind Cas 362 : 27 Cr LJ 1098. A conviction on a charge of dacoity merely under this section has no meeting, as the section does not contain any substantive offence but merely prescribes the minimum punishment which can be passed it robbery or dacoity is attended with certain circumstances. 49 All 59 : 85 Ind Cas 714 : 26 Cr LJ 570. The section applies and not Section 398, where dacoity has been committed and dacoits used weapons. AIR 1925 Nag 136. This section creates no substantive offence. 1928 Bom 521. Section 34, has no application in the construction of Section 398. *Ibid.* In order to render Section 307, IPC, applicable it must be established that the offender did such and such an act constituting the offence. 108 Ind Cas 688 : 29 Cr LJ 440. This section does not require the use of a deadly weapon to be against the person robbed. AIR 1941 Mad 718 : (1941) 1 MLJ 695 : 42 Cr LJ 868 : 39 Cr LJ 323 : AIR 1938 Mad 477. Where the accused was arrested more than a week after the date of dacoity with injuries upon their persons which were testified by medical evidence to be gunshot the fact at best may lead to an inference that they were concerned in some transaction in which they received gunshot injuries but that does not lead to the inference that they were present in the village where dacoity took place on the particular night and they received injuries on that night while they were committing the dacoity. AIR 1956 Bom 186 : 1956 Cr LJ 392. This section and the next do not create substantive offences but merely prescribe the minimum punishment for the offence mentioned in these section. 1980 All LJ 635 : 1981 Cr LJ 1340 : 1981 (UP) Cr LR 568. This section only provides for minimum punishment (1982) 84 Punj LR 103 (does not render independently any act of offence).

Before the section is applied, there must be either a dacoity or robbery. 1961 Kar LJ 548 ; (1984) 1 Crimes 815.

Attempt to murder and dacoity.—On perusal of the statement of the complainant though he had not stated anything against the co-accused but by his statement for the involvement of the appellant/accused is found to be proved that he is the person who armed with a country-made pistol tried to cause injury to the complainant and also commit robbery by forcibly taken away the motor-cycle belonging to him. Moreover, the prosecution as discussed herein above also proved the seizure of the looted property, the motor-cycle from the possession of the appellant/accused and in such circumstances offence punishable under Section 307 of IPC and 394 read with 397 of the IPC is fully proved by the prosecution against the appellant.

In such circumstances, for the offence of robbery, the minimum sentence provided with the aid of Section 397 of IPC is of seven years and no grounds are available for any reduction of the aforesaid sentence. *Hariballabh K. Rawat vs. State of M.P.*, 2010 (2) CrLJ 2309 (Gwalior).

When complaint was dismissed as Magistrate found no *prima facie* case—Revision against the same as filed and accused sought permission to defend revision—Permission was not granted. As Magistrate passed order under Section 203, without hearing accused, he could not also be heard by Sessions Court. *M. Thulasidass* v. *K. Govindarajan*, 1995 Cr LJ 1660 (Mad).

Mere attempt to cause grievous hurt to any person or a show of threat would be sufficient to bring home charge against the offender under Section 397. (1988) 1 Crimes 413 (Gau).

It would not be necessary for the witness to further state as to what was the size of the knife to attract the provisions of Section 397, Penal Code. (1988) 34 DLT 1 (Del).

The informant in his examination in-chief of his statement in the trial Court has frankly and candidly stated that since he was in a state of tension and was concerned with his life and safely, he could not visualise as to who was pointing out the knife and kukri, towards him. On the face of this, evidence, it cannot be said that the prosecution has proved that the respondent used a deadly weapon during the robbery and consequently, he cannot be convicted under Section 397, IPC. *State of Maharashtra* v. *Mahipal Singh*, 1996 Cri LJ 2485 (Bom).

2. Uses.—The word "uses" in this section must be construed in a wide sense, so as to include not merely cutting, stabbing, shooting (as the case may be) but also carrying the weapon for the purpose of overawing the person robbed. 6 LBR 41 : 13 Cr LJ 267 : *see* also 35 PLR 555 : 1934 Cr C 838 : AIR 1934 Lah 522 ; AIR 1931 All 367 : 32 Cr LJ 567 : AIR 1933 Lah 35 : 34 Cr LJ 45 ; AIR 1932 Oudh 103 : AIR 1029 Sind 150 ; 1961 Ker LJ 548 : AIR 1956 Bom 353 : 1956 Cr LJ 700. The difference in the wording of the section and wording of Section 398, is noted. AIR 1975 SC 905 : 1975 Cr LJ 775 which weapon will come within the section. AIR 1980 SC 2127 : 1980 Cr LJ 1977 ; (1984) 1 Crimes 216.

What is essential to satisfy the word "uses" for the propound and Section 397, IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to by capable of creating a terror in the mind of the victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be. *Ashfaq* v. *State (Govt. of NCT of Delhi)*, (2004) 1 Crimes 117 (SC) : (2004) 3 SCC 116 : 2004 SCC (Cri) 687 : AIR 2004 SC 1253 : 2004 CR LJ 936.

3. Deadly weapon.—A stick is a deadly weapon. 82 Ind Cas 45. A *dang* is not a deadly weapon. 99 Ind Cas 49 : 28 Cr LJ 17. A *kirpan* is a deadly weapon. AIR 1975 SC 907 : 1975 Cr LJ 778.

Toy pistol is not a deadly weapon whether its impact be on the frightened victim. *Babulal Jairam Maurya* v. *State of Maharashtra*, 1993 Cri LJ 281 (Bom).

Pistol used in robbery not fired.—In the cases of *Manik Shankarrao Dhotre and Ors. vs. State of Maharashtra*, 2008 Cri LJ 1505 = 2008 (2) AIR Bom R 302 and *Shravan Dashrath Datrange vs. State of Maharashtra*, 1998 Cri LJ 1196, are cited for proposition that Section 397 is individual offence; whereas Section 394 is both individual and vicarious. The sentence for offence under Section 397 of the IPC cannot be awarded to those of the members of the group of dacoits who did not use any deadly weapon. A plain reading of Section 397 of the IPC would make it clear that such guilt can be attributed only to that offender who uses any deadly weapon or causes grievous hurt to any person during course of the commission of the robbery.

In this case though revolver/pistol was not fired or other weapon was not used for causing hurt, but threats with revolvers/pistols were given. It has come in evidence that all the accused were armed and threats were given by them to various witnesses as discussed earlier. *Pawan Kumar Sibban Kewat vs. State of Maharashtra*, 2010 (2) CrLJ 1973 (Bom) (Aurangabad).

Whether possession of knife or seeing it in hands of some of culprits would not be sufficient to attract provisions of Section 397, IPC. The offender must have used a deadly weapon. The word used may also include showing of blades of knife in a menacing way so as to give threat or cause fear in mind of victim. *Rajkumar Bhikram Dhobi* v. *State of Maharashtra*, (1994) 2 Crimes 467 (Bom).

Robbery by using deadly weapons. The sentence for offence u/S 397 of the IPC cannot be awarded to those of the members of the group of dacoits who did not use any deadly weapon. A plain reading of Section 397 of the IPC would make it clear that such guilt can be attributed only to that offender who uses any deadly weapon or causes grievous hurt to any person during course of the commission of the robbery. The provision postulates that only the individual act of accused will be relevant to attract Section 397 of the IPC. In other words, the provision inevitably negates the use of the principles of constructive or vicarious liability engrafted under Section 34 of the IPC. In the present case complainant did not pin point who amongst the applicants assaulted him by means of a sword-stick. Consequently, the conviction of the applicants for offence u/S. 397 of the IPC is not legal and proper. The dangerous weapons i.e. the sword, kukri and sword-stick were found in the Maruti van used by accused persons. The possession thereof could not be attributed to any individual accused. Under these circumstances, the conviction of the accused for offence u/S 4 read with Section 35 of the Indian Arms Act is also improper and illegal. The only order of conviction and sentence which will have to be upheld is, therefore, one u/S 395 of the IPC. *Manik Shankarrao Dhotre and Ors. v. State of Maharashtra*, 2008 CriLJ 1505 (Bom)

Sec. 397 negates use of principles of vicarious liability under Sec. 34.—The sentence for offence u/S 397 of the IPC cannot be awarded to those of the members of the group of dacoits who did not use any deadly weapon. A plain reading of Section 397 of the IPC would make it clear that such guilt can be attributed only to that offender who uses any deadly weapon or causes grievous hurt to any person during course of the commission of the robbery. The provision postulates that only the individual act of accused will be relevant to attract Section 397 of the IPC In other words, the provision inevitably negates the use of the principles of constructive or vicarious liability engrafted under Section 34 of the IPC In the present case complainant did not pin point who amongst the applicants assaulted him by means of a sword-stick. Consequently, the conviction of the applicants for offence u/S. 397 of the IPC is not legal and proper. The dangerous weapons i.e. the sword, kukri and sword-stick were found in the Maruti van used by accused persons. The possession thereof could not be attributed to any individual accused. Under these circumstances, the conviction of the accused for offence u/S 4 read with Section 35 of the Indian Arms Act is also improper and illegal. The only order of conviction and sentence which will have to be upheld is, therefore, one u/S 395 of the IPC *Manik Shankarrao Dhotre and Ors. v. State of Maharashtra*, 2008 CriLJ 1505 (Bombay).

4. Permissibility of conviction with assistance of Section 34.—The provisions postulates only the individual act of the accused to be relevant to attract Section 397. IPC and thereby inevitably negates the use of the principle of constructive or vicarious liability engrafted in Section 34. *Ashfar* v. *State (Govt. of NCT of Delhi)*, (2004) 1 Crimes 117 (SC) : (2004) 3 SCC 116 : 2004 SCC (Cri) 687 : AIR 2004 SC 1253 : 2004 CR LJ 936.

5. Such offender.—The words "such offender" in this section mean any offender who uses a deadly weapon and no other. 3 LBR 121 : 3 Cr LJ 954 ; 62 Ind Cas 865 : 72 Ind Cas 517 ; 51 Cal 266 ; 7 Mys LJ 169 : 81 Ind Cas 800 : 52 Bom 168.

6. Joint-liability.—Section 397 does not provide for joint liability as in Section 149 does. AIR 1935 All 132 ; but *see* AIR 1933 Lah 104 : 68 Ind Cas 817.

The liability under Section 397 IPC is individual and not constructive. *Shravan Dashrath Datrange* v. *State of Maharashtra*, 1997 (2) Crimes 47 (Bom).

7. Sentence.—Under Section 397, a lesser sentence must be enhanced to seven years' rigorous imprisonment. 29 Cr LJ 35 : 9 PLT 572 : 106 Ind Cas 451. The highest punishment under Section 397, can be inflicted only on the offender who actually uses a deadly weapon. 13 Bur LT 148 : 22 Cr LJ 593 : 10 LBR 269 : 62 Ind Cas 865 ; *see* also AIR 1933 Nag 252 : 1933 Cr C 936. Section 34 has no application to provisions of Section 397. 130 Ind Cas 267 : 1931 Cr C 145 : 33 Cr LJ 476 : AIR 1931 Pat 49. The use of a deadly weapon by one of the offenders at the time of committing robbery cannot attract Section 397, for imposition of minimum sentence on another offender who had not used any deadly weapon. AIR 1975 SC 905 : 1975 Cr LJ 778 ; *see* also AIR 1983 SC 654 : 1983 Cr LJ 1043 (benefit of Probation of Offenders Act) ; AIR 1981 SC 644 : 1981 Cr LJ 162 (mitigating circumstances for remitting or reducing the sentence).

Appellant committed robbery causing grievous hurt to PW 1. Hence, there is no hesitation in confirming conviction. But considering age of appellant the Rigorous Imprisonment is reduced. *Mahendranath Parida* v. *State*, (1995) 1 CCR 777 (Ori).

Death sentence—Rarest of rare cases. The murders were not only cruel, brutal but were diabolic. The High Court has held that those who were guilty of rape and murder deserve death sentence, while those who were convicted for murder only were to be awarded life sentence. The High Court noted that the whole incident is extremely revolting, it shocks the collective conscience of the community and the aggravating circumstances have outweighed the mitigating circumstances in the case of accused persons; but held that in the case of others it was to be altered to life sentence. The High Court itself noticed that five members of a family were brutally murdered, they were not known to the accused and there was no animosity towards them. Four of the witnesses were of tender age, they were defenseless and the attack was without any provocation. Some of them were so young that they could not resist any attack by the accused. A minor girl of about fifteen years was dragged in the open field, gang raped and done to death. There can be no doubt that the case at hand falls under the rarest of rare category. There was no reason to adopt a different yardstick. In fact, main accused assaulted witness and took the money from the deceased.

Above being the position, the appeal filed by the accused persons deserves dismissal, which we direct and the State's appeal deserves to be allowed. Accused are also awarded death sentence. In essence all the six accused persons deserve death sentence. *Ankush Maruti Shinde vs. State of Maharashtra*, AIR 2009 SC 2609 : 2009 (6) SCC 667 : 2009 (6) JT 358 : 2009 (7) SCR 182 : 2009 (6) Scale 388 : 2009 (3) Supreme 760 : 2009 (4) SLT 470.

Robbery with attempt to cause grievous hurt. *Conviction under Section 397 only.* Mistake to mention Section 394, effect of.

The High Court held that since he was acquitted in the said case the arrest of Ilyas becomes doubtful and the defence version that he was not arrested as stated by the prosecution but was arrested from his house is believable. It was, therefore, concluded that the accused was shown to the witnesses. It was also pointed out that Section 397 is not a substantive offence and the accused could not have been convicted under Section 397 only but could have been convicted under Section 394 read with Section 397. As the conviction has been recorded under Section 397 and the use of the weapons was not fully established, the respondent is entitled to acquittal.

The conclusions arrived at by the High Court are absolutely sketchy. It came to abrupt conclusion that the accused must have been shown to the witnesses. There is no foundation to such a plea. First Information Report was lodged under Section 394 IPC and charge was accordingly framed. Because of the use of deadly weapon, the trial Court convicted the accused under Section 397 IPC. The trial Court have altered the charge, but that was not done. The High Court could have altered the conviction and imposed adequate sentence. There was no prejudice involved.

Since the High Court's reasonings were perverse the impugned judgment is set aside. However, the respondent is convicted for offence punishable under Section 394 IPC for which he was originally charged. He is sentenced to undergo rigorous imprisonment for 5 years. He shall surrender to custody forthwith to serve the remainder of sentence. The appeal is allowed to the aforesaid extent. *State of Uttar Pradesh vs. Ilyas*, AIR 2009 SC 1145 : 2009 (1) SCC 365 : 2008 (13) JT 197 : 2008 (15) SCR 142 : 2008 (15) Scale 142 : 2008 (9) SLT 717.

Appellant and other convicted accused persons came to prosecution-witnesses an demanded Rs. 50,000/- when demand not met appellant fired with pistol—The accused were chased and apprehended and no injury to prosecution-witnesses nor an money given offence under Section 397, read with Section 511, proved and not unde Section 397, simpliciter—Sentence of 10 years' imprisonment reduced to 5 years unde Section 3, of the Act. *Sukhwinder Singh* v. *State of Punjab*, 1994 Cr LJ 1117 (SC) (1994) 5 SCC 152 : AIR 1994 SC 764 : 1994 UP Cr R 548 : 1994 All Cr Cas 552.

8. Procedure.—Cognizable—Warrant—Not bailable—Not compou-ndable—Triabl by Court of Session.

9. Charge.—I (*name and office of Sessions Judge, etc*), hereby charge you (*name c the accused*) as follows :—

That on or about the........day of.......at.........you committed dacoity (or robbery and that at the time of committing the said dacoity (or robbery) you used a deadl weapon, to wit....... (*mention the deadly weapon*), *or caused grievous hurt to AB*, (o attempted to cause death or grievous hurt to AB), and thereby committed an offenc punishable under Section 397, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

10. Conviction.—Dacoity with attempt to cause death was the charge but n evidence showed that room where Test Identification Parade was held was totall secluded from police station and it could be said that the police had not obliterate themselves from identification parade. The complainant's evidence, that accuse entered his shop and showing them arms like chopper and revolver had looted them was very much insufficient to inspire confidence and was discarded. In thes circumstances the conviction of accused was held not proper. *Sadashiv Krishna Setty* v *State*, 2003 Cr LJ 3590 (Bom) : 2003 ( ) All MR (cri) 1738 : 2003(4) Rec Cri R 533.

Gang Rape and Robbery.—Accused persons compelled prosecutrix to enter insid structure called Khooni Darwaja and robbed her and thereafter appellant accuse raped her by stripping her and continuously threatened her with knife. Testimony o prosecutrix, truthful and reliable.

The injuries on the body of accused MLC have not been explained by accused an the said injuries also suggest that accused had knelt on a hard surface and ha pressed his knees. This would have happened if accused either exercised by shifting hi weight on his knees or indulged in sexual intercourse with a girl lying below. The injur on the right cheek of accused has not been explained by him.

The report shows that the DNA fingerprint isolated from the blood sample o accused matched the fingerprints isolated from the sanitary pad.

This Court need to note no further *qua* his involvement in the crime of criminall intimidating prosecutrix using a knife to rob her and thereafter raping her. *Amit vs State*, 2010 (3) Cri LJ 3154 (Del).

The finger-print on torch found from scene of occurrence on comparison found t be of A-1. This finds support from version of the prosecution-witnesses. The recovery o cartridges from scene of occurrence and the revolver recovered from the possession o A-1, finds support from version of prosecution-witnesses. Conviction upheld. *Mukesh* v *State of Haryana*, (1995) 3 CC Cases 102 (P & H).

There were consistent evidence that informant was in possession of land and had raised the crop. It was on petitioner to prove that they had raised the crop which they had failed to discharge. Hence, conviction cannot be interfered. *Gurubandhu Bhatra* v. *State*, (1994) 2 Crimes 474 (Ori).

The accused entered the field of informant causing injuries to persons present there and committed robbery of harvested crops. Statement of injured witnesses was corroborated by medical evidence but injuries on person of accused were simple and were self inflicted. Conviction of accused under Section 395/397 was held proper. *Inder Singh* v. *State*, 2003 Cr LJ 3434 (All) : 2003 All LJ 1643 : 2003(46) All Cri C 897 : 2003(2) All Cri R 985.

11. Acquittal.—Evidence of one prosecution-witness implicating' appellant besides others not corroborated by other prosecution-witness who had not seen appellant alongwith dacoits. There were inconsistency in evidence—Not safe to rely on evidence implicating appellant and no dependable evidence to connect him in commission of crime—Conviction was held to be not sustainable. *Ratkanta Paramanik* v. *State*, (1994) 3 Crimes 372 (Ori).

Stolen property recovered from accused's house and—Accused was living in joint family—Possession was not established. Benefit of doubt was given. *Sukhdev* v. *State of Haryana*, (1994) 1 Recent CR 404.

12. Identification.—Where accused was identified—But not during trial—Identification parade has no some credentiary value. Identification is, must, in the Court during trial. *Khairatilal* v. *Union Territory of Chandigarh*, (1994) 2 Recent CR 86 (P & H).

13. Circumstantial evidence.—When two accused persons are proved to have committed robbery and murder in one and same transaction and subsequently stolen properties were recovered from them, both robbery and murder is presumed to have been committed by both accused persons and hence their conviction is proper. *Mukund @ Kundu Mishra* v. *State of M.P.*, 1997 (4) Supreme 359.

We would take up the first circumstance. The witness Alwarsamy (PW-4), in his evidence, very clearly admitted that he was not on the talking terms with Thilagavalli, who was none else, but his own sister. At the time when he saw the accused, he (Alwarsamy) was accompanying his real elder brother, namely Ramasubbu. The prosecution did not bother to examine Ramasubbu, though his statement was also recorded. It has come in the cross-examination of this witness that he attended the funeral, though he was on cross terms with the family of the deceased and during the whole funeral, the accused was actually present.

What surprises us is that in spite of this, this witness did not say anything either to the husband of Thilagavalli or even to the Police and his statement was not recorded for good long three days. Now, if the witness had seen the accused following Thilagavalli and he also knew about the violent death of Thilagavalli, and had seen the accused at the funeral, one wonders as to why the witness kept quiet without telling it to anybody. As if this is not sufficient, the Investigating Officer was specifically asked the question as to why these witnesses were not examined by him. The Investigating Officer has admitted that he could not give any reason for not examining any of these witnesses on the same day. He also claimed that the Investigating agency had suspected the accused only after the examination of Alwarsamy and Ramasubbu. It is an admitted position that the statement of these witnesses were not recorded. It was obvious, therefore, that the delay in recording the statement of these witnesses and the stony silence maintained by Alwarsamy would make him an extremely unreliable witness. In our opinion, the Trial, as well as, the Appellate Court have not given the due weight to this weighty circumstance. The Appellate Court has almost apologetically observed that the prosecution would have done better by examining Alwarsamy without any waste of time. However, the Appellate Court chose to accept his evidence. Unfortunately, the Appellate Court has not even applied its mind to the circumstance that according to this witness, the accused was present in the funeral. That crucial circumstance seems to have been escaped the notice of the Appellate Court. Ordinarily, we would not discuss the evidence in our appellate jurisdiction, however, when it is found that the crucial circumstances have escaped the notice of the Appellate Court and/or the Trial Court, this Court would consider the evidence lest any injustice is caused. In our opinion, the evidence of Alwarsamy should not have been believed. This takes care of the first circumstance.

When we see the Inquest Panchanama it is apparent that there was one ear stud on the body of the deceased. Therefore, this gives a shattering blow, firstly to the evidence of Subbiah and secondly, to the credibility of the investigating agency. As if this is not sufficient, when the accused was arrested about 12 days after the incident he is said to have confessed that he had sold "one" ear stud in the shop of Shankar. When we see the evidence of Shankar it comes out that the witness said that the accused had come to sell an ear stud, but he had refused to buy, as it was only one piece of ear stud out of the pair that accused had offered to sell. He, therefore, says that he gave one pair of ear stud to the investigating agency, which pair ultimately has come up before the Court as Material Object.

This slip-shod evidence, therefore, is very hopelessly insufficient in establishing the fact that the so-called ornaments belonged to and were on the person of Thilagavalli. We do not know what was the public prosecutor doing at the time of the examination-in-chief and why he did not confront the witness on these ornaments. We do not know as to how the Trial Court permitted these questions in re-examination. The purpose of the re- examination is only to get the clarifications of some doubts created in the cross examination. One cannot supplement the examination-in-chief by way of a re-examination and for the first time, start introducing totally new facts, which have no concern with the cross examination. The Trial Court has obviously faulted in allowing such a re-examination. Be that as it may, even if we accept that the Trial Court was justified in allowing the re-examination, the evidentiary value of the contents of the re-examination, in our firm opinion, is nil.

As regards the fourth circumstance, we think that it was for prosecution to explain the fracture suffered by the deceased. Even otherwise that circumstance is extremely insignificant.

It has also come in evidence that the accused was a known person to his family members. One wonders as to why would the accused whom the deceased knew would venture to rob her. Motive of robbery does not seem to be present in the present case. The absence of motive in a case which depended on circumstantial evidence is more favourable to the defence.

The jacket on the person of the accused was said to have had human blood. In our opinion, this circumstance is insignificant, particularly because the blood group is not tested upon and secondly, it is actually absurd thing that the accused would keep on wearing the same blood stained clothes for 12 days. In short, we are of the clear opinion that both the Courts below have erred in convicting the accused of the offences under Secs. 302 and 392 read with Sec. 397 of IPC. *Pannayar vs State of Tamil Nadu by Inspector of Police.*, 2009 AIR SCW 5608 : 2009 CrLJ 4454 (SC) : AIR 2010 SC 85.

Independent witness. The accused were amongst others accused, who committed dacoity at the residence of Lallukhan and looted property from his house. The prosecution witnesses identified the accused appellants came at the residence of Lallukhan and committed dacoity. Witnesses stated that Liyakat snatched wrist watch and Rs. 2,500/- from him. Wrist watch recovered from Liyakat was identified by Lallukhan belonging to him. From the bare perusal of the statements of the prosecution witnesses mentioned above, it is clear that the prosecution has been able to prove the case against the accused appellants beyond reasonable doubt for the offences charged against them. Accused Liyakat was arrested and on the basis of information given by him under Section 27 of the Evidence Act wrist watch was recovered from him Lallukhan proved and identified that the wrist watch recovered from Liyakat belonged to him. The arrest memo and recovery memo were proved by the independent witness.

The prosecution has been able to prove case beyond reasonable doubt against the accused for the offences under Sections 3 and 25 of the Arms Act. and they have been rightly convicted and sentenced under Section 3/25 of the Arms Act. I am in agreement with the findings recorded by the trial Court for the offences under Sections 395, 397, IPC against the accused and for Sections 3 and 25 Arms Act against the accused appellant. *Ramzan and Anr. vs. State of Rajasthan*, 2010 (3) CrLJ 2607 (Raj).

Eye witness—Circumstantial evidence. Accused murdered deceased and committed robbery her gold ornaments. Eye witness who saw violent death of deceased, kept quite about incident. Delay in recording his statement. We would take up the first circumstance. The witness Alwarsamy (PW-4), in his evidence, very clearly admitted that he was not on the talking terms with Thilagavalli, who was none else, but his own sister. At the time when he saw the accused, he (Alwarsamy) was accompanying his real elder brother, namely Ramasubbu. The prosecution did not bother to examine Ramasubbu, though his statement was also recorded. It has come in the cross-examination of this witness that he attended the funeral, though he was on cross terms with the family of the deceased and during the whole funeral, the accused was actually present.

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Sole testimony of injured witness. In the present case complainant was driving a car when the incident took place. He was near red light. It is not the plea of the appellants that there was no sufficient light for injured complainant to see the accused persons. The road on which the incident took place is one of the main roads of city and is a well lit road. The victim had sufficient and good opportunity to see the accused persons since, one accused came to the window of the driver seat, opened the door and asked him to move aside, the other accused entered from the left and he was sandwiched between the two accused persons. The three accused on back seat of the car were holding knives and his briefcase, containing cash and other papers. The victim was being pointed and threatened with knives. His wrist watch and money was removed by the accused. He saw three accused taking his briefcase and sitting on the rear seat. Complainant had begged for his life from the accused persons. The incident was not committed in a lightening manner and the complainant had received injuries and got good time to see the accused persons. If a witness had sufficient time to see assailants and even has with the assailants and got injured at the hands of the assailants, who had come to rob him, the faces of the assailants gets engraved in the memory of the victim due to the gravity of incident and injuries he gets at the hands of the accused persons and it is not easy for him to forget those who put his life in danger, caused injuries to him and robbed him. There is nothing unnatural if a victim identifies his tormentors or the robbers at a later stage during trial. Such an identification cannot be doubted because the person who is identifying has suffered at the hands of the appellants. Here the complainant was truthful and the person whom he had not seen during the incident was not identified by him in the Court, despite police having made him the accused and only those five were identified by him who were actually involved and had robbed him at knives points. Conviction of accused persons on sole testimony of complainant, proper. *Vinod Kumar and Ors. v. State*, 2007 CriLJ 2861 (Del).

14. Injuries.—Accused attacked deceased and injured with chopper and removed ornaments from body of deceased. The ferocious attacks on the victims, the number of injuries inflicted and the manner in which it was inflicted and the gravity of those injuries would clearly reveal the intention or motive of the accused. At any rate his acts cannot escape falling either under Clause 3 or Clause 4 of Section 300 IPC. The Court below is, therefore, perfectly justified in holding him guilty of offence punishable under Section 302 IPC. *Rijo vs. State of Kerala*, 2010 (2) CriLJ 1315 (Ker).

* * * * *

Sec. 398. Attempt to commit robbery or dacoity when armed with deadly weapon.—If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

Synopsis

1. Scope 2544
2. Procedure 2544
3. Charge 2544
4. Acquittal 2544

1. Scope.—To support a conviction under this section, it is necessary to prove that at the robbery the accused was armed with a deadly weapon, and not merely that one of the robbers who was with the accused at the time carried one. Rat Un Cr C 797 : Rat Un Cr 921 : 11 Ind Cas 1004 ; 23 All 78 ; 6 LBR 41 ; 1923 Lah 66 : AIR 1941 Mad 489 : ILR 1941 Mad 592 : 42 Cr LJ 821. Expression 'uses a deadly weapon' includes the carrying of a weapon for the purpose of overawing any person robbed as contemplated by the expression 'armed with deadly weapon' in Section 398, IPC. 66 Punj LR 173. Section 398, IPC, does not create any substantive offence. It only regulates the measures of punishment when certain facts are found to exist in the commission of the substantive offence which is robbery. 30 Bom LR 88 : 52 Bom 168.; AIR 1933 Lah 66. This section does not apply to a case in which robbery has been actually committed. 139 Ind Cas 742 : 33 Cr LJ 926 : 7 Luck 543 : AIR 1932 Oudh 103. Section 34 has no application in construction of Section 398. AIR 1928 Bom 59 : 29 Cr LJ 383 : 30 Bom LR 88 : 52 Bom 168. A man cannot be convicted of abetting an offence under Section 398. AIR 1926 Rang 207 : 5 Bur LJ 103 : 27 Cr LJ 1285 : 98 Ind Cas 181 ; AIR 1952 Vindh Pra 42 : 1952 Cr LJ 986. This section refers to an attempt to commit a robbery or dacoity. This section applies to the stage of attempt and not to that of preparation. 49 Cut LT 222. The conviction of accused was passed under Section 399, though they were charged under Section 398, is not illegal. (1980) 49 Cut LT 222 : ILR (1980) 1 Cut 606.

On careful reading of the evidence of, it could be seen that their evidence is not consistent with the allegations in the complaint. Further, though complainant P.S.I. has stated in his evidence that he secured the presence of panchas at the scene of offence itself and seized from the possession of accused panchas knives, the said panchas have not been examined to prove the seizure of knives under the panchanama have not stated anything about the Police apprehending the accused at the scene of offence itself and seizing from the person of accused, the two knives. Though it is alleged that the said four persons were holding knives and clubs also, no club is said to have been seized from any of the accused. Besides this, no evidence whatsoever is placed on record by the prosecution to establish that knives said to have been seized from the person of accused were deadly weapons so as to attract the penal provisions of Section 398 IPC. *Arun Anthony Swamy vs. State of Karnataka*. 2010 (2) CrLJ 1948 (Karn).

2. Procedure.—Cognizable—Warrant—Not bailable—Not. Compoun-dable—Triable by Court of Session.

3. Charge.—Form same as in Section 397, with the following alterations :—

In the third line for "committed", substitute "attempted to commit" and the fourth line for "committing" substitute "the attempted committing of".

4. Acquittal.—Where prosecution was for offence under Section 398, IPC, occurrence was not eye-witnessed—Identification parade was not reliable—Conviction was held to be not sustainable. *Rqjesh* v. *State of Rajasthan*. (1994) 1 CCR 483 : 1994 RC 293 (Raj).

Sec. 399. Making preparation to commit dacoity.—Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Scope 2545
2. Procedure 2548
3. Charge 2548
4. Acquittal 2548
5. Sentence 2549

1. Scope.—In order to commit the offence of preparation, it is not necessary that the prisoners should have done an overt act towards the commission of the dacoity. What the law contemplates is that they should have done some act to get ready for a dacoity, and the collection of men from different villages, coupled with the collection of arms, sufficiently proves the required preparation. The mere assemblage to commit dacoity does not amount to preparation, but when it is found, that the members of the gang had taken into their possession instruments breaking and arms for the offensive and defensive purposes and they actually proceeded to a place near the scene of contemplated dacoity, and offence under this section has been contemplated. 6 PR 1916 Cr : 34 Ind Cas 100 ; 4 DLR (Simla) 154 : AIR 1949 East Punj 340. In order to constitute the offence of preparation to commit dacoity some act amounting to preparation must be proved. Apart from this, it should also be proved that the act for which preparation was made was dacoity. Under Section 402 assembly of five or more is needed to establish a charge of dacoity but in instant case only three accused persons were arrested by the police while they were attempting to commit the dacoity. It was held that accused could not be convicted under Section 399/402. *Asgar* v. *State*, 2003 Cr LJ 1997 (Raj) : 2003(2) Cur Cri R 384 : 2003(1) Raj LR 564 : 2003(2) Raj LW 1209. The offences of commission of dacoity, preparation for it and assemblage for the same purpose, have this in common, that they presume an intention or agreement to commit dacoity by five or more persons. A mere assembly without further preparation is not a preparation within the meaning of this section, for if it were Section 402, would be redundant. 41 Cal 350 : 18 CWN 498 ; *see* also 71 Ind Cas 360 ; 81 Ind Cas 168 : 22 ALJ 1028. The mere "assemblage" to commit dacoity does not amount to "preparation" within the meaning of Section 392, Penal Code. 9 Lah 550 : 109 Ind Cas 593 : 29 Cr LJ 577 : AIR 1928 Lah 193 ; 6 PR 1916 Cr : 17 Cr LJ 280 : 34 Ind Cas 1000 ; 158 Ind Cas 500 : 8 PR 173 : 36 Cr LJ 1384 : 1935 Cr C 990 : AIR 1935 Rang 294 : 1952 Cr LJ 1119 : AIR 1953 Punj 269. *See* also AIR 1943 Pat 82 : 44 Cr LJ 337 : where preparation and attempt have been distinguished. AIR 1943 Pat 82 : 44 Cr LJ 337. Where a number of persons assembled at the scene whereat dacoity was contemplated and one of them armed himself with a gun in order to prevency any arrest being made, *held*, that there was sufficient material to constitute an offence under this section. 97 Ind Cas 745 : 27 Cr LJ 1161 : 8 Lah LJ 460 ; *see* also AIR 1935 Oudh 471 : 36 Cr LJ 1003 : 1935 OWN 770 : 156 Ind Cas 815 : 1935 Cr C 1145. Mere proposal for committing dacoity do not make persons liable under Section 399 or Section 402. 17 Cr LJ 97 : 32 Ind Cas 833. Act of persons hiding near a village armed with gun. constitute preparation for committing dacoity. 8 LLJ 406 : 27 PLR 752 : 27 Cr LJ 1161 : 97 Ind Cas 745. The onus is on the prosecution under Section 399, to show there was intent to commit dacoity. 16 Cr LJ 745 : 17 Bom LR 906 : 31 Ind Cas 345. Where persons from long distances come in company with dacoits the inference is that they belonged to party of dacoits. AIR 1953 Oudh 53 : 1933 Cr C 93 : 34 Cr LJ 101. Proof of participation in more than two dacoities within comparatively short space of time is necessary to prove existence of gang. ILR 1962 AP 96 : 1963 (2) Cr LJ 121 : AIR 1963 AP 314.

The present section is one of the few exceptions to the general rule. (1980) 49 Cut LT 222. The conspiracy is to be proved first, thereafter, any step taken with the intention and for the purpose of forwarding that design will be a preparation punishable under this section. 1982 Cr LJ 449 : (1982) 21 Del LT 26. Preparation in Section 399, devising or arranging means essential for the purpose of commission of the offence of dacoity in respect of which determination to commit the offence exists. AIR 1952 SC 1809 (any stage antecedent to such determination would not ordinarily amount to preparation).

There is manifestly a distinction between the offence under Sections 399 and 402. The offence under Section 402, is complete as soon as five or more persons assemble together for the purpose of committing a dacoity. Preparation for committing a dacoity may take place before or after the dacoits assemble. AIR 1960 Pat 582 : 1960 Cr LJ 1650. Section 399, is attracted when some additional step is taken in the course of preparation. AIR 1960 Punj 482 : 62 Punj LR 156 : 1960 Cr LJ 1234. No overt act, in addition to preparation need be proved for showing the purpose. 1960 All Cr 163 : 1960 ALJ 277. The circumstantial evidence was not in any manner consistent with innocence of the accused and it unambiguously showed that within all human probability they had embarked on the enterprise of dacoity. They had prepared themselves for the crime and had assembled for committing it. They were, therefore, guilty under Sections 399 and 404. AIR 1959 All 727 : 1959 All Cr R 312 : 1959 Cr LJ 1274 : AIR 1956 All 464 : 1956 Cr LJ 956 : 1956 All LJ 853. The presence of at least five persons taking part in robbery is an essential ingredient of dacoity and indeed, is the one ingredient which distinguishes it from simple robbery. It is clear that in Sections 365 and 396, Indian Penal Code, and in offences under Sections 397 and 398, where the charge is that the accused has actually taken part in a dacoity, this ingredient of at least four other persons having the common intention must be present before there can be a conviction. In Section 402, which makes punishable the act of assembling for the purpose of a dacoity, the section itself makes it clear that the above ingredient must be present. What is punishable under Section 399, is the making of any preparation for the committing of any dacoity. AIR 1958 25 : 61 CWN 856 : ILR (1958) 1 Cal 447 : 1958 Cr LJ 25 ; AIR 1954 Kutch 1 : 1954 Cr LJ 366.

Mere assemblage for the purpose of commission of the dacoity is a distinct offence punishable under Section 402, of the Penal Code. Hence, such assemblage cannot be deemed to be preparation for the commission of a dacoity punishable under Section 399, of the Penal Code. AIR 1951 All 452. The natural inference from the fact that the accused were found assembled in the dark night inside a grove, some furlongs away from the village *abadi*, and far from their own homes, with two guns and a pistol and a lot of cartridges would be that they assembled there for the purpose of the commission of a dacoity. 1951 ALJ 466. In a case under Section 399, it is not necessary for the prosecution to prove that the intention of the accused was to commit dacoity in the house of a particular person of a particular village. AIR 1960 Pat 582 : 1960 Cr LJ 1650. Similarly it is not necessary to prove causing of actual injury (AIR 1960 Punj 482 : 1960 Cr LJ 1234) or recovery of home breaking implements. (AIR 1959 All 727 : 1959 All Cr R 312 : 1959 Cr LJ 1274. On facts it was held that accused had assembled together for the purpose of committing dacoity but in the absence of any evidence about preparation for committing the dacoity, the accused can safely be found to be guilty under Section 402, and not under Section 399. AIR 1973 SC 488.

It must be proved that there were persons who had conceived the design of committing dacoity. After the proof of such conspiracy any step taken for the purpose of forwarding that design will be preparation punishable under the section. 1982 Cr LJ 449 : (1982) 21 Del LJ 26 : 1969 All LJ 982 : 1962 (1) Cr LJ 3 (deduction to be made for facts and circumstances of each case) ; When offence would come under Section 120 B, and Section 399. (1972) 38 Cut LT 50.

For proof and evidence *see* AIR 1978 SC 1412 : 1979 Cr LJ 1090 and *Chhatey Singh v. State* , 2005 Cr LJ 1015 (All.).

The purpose of assembly or of the preparation was the commission of dacoity is, therefore, an essential ingredient to be proved by the prosecution. 1960 AWN (HC) 210. It must be held that the contrary judgments in the same occurrence should not be allowed to stand and all accused are to be acquitted. 1983 (1) Crimes 407. For the relative scope of Sections 399 and 402, *see* 62 Punj LR 196 : AIR 1960 Punj 482 : 1982 Cr LJ 29 : (1981) 83 Punj LR 426 (Section 402, is mere assembly without other preparation while Section 399, contemplates some additional step towards preparation) : *see* also 1973 All Cr R 398 : 1978 Cr LJ 877 and 1982 Cr LJ 499 : 1979 Cr LJ 1090 : AIR 1979 SC 1412 ; 1979 Cr C 46 ; 1979 UP Cr C 48.

No conviction can be recorded under Section 399 or Section 402, simply on the basis of the fact that a certain number of persons, some being armed are apprehended at a platform of a railway state. 1978 Cr LJ 877 : 1983 (1) Crimes 821 ; *see* also AIR 1962 All 10 (charge under Sec. 402, covered the ingredient of Secs. 147 & 148, 3 IPC).

Where in pursuance of information the police was successful to apprehend four out of five accused, one of course managed to escape and from their personal search deadly weapons were recovered. The essential ingredient of offence under Section 300, IPC, is made out. Hence, there was infirmity in the order. *Dalip Kumar* v. *State (Delhi Administration)*, (1994) 3 CC Cases 152 (Del).

The accused were convicted for having assembled in the orchard for the purpose of committing dacoity in the village. The police party raided the place on information furnished by an informant and arrested the accused. It was observed that prosecution failed to prove that appellants along with other companions had assembled at that lonely orchard for purpose of committing dacoity and not for any other purpose. Mere possession of fire-arms could not be sufficient to prove that they intended to commit dacoity and not any other crime. *Held*, that opposition failed to prove charge under Section 399, or under Section 402, against appellants. 1987 Cri LJ 1391 (Pat). punishable under Section 406. They could not take plea that they were bankers, that deposits created only the relationship of debtor and creditor and that they were not to be proceeded under criminal law. 1987 Cri LJ 2009 (Ker).

Lone person found in a lonely place charge of preparation for dacoity not proved. Accused was found seated in a lonely place in the night. Firearms, bombs and a *Bhiyali* were seized from him. *Held*, charge was not proved. 1986 Cr LJ 1031.

In order to bring the case within purview of Sections 399 and 402, it is incumbent upon prosecution to prove beyond reasonable doubt that accused persons were making preparation for committing dacoity and that they assembled there for. Further under Section 402, IPC, the number of dacoits should be five or more. *Chhotey* v. *State*, 1995 (32) ACC 125 (All).

When charges were framed under Sections 399/402, IPC—Petition under Sections 397/401 read with Section 482, Cr PC against the order. On apprehending the accused and their personal search revealed recovery of deadly weapon. Hence, all the ingredients of Section 399, IPC, is made out. Hence, no infirmity in order. *Dalip Kumar* v. *State*, (1995) 1 East Cr C 38 (Del).

2. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable—Triable by Court of Session.

3. Charge.—"I, (*name and office of the Sessions Judge, etc.*), hereby charge you (*name of the accused*), as follows :—

That on or about the..........day of..........at...........you made preparation by...... (*specify the act*) for committing dacoity and thereby committed an act punishable under Section 399, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

4. Acquittal.—The very commencement of prosecution story appears unnatural and improbable. Further police avoided presence of public witnesses the story of actual arrest was also not trustworthy. In the circumstances conviction and sentences are set aside and appellant acquitted. *Ram Lal* v. *State*. 1994 (31) ACC 699 (All).

There was not an iota of evidence to suggest that accused were devising or arranging means or measures necessary for commission of an offence of dacoity. It was also not established that they had assembled at the place for committing dacoity. In view of this and going through at the time of reasoning adopted by trial court cannot escape the conclusion that conviction under Sections 399 and 401, IPC, deserved to be quashed and accordingly quashed. *Khyali* v. *State of M.P.*, 1994 Cr LR (MP) 45.

When raid was undertaken on secret information that dacoits will be committing dacoity and—Two public witnesses associated with the raid—One not produced in evidence—Other also not inspiring confidence. Interference warranted in the order of acquittal. *State (Delhi Administration)* v. *Prem Chand*. (1994) 53 DLT 778.

Conviction of the accuseds—Appeal against the same was filed—Prosecution version brought with improbabilities and impossibilities—Conviction held to be not sustainable. *Maqbool Ahmad* v. *State of U.P.*, 1995 JIC 44 (Alld).

The prosecution story was not based on truth. The trial court has not properly scanned the evidence on record nor has evaluated the circumstances available on record. Hence, order set aside. *Raghubir* v. *State of U.P.*, 1995 JIC 210 (All).

The accused persons alleged to have made preparations for commission of dacoity. The evidence showed that they were possessing arms but they had not used them. In addition to this, not a single penny was recovered from their possession and there was no public witness in support of prosecution case. It was held that accused persons were entitled to the acquittal. *Amar Singh* v. *State*, 2003 Cr LJ 1321 (All) : 2003 All LJ 516 : 2003 (46) All Cri C 316 : 2003 (1) All Cri R 256.

In a Bombay case where the accused allegedly made and assembled. The accused armed with deadly weapons for committing the dacoity. It was held that possession of chopper or knife, dagger or a spear by itself was not sufficient to show that persons possessing such weapons are members of gang of dacoits and had assembled for committing the dacoity. Possession of such day to day use weapons is customary for villagers. In the absence of some natural, credible and specific evidence trial judge had landed in error of passing the order of conviction which was set aside. *Sadashiv* v. *State*, 2003 Cr LJ 3661 (Bom) : 2003 ( ) All MR (Cri) 1717 : 2003(4) Bom LR 292.

The accused was charged under Section 399 for making preparation to commit dacoity after police conducted raid on receiving secret information. Trump witness of prosecution stated that one of appellants instructed his associates after boarding down from vehicle that they were to be well prepared with their weapons and as soon as cashier was to come from bank he was to be looted. No other evidence was available. It was held that conviction of appellant for said offence was not proper. *Arun Vinayak Garkar* v. *State*, 2004 Cr LJ 1053 (Bom) : 2003( ) All MR (Cri) 1481 : 2004 (Sup) Bom CR 103.

Non-joining of public witnesses in raiding party make the case of prosecution doubtful. Investigation regarding acts of senior officer should not be done by junior officer. Appellant acquitted. *Ramjatan* v. *State*, (1995) 3 CCR 737 (Alld) : 1995 JIC 669 (All).

5. Sentence.—When the incident was considerably old and convict being 80 years of age hence sentence was reduced to period already undergone—So far accused 6 is concerned, his conviction under Section 25 (1) (a), was confirmed. The occurrence is said to have taken place in 1976 and A-6 is aged about 80 years. Therefore his sentence of one year's R.I., is reduced to the period already undergone. *Nasru* v. *State of U.P.*, 1994 SCC (Cri) 51 at p. 53 : 1994 Supp(2) SCC 493 : 1993(4) Scale 29 : 1993 Cr LR (SC) 731.

In a Jharkhand case, the conviction of the accused, who was awarded sentence for four years RI and had already been in custody for a period of 3 years, was reduced to the period already undergone. *Ravi Rajwar* v. *State*, 2003 Cr LJ 634 (Jhar) : AIR 2003 Jhar HCR 48 : 2002 (3) East Cri C 315.

* * * * *

Sec. 400. Punishment for belonging to gang of dacoits.—Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with *imprisonment for life*, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Amendment 2550

2. What constitutes offence 2550
3. Scope 2550
4. Evidence and proof....................2552
5. Sentence 2552
6. Procedure....................2552
7. Charge 2552

1. Amendment.—The words in italics were substituted for the words "transportation for life" by Act 269, 1955, Section 117 and Sch. (with effect from 1.1.1956).

2. What constitutes offence.—In order to sustain a conviction under this section, evidence must be forthcoming that there was a gang of persons, that they were associated together and such association was for the purpose of habitually committing dacoity and robbery. 1 CWN 146 ; 27 Cal 139 : 4 CWN 97. The associating and purpose of association may be proved by direct evidence, *viz.* that the accused met, and determined to join together for the purpose of habitually committing dacoity. In the absence of direct evidence, the associating and purpose of association may be established by proof of fact from which they may be reasonably inferred. 32 Mad 179 : 83 Ind Cas 683. For an offence under this section something more than a casual association is necessary. The section involves the motion of continuity and indicates a more or less intimate connection with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity. 63 Ind Cas 455. The offence under Section 400, is entirely a creation of a statute and is intended to break up gangs mentioned therein by punishing also their associates who share their purpose. Section 400, appears to postulate the existence of a definite gang operating for a definite period and the object of the section would seem to be provide for the punishing of those proved to be members of such a gang against whom evidence is not forthcoming. ILR 1962 AP 96 : 1963 (2) Cr LJ 121 : AIR 1963 AP 314 ; *see* AIR 1966 AP 344 (the existence of an agreement and the preparation of the persons in the agreement can only be inferred from the circumstance of the case).

3. Scope.—To support a conviction under this section it is necessary to prove, (1) that a gang of dacoits existed, and (2) that the accused belonged to that gang. It is not sufficient to prove that the accused repeatedly gave shelter and assistance to the dacoits. 1 Bom LR 156 ; AWN 1886, 65 ; 18 PLR 1910 Cr : 6 Ind Cas 492 ; 23 WR Cr 18. There are many points which have to be considered in determining what is an adequate sentence to pass upon an accused convicted of an offence falling under Section 400, IPC. Among these may be noted the following ; (i) how long has the accused belonged to the gang ; (ii) what dacoities have been committed by the gang since the accused joint it ; (iii) in how many of these dacoities did the accused actually take part ; (iv) what are the character of the dacoities in which the accused actually took part. Whether they were accompanied with murder, culpable homicide, grievous hurt, torture, or with any acts of a specially brutal character, or were they only dacoities of ordinary character. LBR (1872-1892), 441. The term "belong" in this section implies something more than the idea of casual association it involves the action of confirmity and indicates more or less intimate connection with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity. 1930 Cr C 1079 : AIR 1930 Oudh 455 : 100 Ind Cas 440 : 19 Cr LJ 705 : 47 Cr LJ 471 ; 7 Ind Cas 1012 ; ILR 1962 Andh Pra 96 ; 1963 (2) Cr LJ 121 : AIR 1963 AP 314 ; AIR 1956 Ori 177 : 22 Cut LT 317 : ILR 1956 Cut 195 : 1956 Cr LJ 1203 (having evidence of previous conviction). 1953 MWN 933 (evidence of bad character admissible to prove relevant fact which cannot be proved habit alindu). It is not necessary for a conviction under this section that the person convicted must have taken part in any dacoity. *Ibid.* The evidence as to prior criminal proceedings against the accused which resulted in an acquittal cannot be relied on where the accused is again charged for the same offence but that same can be relied on where the latter proceeding relates to a totally different offence. 5 OWN 760 : 112 Ind Cas 337 : AIR 1928 Oudh 430. Evidence respecting commission of offence and proceedings under Section 110, Cr PC, are admissible. AIR 1925 Cal 872 : 52 Cal 525 : 26 Cr LJ 1037 : 42 CLJ 501 : 87 Ind Cas 925. Where the accused is charged under Section 400, IPC, evidence of previous conviction is admissible as evidence to prove habit and association. AIR 1930 Oudh 455 : 128 Ind Cas 739. The offence contemplated in this section is one of a very special character and entirely the creature of statute and should therefore be strictly construed. Association for the habitual pursuit of dacoity is the gist of the offence. Although the evidence need not show the same degree of particularly as to the commission of each dacoity as is required to support a substantive charge of that crime, it must be established, for the purpose of conviction under the section, that the accused belong to a gang whose business is the habitual commission of dacoity. The special conspiracy must be proved. 16 CWN 69 : *see* also 65 PLR 1911 : 17 Ind Cas 1006 ; 1 Bom LR 15 : 1 CWN 146 ; LBR (1872-1892), 441. The mere fact that some women are the mistresses of dacoits does not render them liable also as dacoits. Rat Un Cr C 863. A conviction can be under this section even when no actual commission of dacoity is proved. The element of the offence is association with the knowledge that it is formed for the purpose of committing dacoity habitually. Hence, where sentence is already passed for the offence of committing dacoity there is no bar to the passing of a sentence under this section. 27 OC 385 : 89 Ind Cas 836 : AIR 1925 Oudh 374 ; *see* also 23 ALJ 18 : 86 Ind Cas 282 : 52 Cal 595 : 42 Cr LJ 501 : 26 Cr LJ 123. The essence of the section is the agreement habitually to commit dacoity not the actual commission of dacoities. Existence of such an agreement and the participation of any person in that agreement may be inferred from the circumstances. 1928 Cal 309 : AIR 1921 All 32 : 19 ALJ 725 : 22 Cr LJ 663 : 63 Ind Cas 455.

The importance of the word "necessarily" in the section is to be borne. AIR 1956 Orissa 177 : 1956 Cut LT 317 and the section is intended to break up the gang mentioned there by punishing also their associates. AIR 1963 AP 314 : ILR 1962 AP 46 : 1963 (2) Cr LJ 121 (the offence is entirely a statutory one). A conviction under this section is considered bad in law merely because evidence on record would also justify conviction of a special offence under Section 395, IPC. AIR 1959 AP 387 : 1959 Cr LJ 987. For the meaning of "gang" referred to in this section *see* AIR 1963 AP 314 : ILR 1962 AP 46. It is not necessary that the accused should have taken part in any dacoity. 1972 Cr LJ 1074 (expression "associate" taken along with the words "habitually committing dacoity.").

4. Evidence and proof.—Proof that an article which is traced to the possession of an accused was stolen of a condition precedent for any presumption under Section 114. ILR 1961 AP 96 : 1963 (2) Cr LJ 121 : AIR 1963 AP 314.

In 1953 MWN 933 the following points were sought for, obtained and proved *viz.*, (1) the existence of the gang for the purpose of committing dacoity during the time specified in the charges ; (ii) their association for that purpose ; (iii) relationship by blood or marriage or community or interest among them ; (iv) approver's evidence corroborated on material points ; (v) confession of co-accused recorded with all legitimate precaution and ensuring that it was a voluntary and truthful one ; (vi) evidence relating to the 14 specific cases of dacoity committed by the gang as well as other similar dacoities ; (vii) evidence of recoveries of properties stolen in these dacoities and found in possession of the accused ; (viii) simultaneous absence from their homes in batches or singly of members of this gang coincident with the occurrence of dacoities in the area operated upon ; (ix) decrease in the number of dacoities after the apprehension of the deceased ; (x) habitual commission of dacoities proved by the aggregate acts ; (xi) sameness in the *modus operandi* in regard to all these dacoities ; (xii) opinion of the Police officers in regard to this *modus operandi* ; (xiii) prompt complaints given by the victims in all these cases ; and (xiv) identification of the most of the accused at parades held with all precautions to ensure a fair and legitimate identification. *Held*, that the conviction under Section 400, was correct.

For proof of association *see* AIR 1961 Pat 260. For admissibility of previous conviction. AIR 1956 Ori 177 : 1956 Cr LJ 374.

5. Sentence.—It is a serious offence and the maximum penalty should be added. AIR 1961 Pat 260 : ILR 38 Pat 1251.

6. Procedure.—Cognizable—Warrant—Not bailable—Not compou-ndable—Triable by Court of Session.

7. Charge.—"I (*name and office of Sessions Judge, etc.*), hereby charge you (*name of the accused*), as follows :—

That on or about the.....day of......at......you belonged to a gang of persons associated for the purpose of habitually committing dacoity, and thereby committed an offence punishable under Section 400, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 401. Punishment for belonging to gang of thieves.—Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of *thugs* or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Scope 2553
2. Evidence 2554

3. Two serious cases 2554
4. Criminal Procedure Code. Section 271 2554
5. Punishment 2555
6. Procedure....................2555
7. Charge 2555

1. Scope.—To sustain a conviction on a charge under this section, there must be proof that association was for the purpose of habitual theft. The habit should be proved by an aggregate of acts. 9 PR 1880 Cr ; 1946 OWN 316 : 227 1C 204. It is not sufficient to prove that the accused is simply a member of a robber tribe ; it should also be shown that he actually conserted with persons who were themselves associated for the purpose of habitually committing theft or robbery. 37 PR 1869 Cr. There must be evidence that the accused were members of a gang associated for the purpose of habitually committing theft, before there should be conviction of an offence under this section. 4 CWN 97. Previous convictions under Section 110. Cr PC, are relevant. AIR 1930 Sind 211 : 126 Ind Cas 468. Previous conviction and proceedings under Section 110. Cr PC, are admissible for proving habit though not of general bad character. Such evidence is not excluded by Section 54, Evidence Act. AIR 1930 Sind 211 : 126 Ind Cas 468 : but *see* 31 Cr LJ 192 : 21 Cr LJ 386 : 47 Cal 154. But reports of existence of gang of cattle-lifter and frequence of thefts in particular area, made to police are inadmissible being hearsay. *Ibid.* Evidence of frequent commission of or complicity in theft or robberies is enough evidence for conviction. 31 CLJ 192 : 47 Cal 144 : 55 Ind Cas 994. Mere fact that accused was found to have received stolen property from gang is not sufficient to convict them under Section 401. Being number of gang associated for purpose of committing burglaries is different from actually taking part in them. Generally concurrent sentences should be given though consecutive sentences are illegal. AIR 1932 Lah 298 : Ind Cas 27 : 33 Cr LJ 251 : 33 PLR 602. It is not necessary for a conviction under this section that the person convicted must have taken part in any one theft or robbery. 118 Ind Cas 423 : 30 Cr LJ 922 : AIR 1929 Oudh 321. In determining to that extent in any particular case the punishment should approach to or recede from the maximum limit prescribed by the section, the trying Magistrate has to take into account several factors, *inter alia* the antecedents of the prisoner. whether such antecedents speak well or ill of him, such as his character and state of life whether good or bad including previous convictions, if any, 24 SLR 252 : AIR 1930 Sind 211. This section ought not to be resorted to when the persons sought to be brought within its four corners might have been made responsible, for distinct and individual offences : nor is it intended to affect them unless an association for the actual commission or theft of robbery is clearly made out. AWN 1816. 16 : *see* also AWN 1886. 15 : Rat Un Cr C 418 ; 5 CPLR Cr 24 : 33 PR 1886 ; 3 PR 1915 : 15 CWN 462 . 14 Bom LR 273 ; 10 Ind Cas 23 ; 36 PWR 1912 Cr : 1 Cr LJ 690 : 1 Weir 452. To sustain a conviction under this section it is necessary to prove : (1) there existed a gang of persons ; (2) that those persons were associated for the purpose of committing theft or robbery (3) that theft or robbery was committed habitually : (4) that the accused was a member of such a gang. 13 PR 1914 (Cr) ; 110 PLR 1916 ; 47 Cal 154 ; 1923 Lah 666 ; 73 Ind Cas 815 ; 26 Bom LR 1223. As regards value of approver's evidence to prove an offence under this section, *vide* 87 Ind Cas 846 : 26 Cr LJ 1024. The object of this section is to punish the persons who organise thieving expeditions and form a party to commit theft. 28 Cr LJ 179 : 28 PLR 19 : 99 Ind Cas 851. 'To belong" means to be one of the gang. AIR 1927 Lah 524 : 28 PLR 19 : 28 Cr LJ 179. The word 'belong' implies something more than casual association. It involves the notion of continuity and the proof of a more or less intimate connection with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected had identified himself with the gang the common purpose of which was the habitual commission of either theft or robbery. AIR 1960 Guj 5 : 1960 CR LJ 1204 ; (1960) 1 Guj LR 34 ; (1978) 38 Cut LT 683 ; 1974 Mad LJ (Cr) 203. It is not necessary that the members of the gang should be members right from the very begining. *Ibid.* The word "belong" something more than the casual association. 1980 Mad LJ (Cr) 793 ; 1981 Cr LJ (NOC) 36.

2. Evidence.—In the absence of direct evidence, in a prosecution under this section, the purpose of association may be established by proof of acts from which this may be reasonably inferred. So the prevalence of theft in certain areas and the rise and fall coinciding with action taken against members of the supposed gang are as much relevant circumstances as are the conviction obtained against certain members. ILR 1937 Nag 315 : 166 Ind Cas 582, 527 : 38 Cr LJ 237, 251 : AIR 1937 Nag 27 (FB). The evidence of previous convictions of dacoity and order under Section 110, Cr PC, are admissible for the purpose of proving habit and association in a subsequent trial under this section. *Ibid.* Where several persons are being tried under Section 401, of being members of a large gang, the evidence that a big gang was in existence and was committing acts of depredation on the community all over India, Burma and Ceylon and that some of the accused, who are residents of a particular village, were found associated together in crime characteristic of the gang in distant parts of India, is sufficient to justify a Judge even on ; very little proof of actual association of particular accused, in leaving it to the jury to decide whether the particular accused is a member of the gang. AIR 1938 Mad 858 : 1938 MWN 595 : 1938 M Cr C 145. Where several persons are being tried under Section 401, for being members of a gang the evidence of association before the period of charge is admissible to corroborate the evidence of association during that period. *Ibid.* Where several persons are being tried under Section 401, for being members of a gang, proof of their association outside British India for the purpose of committing crime is not barred under Section 188, Criminal Procedure Code, read with Section 401, Penal Code, as the Court is not concerned with the trial of a person for an offence committed outside British India, but with the fact that the accused committed offence outside British India, which affords evidence that the accused associated together for the purpose of committing crime. *Ibid.* Habit is a fact in issue to the proved for the purpose of establishment of the ingredient of the offence under this section. (1972) 38 Cut LJ 683.

3. Two serious cases.—Where two serious cases are started against persons accused under Section 401, of being members of gang, it is not only permissible to confine the two trials but it is also convenient and proper when all the accused are members of one gang. AIR 1938 Mad 858 : 1938 MWN 595 : 1938 M Cr C 145.

4. Criminal Procedure Code, Section 271.—In a trial under Section 401, Penal Code, although a number of charge-sheets are originally filed against the accused, there is nothing objectionable if only one charge is framed in the Sessions Court against all the accused, if all the accused are in fact members of that gang, for all the members of the gang can be tried together for the offence of being members of that gang and it matters not how and when they were arrested. AIR 1938 Mad 858 : 1938 MWN 595 : 1938 M Cr C 145.

Though the offence falling under Sections 399 and 402, would probably involve similar ingredients, the difference between the two is that under Section 402, mere assembly without preparation is enough while under Section 399, some additional step is taken by way of preparation. (1961) 26 Cut LT 571 : 1960 Cr LJ 1234 ; 1983 UP (Cr) Rul 259 ; (1982) 2 LR (Cr) 548 ; (1972) 1 Cut LR Cr 37, 1982 Jab LJ 300 : 1983 MPLJ 449.

5. Punishment.—AIR 1980 SC 1631 : 1980 Cr LJ (NOC) 178 (accused old men sentence reduced) AIR 1979 SC 1690 (released on probation). (1980) 7 Cr LJ 236.

6. Procedure.—Cognizable—Warrant—Bailable—Not compoun-dable—Triable by a Magistrate of the first class.

7. Charge.—"I (*name and Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That on or about the.......day of.......at........you belonged to a (wandering) gang of persons associated for the purpose of habitually committing theft (or robbery) and that you thereby committed an offence under Section 401, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 402. Assembling for the purpose of committing dacoity.—Whoever, at any time after the passing of this Act, shall be one or five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term, which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Scope 2555
2. Assembly for dacoity 2556
3. Procedure....................2556
4. Charge 2556

1. Scope.—A mere assembly without further preparation is not a preparation under Section 399. This section applies to the case of mere assembly without proof of other preparation. 18 CWN 498 ; *see* also 23 All 124. Section 402 contemplates a stage when the whole project still lies in the realm of design and intention without any attempt having yet been made to give it a concrete shape. AIR 1958 Cal 25 : 61 CWN 856 : ILR (1958) 1 Cal 447 : 1958 Cr LJ 25 ; 28 Cut LT 571 ; 1982 Cr LJ 448 ; (1982) 21 Del LT 26. The members of an unlawful assembly were held to be guilty of an offence under this section on their own admission that they not only knew that the assembly was an assembly for committing dacoity but that all the members (including themselves) composing it lived on the proceeds of dacoity and had no other means o living. 7 WRC 61. But an assemblage of 5 or more persons for the purpose o concerning plans for committing dacoity yet remote or contingent or for discussing the possibility of committing it is not within the meaning of this section, which postulates a determination to commit a dacoity. 22 Ind Cas 833 ; 32 Ind Cas 343 ; AIR 1962 All 13 1962 All Cr R 90 : 1962 (1) Cr LJ 3 (benefit of doubt from the surrounding circumstances). Proof of being member of the gang is not enough. Proof of the actua part taken by each is not necessary. 34 Ind Cas 1000 ; *see* also 84 Ind Cas 860 : AIR 1925 All 62 : 22 ALJ 1028 : 26 Cr LJ 380 ; 106 Ind Cas 350 : AIR 1928 Lah 144 : 29 Cr LJ 14 So accused belonging to different villagers found together in a lonely place armed for committing dacoity can be convicted under this section. 27 Cr LJ 605 : 94 Ind Cas 269. Where persons are accused under Sections 309/402, it is difficult to give direct evidence of the purpose of the assembly. 1949 AWR 471. The intention or agreement to commit dacoity is to be established before the member of the assembly can be punished under Section 402. 1953 Cr LJ 990 : AIR 1953 Bhopal Section 21. The essentia ingredient of the offence under the section are the accused besides being members of an assembly of five or more persons, the purpose of which was committing of dacoity. AIR 1979 SC 1412 : 1979 Cr LJ 1090 ; 1982 Cr LJ 449 ; 1978 Cr LJ 877. 1979 All Cr C 179 ; 1980 Cr LJ (NOC) 21.

A police officer who conducted a raid to arrest the accused under Section 399 read with Section 402, IPC, was appointed Investigating Officer, to investigate it. *Held, it is* violative of principles of natural justice. 1986 Cr LJ 1031 (Pat).

2. Assembly for Dacoity.—The oral evidence adduced in the case is only to the effect that the petitioner was found in the company of others and also that the first accused in the case had in his possession a dagger. Merely from these facts, it may not be possible to draw an inference that the persons were assembled for the purpose of committing dacoity. Of course concrete evidence with regard to the intention behind the assembly may not be easy to get: but then the available facts and circumstances should at least justify a reasonable inference that the gathering had such an intention. There is not even any circumstantial evidence available in the present case to show that the petitioner was actually available at the spot with an intention to commit dacoity. *Nijamudeen v. State of Kerala*, 2002 Cri LJ 3266 : 12002(2) ALD (CRL) 165.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compound-able—Triable by Court of Session.

4. Charge.—I (*name and office of Sessions Judge*, etc.), hereby charge you *(name of the accused)* as follows :—

That on or about the......................day of..............at.........you were one of five (or more) persons assembled for the purpose of committing dacoity ; and that you thereby committed an offence punishable under Section 402, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

OF CRIMINAL MISAPPROPRIATION OF PROPERTY

Sec. 403. Dishonest misappropriation of property.—Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations

(a) *A* takes property belonging to *Z* out of *Z's* possession in good faith, believing, at the time when he takes it, that the property belongs to himself. *A is* not guilty of theft ; but if *A*, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) *A*, being on friendly terms with *Z*, goes into *Z's* library in *Z's* absence, and takes away a book without *Z's* express consent. Here. if *A* was under the impression that he had *Z's* implied consent to take the book for the purpose of reading it, *A* has not committed theft. But, if A. afterwards, sells a book for his own benefit, he is guilty of an offence under this section.

(c) *A* and *B*, being joint owners of a horse. *A* takes the horse out of B's possession, intending to use it. Here, as *A* has a right to use the horse, he does not dishonestly misappropriatesit. But, if *A* sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration

A finds a Government promissory note belonging to *Z*, bearing a blank endorsement. *A*, knowing that the note belongs to *Z*. pledges it with a banker as a security for a loan, intending at a future time to restore it to *Z*. *A* has committed an offence under this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence ; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner, and has kept the property for a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it : it is sufficient if, at the time of appropriating it, he does not believe it to be his own property or in good faith believes that the real owner cannot be found.

Illustrations

(a) *A* finds a rupee on the high-road, not knowing to whom the rupee belongs. *A* picks up the rupee. Here *A* has not committed the offence defined in section.

(b) *A* finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(c) *A* finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn cheque, appears. *A* knows that this person can direct him to the person in whose favour the cheque was drawn. *A* appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(d) *A sees Z* drop his purse with money in it. *A* picks up the purse with the Intention of restoring it to *Z*, but afterwards appropriates it to his own use. *A* has committed an offence under this section.

(e) *A* finds a purse with money, not knowing to whom it belongs ; he afterwards discovers that it belongs to *Z*, and appropriates it to his own use. A is guilty of an offence under this section.

(f) *A* finds a valuable ring, not knowing to whom it belongs. *A* steals it immediately without attempting to discover the owner. *A* is guilty of an offence under this section.

Synopsis

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1. Gist of offence.—To constitute the offence under this section, there must be misappropriation of moveable property and the misappropriation must be dishonest. In order to be dishonest, the property must be misappropriated or converted "with the intention of causing wrongful gain to one person or a wrongful loss to another", i.e., with the intention of causing gain by unlawful means of property to which the person gaining it is not legally entitled, or the loss by unlawful means of property to which the person losing it is legally entitled. Where there is no intention to cause wrongful gain or wrongful loss of property and merely an intention to deprive the owner temporarily of the use of the property, dishonesty is not made out. 27 PR 1887 Cr ; *see* AIR 1950 All 266 ; 5 Al Cr D 713 : 6 DLR (Pat) 149 ; AIR 1961 Assam 132 : (1960) 1 Assam LR 224 : 1961 All Cr R 405 : 1961(2) Cr LJ 457. Bare intention to misappropriates not enough. 1961(1) Cr LJ 624. Criminal misappropriation takes place when the possession has been innocently came by, but where by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent. 15 Cal 388. Where money is paid my mistake, and the person receiving it either at the time he received the money or at any time subsequently before its refund, discovers the mistake made by the complainant, but determines to appropriate the money, he is guilty of misappropriation. 2 NWP 475. Where a Railway Claim Inspector whose duty was to investigate claims and to report what arrangements he could make with persons making claims against the railway sold certain goods to a claimant but never credited the price to the Railway ; *held*, that he was guilty of the offence of criminal misappropriation under Section 403, and not an offence under Section 408. 28 Cr LJ 161 : 99 Ind Cas 593 : 8 Lah LJ 515. Proof as to some of the money mentioned in the charge being misappropriated is sufficient even though exact amount is uncertain. 1928 Bom 148. Mere retention of money is not an offence. 1928 Bom 205 : 30 Bom LR 624 : 29 Cr LJ 922. In a case of alleged misappropriation, it is not enough for the prosecution to show that the accused received certain sums of money and failed to account for them, unless and until the prosecution can point to state of facts which led inevitably to the conclusion that the accused was guilty, the prosecution has failed to discharge the onus which lies on him. 61 Cal 168 ; *see* also AIR 1933 PC 7 : 64 MLJ 290 : 1933 Cr C 130 : 43 Ind Cas 224 : 34 Cr LJ 550 (PC). In order to frame a charge of criminal misappropriation, it must be proved that actual conversion or appropriation of the property by the accused for his own use has taken place. AIR 1938 Mad 172 : 39 Cr LJ 312 ; AIR 1940 Mad 329 : 41 Cr LJ 824. Where an employee withdraws security amount deposited by him without employer's permission and before adjustment of accounts, such withdrawal amounts to criminal misappropriation. AIR 1938 Cal 451 : 39 Cr LJ 691. If the person who takes cattle scattered on account of *cheeta* scare subsequently retain it intending to treat it as his own, then he will be guilty of criminal misappropriation. AIR 1944 Mad 26 : (1943) 2 MLJ 334 : 45 Cr LJ 22 : 210 IC 315. Although mere realisation of money and failure to credit the same is not in itself criminal mis-appropriation but the retention of money realised for a particular purpose without any justification shown ordinarily leads to the inference that it has been misappropriated. 51 CWN 301 ; AIR 1957 Mad 46 : (1957) 1 MLJ 55 (detention of money without explanation is not misappropriation) : AIR 1956 Mys 40 : ILR 1956 Mys 11 : 1956 Cr LJ 630. This section has no application where one partneevaded the payment of profit of partnership to another one pretext or another. AIR 1949 Cal 89 : 59 Cr LJ 154. For what amounts to conversion amounting to offence under the section. *See* also AIR 1956 Mys 38 ; AIR 1961 Assam 132 ; AIR 1967 Goa 51 (under Section 453, of the Poortagese Penal Code) ; 1980 Punj LR 148 ; (1980) 82 Punj LR 148 ; 1964 MPLJ 750 (for the essential ingredient of the offence) ; AIR 1959 Bom 408 ; ILR 1979 Bom 864 (cheating distinguished). The section makes it an offence to dishonestly misappropriate or convert to one's own use moveable property. AIR 1958 SC 56 ; 1958 Cr LJ 228 ; 1969 Cr LJ 14 : 1969 Cr LJ 973 : 1970 All Cr R 240.

In the instant case there were two contracts *i.e.* one between the principal and contractor and another between contractor and sub contractor. On completion of work sub contractor demanded money for completion of work and on non-payment filed criminal complaint alleging that contractor having received the payment from principal had misappropriated the money. It was held that matter was of civil nature and criminal complaint was not maintainable and was liable to be quashed. *U. Dhar* v. *State of Jharkhand*, 2003 Cr LJ 1224 (SC) : AIR 2003 SC 974 : 2003 AIR SCW 466 : AIR 2003 Jhar HCR 296.

Merely because the accused was not having any receipt of purchase of impugned electric wire. It cannot be said that he is *prima facie* guilty of the offence punishable under Section 403, IPC. *Mohammed Ali* v. *State of MP*, 2006 Cr LJ 1368 (MP).

2. Theft and misappropriation—Distinguished.—"In theft the object of the offender always is to take property which is in the prosecution of a person out of that person's possession ; and the offence is complete as soon as the offender moved the property in order to a dishonest taking of it. In the offence of criminal misappropriation, there is not necessarily an invasion of the possession of another person by an attempt to take from him that which he possesses. The offender is already in possession of the property and is either lawfully in possession of it, because he has found it or is a joint owner of it, or has possession, it not strictly lawful, is not punishable as an offence because he has acquired it under some mistaken notion of right in himself or of consent given by another (*see* the Illustrations to Section 403). The offence consists not in wrongfully obtaining possession but in misappropriation, either permanently or for a time, of property which is already without wrong in the possession of the offender. The dishonest intention to appropriate the property of another is common to theft and to criminal misappropriation. But this intention which is theft is sufficiently manifested by a moving of the property must in the other offence be carried into action by an actual misappropriation or conversion".—*Morgan, and Macpherson*, 359. In both the cases the property is moveable property. Where property, lost by the owner, is found in the possession of the accused, the offence committed by the accused is not theft but misappropriation as the property was not taken from the possession of the owner. 1 LBR 123. Persons retaining in his custody animals which have strayed and using them is guilty under Section 403. AIR 1957 Assam 35 : 1957 Cr LJ 349. An easy method of differentiating between the offence of theft, cheating with delivery of property, criminal misappropriation and criminal breach of trust is to find out whether the original taking was honest or dishonest and whether it was with the consent of the owner or without it. In theft the original taking is without honesty and without the consent of the owner, and in criminal breach of trust it is with both. In obtaining property cheating the taking is dishonest but with the consent of the owner, and in criminal misappropriation it is honest but without the consent of the owner. AIR 1928 Nag 113.

3. Misappropriation and murder.—The accused demanded money for wine and gambling from his mother and on her refusal he committed her murder and removed her jewellery. The testimony of eye-witnesses who were none else but his own father and brother, was consistent and corroborated by medical evidence. The conviction of accused for murder and misappropriation of jewellery of the deceased person was held proper. *Raj Kumar* v. *State*, 2003 Cr LJ (NOC) 249 (MP).

4. Dishonestly.—Where there is no dishonest intention an offence is not made out. Cr Reg 1st May, 1872. In a case of criminal misappropriation, the Court should consider the question, whether the money was kept with a dishonest intention, or only on a wrong opinion that the prisoner was justified in keeping it. In the latter case, the act of accused would not constitute the offence of criminal misappropriation. Rat Un Cr C 700. A partner who dishonestly misappropriates or converts to his own use any of his partnership property with which he is entrusted or which he has dominion over, is guilty of an offence under this section. 6 Bom 553 ; 1 PLT 197 ; 10 PR 1903 Cr ; AIR 1925 Cal 154 : 25 Cr LJ 669 : 81 Ind Cas 157 ; 1959 Cr LJ 1032 : AIR 1959 Bom 586 : ILR 1958 Bom 670. But *see* AIR 1965 SC 1433 : (1965) 1 SCWR 586 : 1965 (2) Cr LJ 431 : (1965) 2 SCJ 186, where it was held that a partner has undefined ownership along with the other partner over all the asserts of the partnership. If he chooses to use any of them for his own purposes he may not be actionable civil to the other partner. But he does not thereby commit any misappropriation. (1965) 1 SCWR 586 : 1965 (2) Cr LJ 431 : (1965) 2 SCJ 186 : AIR 1965 SC 1433. So also the retaining of money by servants for his wages would constitute an offence. 11 WR Cr 51. No offence under this section is made out until it is established that there is dishonest misappropriation. AWN 1881, 80 ; *see* also 10 WR Cr 23 ; 17 WR Cr 11. Joint property may be the subject of criminal misappropriation. AWN 1881, 89 : 1 JG 31. In a case of criminal misappropriation, the element of dishonesty on the part of the accused has to be proved beyond doubt. 1923 Cal 57 ; *see* also AIR 1934 Cal 454 : 1934 Cr C 620 : 35 Cr LJ 886 : 149 Ind Cas 36 ; AIR 1923 Mad 364 : 17 MLW 157 : 44 MLJ 128 ; AIR 1922 Cal 57 : 24 Cr LJ 348 : 72 Ind Cas 348. A person finding a property of which from the nature of it there must be owner, must take reasonable care of it and endeavour to find out the owner. 67 Ind Cas 497. Where the accused acted *bona fide* in retaining property belonging to the complainant no offence under this section is committed. 44 MLJ 128. Where the reversioner of a mortgagor sold some of the bricks of the mortgaged property, that had tumbled down and appropriated the price, *held*, that accused could not be convicted either under this section or under Section 426, in the absence of a finding of dishonest misappropriation or of substantial deterioration of the property. 6 CWN 34. The managing member of a joint Hindu family may be liable to a charge of misappropriation, if after a division of the property has taken place, and the share of each member of the family has been ascertained, it is found that the manager has wrongfully applied to his own use the charge that belongs to one of the other co-partners. 1 Weir 453. There is no dishonest misappropriation of property where the same is in the sole possession of the father of a Hindu Joint family. 1961 (2) Cr LJ 453. The accused found two logs of wood drifting in a river and took possession of them. They were left in front of his house for nine months. *Held*, that he committed an offence under this section. 1 Weir 455. The mere picking up of money, and retaining it, or making it over to another, could not necessarily constitute the offence. 5 CPLR 47 Cr ; *see* also 28 PLT 1905 ; 11 PR 1908 Cr.

The mortgagor contracted with the mortgagee that the compensation money received by him would be first applied for satisfaction of the mortgage does but fails and neglects to pay the same. The offence is a breach of contract and not an offence under Section 403, 589 CWN 552 : AIR 1954 Cr 547 : 1954 Cr LJ 1556.

Dishonesty may be proved by positive evidence or may be presumed from circumstances. AIR 1956 Mys 40 : 1956 Cr LJ 630 ; AIR 1960 All 387 ; (1961) 1 Cr LJ 624 ; 1970 All Cr R 240 (proceeded to recover money for the stolen bullocks) ; *see* also 1973 Cr LJ 123 (no dishonest be intention ; AIR 1961 Assam 132 : 1961 (2) Cr LJ 457 (no dishonest intention) ; (1980) 82 Punj LR 148 (landlord receiving rent in Court for very same period already realised), not refunding the same to the tenant when demanded is guilty of offence under this section.

It was held that conduct is the material evidence and the testing factor to decide the intention. *Santha* v. *State of Tamil Nadu*, 1995 MLJ (Cr) 331 (Mad).

5. Misappropriation and conversion.—The essential ingredient for an offence under this section is proof of dishonest misappropriation of the property or conversion to one's own use. 47 Ind Cas 667 ; 40 All 190. Misappropriation means setting apart the thing appropriated to the wrong person or for wrong use and dishonestly. 16 Cr LJ 1915 : 31 Ind Cas 651. An offence under this section is committed where money is converted to his own use. AIR 1935 Oudh 4. No prosecution can be founded on the suspicion of the complainant that the accused has misappropriated the money. AIR 1939 All 602 : 40 Cr LJ 917 : ILR 1939 All 851. Dishonest misappropriation for a time is misappropriation within the meaning of Section 403. AIR 1938 Nag 445 : 39 Cr LJ 895. Not only has the prosecution in a case of criminal misappropriation to prove that the accused received the money and has not accounted for it, but also to prove that be converted it to his own use. AIR 1938 Lah 634 : 39 Cr LJ 851. It is not criminal misappropriation for one of several co-owners to take property belonging to them all unless it is also found that he appropriated it to his sole use. 25 Cr LJ 669 (1). Any use of temple property by the priest otherwise than for the idol or temple amounts to misappropriation. Rat Un Cr C 919. In a case of criminal misappropriation the Court should consider the question, whether the money was kept with a dishonest intention, or only on a wrong opinion that the prisoner was justified in keeping it. In the latter case, the act of the accused would not constitute the offence of criminal misappropriation. Rat Un Cr C 700 ; 6 Bom LR 94. Where agent or servant applies the money collected on behalf of his master to his own use he commits an offence under this section. 3 NWP 30. A person who is proved to have dishonestly misappropriated cannot be convicted of retaining it under Section 411. 3 LBR 254. An offence under this section has been committed when a person tries to dispose of another's missing bullock. 119 Ind Cas 863 : 30 Cr LJ 1133 : AIR 1929 All 917 : 1929 Cr C 645. Where a licence makes as entry in receipt contrary to rules fixed, he does not commit an offence under this section. 1930 Cr C 468 : AIR 1930 Lah 408. The appropriation by the finder of a spanner of no appreciable value the owner of which the finder had no reasonable means of discovering falls under Illustration (a) of Section 403. 32 Bom LR 356 : AIR 1930 Bom 176. Where the accused is charged for an offence under Section 403, IPC, it is not incumbent upon the prosecution to establish that a definite sum has been mis appropriated. 52 Bom 280 : 30 Bom LR 325 : 108 Ind Cas 505. Appropriation of money paid by mistake is an offence under this section. 2 NWP Cas 425. *A* and *B* met at Banaras station. A got a ticket for Ajudhia and *B* for Benares Cantonment. A showed her ticket to *B* to *see* if it was all right. *A* instead of returning the same ticket, substituted his own. *Held*, that the offence was one of misappropriation under this section. AWN 1895, 9. A person who found coin from land bought by him cannot be convicted under this section Rat Un CR C 8. This section is no way restricted to appropriating property to' one's own use. If a trustee repudiates the trust and asserts that he is holding on behalf of a person other than the one who entrusted it to him ; he is as much guilty of misappropriation as if he had up his own claim. 92 Ind Cas 585 : 48 All 288 : 7 Cr LJ 297.

Where it is alleged that the complainant lent a jewel to the accused who dishonestly retained it and converted it to his own use *prima facie* an offence under Section 403, or Section 406. Penal Code is made that it must be gone into and tried. 1951 ALJ 631 : 1951 1 AWR (HC) 521. Accused is an employee of post office. Complainant entrusted amount to him for sending money order. Accused did not send that money order not entered the amount in account books and registers. Accused was held guilty for dishonestly misappropriating the amount entrusted to him and falsified the accounts. ILR 1953 TC 600 : 1953 Cr LJ 1777 : AIR 1953 TC 537.

Ordinarily if a person receive a money which he is bound to account for and does not do so, he is *prima facie* guilty of the offence of misappropriation. In the case of a servant charged with misappropriation will be established if the prosecution proves that the servant received the goods, that he was under a duty to account to his master and has not done so. 1962 Ker LT 679 : (1962) 2 Ker LR 256. There can be criminal misappropriation by *Bhagdar* where there is clear evidence and the status of the person charged under the West Bengal Bargadars Act, 1950, can not be availed of to prevent the application of the ordinary law of this law. I. LR (1957) 1 Cal 506.

For finding the accused guilty under the section, it must be shown that he was in possession of moveable property or had dominion over it. 1978 Cr LJ 1379. The owner "converts to his own use" must necessarily connote the user of or dealing with the property in derogation of the rights of the owner. AIR 1956 Mys 40 : 1956 Cr LJ 630 ; AIR 1958 Mys 82 : 1958 CR LJ 784. In a criminal misappropriation the property comes into the possession of the accused innocently in some natural manner but by subsequent change of intention the retention become unlawful, criminal misappropriation in while in criminal breach of trust the placing of the accused in a position of trust and there is dishonest use in the disposal of the property invidation of the trust. 1967 Mad LJ (Cr) 20 ; 1964 Jab LJ 724.

6. Moveable property.—A bull set at large by a Hindu at the time of performing funeral ceremonies in accordance with Hindu religious usage is not property "capable of being misappropriated". 8 All 51. A bull dedicated to an idol and allowed to roam at large is *not free bastia* and therefore *res nullius*. 11 M 145 ; *see* also 23 Cr LJ 401 : 67 Ind .Cas 497. The offence consists in the dishonest misappropriation or conversion of moveable property, and before a conviction can be recorded, it must be proved that the article forming the object of the charge was moveable property. 18 Bom 212. Standing crops are immovable property. When a judgment debtor cuts the crops under attachment and removes them he commits an offence under this section. 22 M 151. Where a bullock followed a cow and owner lost possession of same, bullock cannot be subject or theft but of misappropriation. 18 Cr LJ 300 : 38 Ind Cas 332 : 10 Bur LT 261. The word "property" is used in much a wider since. AIR 1962 SC 1821 : (1962) 2 Cr LJ 805.

7. Explanation 1.—The offence under this section consists in the dishonest misappropriation or conversion either permanently or for a time, of property which is already without wrong in the possession of the offender. 12 M 49. Where the brother of a girl, who picked up a gold necklace, got possession of the necklace from the latter on the representation that it belonged to an acquaintance of his, but latter on delivered it to the police, although repeating to the police, representing made to his sister, which were found to be untrue to the knowledge of the accused, *held*. that he was guilty under the section. 24 R 1886 Cr. The essential thing to be proved in such case is that the accused was actuated by dishonest intention or not, which is to be inferred from false accounting, absence of *bona fide or* reasonable explanation for nor-accounting. AIR 1956 Mad 452 : 1956 Cr LJ 1079 ; AIR 1959 HP 14 : 1959 Cr LJ 973. Where the person entrusted with funds for disbursement for a particular purpose misappropriate by preparing false documents, he is guilty under the section. AIR 1972 SC 958 : 1972 Cr LJ 593. According to this Explanation 1, a dishonest misappropriation for a time only is misappropriation within the meaning of this section. (1973) 17 MLJR (Cr) 78 ; AIR 1972 SC 952.

8. Explanation 2.—It deals derelict property and abandoned articles. A human body dead or alive is not also property capable of theft or misappropriation just like fish in a navigable river creek *etc.*, as lacking in having an owner and as such incapable of theft or misappropriation. 1978 Cr LJ 1379.

9. Charge.—In a case in which the accused is charged under this section, the charge should specify the person to whom the property belonged. 14 WR Cr 13. Several cases of misappropriation constitute separate offences. 15 WR Cr 5. Sessions Judge can convert conviction from Section 405 to 403. AIR 1935 Oudh 14. Where charge under Section 403, is not properly drawn up it is not fatal unless prejudicial to the accused. 70 Cr LJ 301.

10. Proof.—The fact of misappropriation can be proved by direct as well as by circumstantial evidence. 34 CLJ 200. Where a police constable of seventeen year's standing caught stray sheep intended for sacrifice and on his transfer from the *thana* to which he was attached to another *thana* took it with him there, *held*, that it was sufficient evidence of dishonesty and that he was guilty of an offence under this section. 17 ALJ 145. Proof of receipt of money and mere failure to account for is not sufficient. Proof of conversion by accused to his use must be shown. AIR 1938 Lah 634.

In order to prove an offence under Section 403, the prosecution has to prove that the property in this case was the property of the complainant and that the accused misappropriated the sum or converted it to his own use or that he did so dishonestly. AIR 1958 SC 56 : (1959) 2 SCA 221 : 1958 SCJ 343 : 1958 All Cr R 273 : 1958 Cr LJ 228.

11. Completion of the offence.—Under this section the offence is complete the moment the accused receives or retains the money with a dishonest motive of appropriating it or converting it into his own use. 1921 Pat 31 : 56 Ind Cas 775. Section 403, itself would not apply if there is merely an intention to misappropriate and there is no actual dishonest misappropriation. 5 AI Cr D 73 : 6 DLR (Pat) 149.

In absence of allegation as to entrustment to husband complaint under Sections 403/406, IPC against him is liable to be quashed. *Pradipta Basu Roy Chowdhury* v. *Babita Basu Roy Chowdhury*, 1997 (2) East Cr C 161 (Cal).

12. Cases.—It is a possible view that an accused is guilty of criminal breach of trust between the misappropriation and the repayment, but Courts should be slow when repayment is at once made on demand to assume guilt in accused person. Criminal liability is not the same as civil liability. 97 Ind Cas 1041 : 27 Cr LJ 1217. It cannot be laid down as an absolute rule applicable to all cases that if a man cannot move a thing away, he cannot dishonestly convert it to his own use. 92 Ind Cas 747 : 27 Cr LJ 331 : 50 MLJ 94. Where a Sub-Inspector of Police who came across a stray bullock advertised for the owner but as none turned up had it sold after 20 days, he is not guilty of any offence under this section. 91 Ind Cas 37 : 23 ALJ 128. Where it is proved that a certain sum of money for which a Hindu father was accountable was not accounted for him and in a scheme sent he was ordered to pay the amount it will not amount to misappropriation. 1926 MWN 194 : 23 LW 714 : 94 Ind Cas 634 : 50 MLJ 353. Where a post master opened a V.P. article addressed to himself and extracted a railway receipt from it without paying for it for six days and made false entries in the P.O. books it amounts to technical misappropriation under Section 403. AIR 1928 Lah 92 : 8 Lah LJ 662 : 29 PLR 151 : 19 Cr LJ 598 : 109 Ind Cas 236 ; *see* also 68 Ind Cas 157 : AIR 1923 Nag 146 : 23 Cr LJ 557. In case of receiving money to be handed over at another place with dishonest motive offence is committed at the place of receipt. Failure to hand over is not an ingredient of the offence nor is it a consequence. AIR 1921 Pat 85 : 1921 PHCC 31. Where the allegations made in a complaint are that the complainant paid certain sums of money to the accused (which moneys were to be used for the purpose of bribery to certain officers) on the undertaking of the accused to obtain for the complainant a certain post, that complainant does not make out a case of criminal misappropriation, for in order to constitute this offence the property must have come into the possession of the accused innocently in the first instance. 165 Ind Cas 596 : 1936 Cr C 961 : AIR 1936 Rang 471. Withdrawal by employee of sum deposited by him as security without permission of employer and prior to adjustment of accounts amounts to criminal misappropriation. AIR 1938 Cal 451. A commission agent advanced a sum to a grower of potatoes upon the mortgage of his crop. The mortgage was not security for repayment of money advanced but to secure to the commission agent the sale of crop and his commission. The grower in breach of this agreement sent the potatoes for sale to another agent. *Held*, that the grower could not be said to have committed criminal misappropriation, criminal breach of trust or cheating. AIR 1938 Sind 48. Where on settling the marriage of his daughter with the complainant, the accused took from the latter certain ornaments, and clothes of female wear, meant either as a present to the future bride or as a part of the *pan* but in any case given and taken in contemplation of marriage, but later on he married his daughter to some other persons and on being questioned by the complainant, denied both the agreement for marriage and the receipt of the articles. *Held*, (1) that he had dishonestly misappropriated or converted to his own use the articles in question and an offence under Section 403 has been committed. 42 CWN 783. In the above case *Mukherjee, J.*, remarked : "If the accused had disputed his liability in law to return the articles instead of denying their receipt, there would have been a complete answer to the criminal prosecution." The accused an employee of the post office was supplied with postal stamps for sale to the public. *Held*, that the transaction was not a loan but an entrustment. 1960 All Cr R 261 : 1960 All WR (HC) 415.

An owner of the joint property cannot be guilty of misappropriation of his own property. The principle will apply to joint members and partners. AIR 1965 SC 1433 : 1965 (2) Cr LJ 431 : 1979 Cr LJ 738 : 1972 Cr LJ 945 : 1961 (2) Cr LJ 453 (managing member of Hindu joint family). But *see* AIR 1964 Ori 1198 : 1964 (1) Cr LJ 525 and the earlier case reported in (1904) 1 Cr LJ 757, where the partner was found to be guilty of breach of trust. *See* also 1976 Chand LR (Cr) 67.

The complainant lent a jewel to the accused who dishonestly retained it and converted it to his own use, it was held that there was a *prima facie* case under Section 403 or Section 406. 1951 ALJ 631 : 1951 AWR (HC) 521.

The principal cannot be held liable for misappropriation committed by the agent. (1967) 8 Guj LR 552. For liability of corporate bodies. *See* AIR 1964 Bom 195 : 1964 (2) Cr LJ 276. There are some facts which constitute offences to be under the section and under a Special Act. AIR 1971 Cal 93 : 1971 Cr LJ 361.

In the instant case, the averments made in the complaint petition show that money was handed over by the opposite party to the petitioners to supply levy cement with the abolition of the control on cement the system of supply of levy cement was abolished. Therefore, the money given by the opposite party No. 1 to the petitioner No. 1 for the purpose cannot be fulfilled. It was the duty of the petitioners to refund the money as requested by the opposite party as well as the Government of India. In spite of that the money was not refunded. In view of the above, it cannot be said that the averments made in the complaint petition even if it is taken to be true, do not make out a case of criminal breach of trust or misappropriation or simple misappropriation. This is dependent upon the intention of the parties. The petitioners stated that there were outstanding balances as per the accounts and if the accounts are taken into consideration the petitioners would not be liable to pay. All these matters require full dress trial. It can be ascertained only after recording evidence of the witnesses for the complainant and the petitioners. *(M/s.) Modi Cement Ltd.* v. Assam *State Co-operative Marketing and Consumer's Federation Ltd.*, (1994) 1 Gau LR 226.

13. Procedure.—Cognizable—Warrant—Not bailable—compoun-dable with permission of the Court—Triable by any Magistrate.

14. Charge.—"I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*), *as* follows :—

That on or about the .... day of .... at ....you dishonestly misappropriated (*or converted to your own use*) certain moveable property, to wit ....belonging to *A. B.*, and thereby committed an offence punishable under Section 403 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 404. Dishonest misappropriation of property possessed by deceased person at the time of his death.—Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine ; and if the offender at the time of such person's decree was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration

Z dies in possession of furniture and money. His servant *A*, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. *A* has committed the offence defined in the section.

Synopsis

1. Scope 2567
2. Procedure 2568
3. Charge 2568

1. Scope.—"This section is intended on to the punish servants and strangers who could possibly have no right to or interest in, the effects of a dead man, and who misappropriated such effects, but not to punish near relations who take possession of and deal with the effects under a claim of independent ownership or as heir to the deceased. 25 Ind Cas 514. It is not necessary for a conviction under this section that the accused should misappropriate it to his own use. 12 WR Cr 39 ; 11 WR Cr 1. Under this section all the elements are required to constitute the offence which would be required to constitute the offence of criminal misappropriation in respect of a person who is alive. 12 WR Cr 39. The essential ingredient of offence under Section 404 was the knowledge on the part of the accused that the property in question was in possession of the deceased person at the time of that person's death and had not since been in the possession if any person legally entitled to such possession. 1961 MPLJ (Notes) 130. This section does not apply to immoveable property. 6 BHC Cr 33 ; AIR 1956 Madh Pra 49 : 1956 Cr LJ 224 : Madh BLR 1955 Cr 328. This section relates to a description of property peculiarly needing protection. The offence consists in pillaging of moveable property during the interval which elapses between the time when the possessor of the property dies and the time when it comes into the possession of some person or officer authorized to take charge of it. The proof should be that the property belonged to or was in the possession of the deceased person at the time of his death, and that it has since been misappropriated or converted to his own use by a person who knew or had reason to know that it belonged to the deceased."—*Morgan and Macpherson.*—This section is expressly limited to moveable property alone and criminal misappropriation or conversion is easily possible of the moveable property where the materials which have been secured from the building are removed. LR 6 All 200 Cr : AIR 1925 All 673 : 24 ALJ 153 : 27 Cr LJ 7. Under this section the prosecution must prove not only misappropriation or dishonest conversion to his own use of the property by the accused. The prosecution must also prove that the property was in the possession of a deceased person at the time of his death and that it has not since been in the possession of any person legally entitled to such possession. AIR 1949 Cal 171 : 50 Cr LJ 241.

There is no reason to restrict the property to moveable property. AIR 1962 SC 1823. Removal of ornaments from a dead body amounts to dishonest misappropriation of property possessed by the deceased and is an offence under Section 404, I.P.C. AIR 1959 MP 192 : 1958 MPLJ 398 : 1958 Cr LJ 90 : 1958 All Cr R 282 ; AIR 1973 SC 448 : 1973 Cr LJ 344. The accused must have done the act of misappropriation or conversion dishonestly. AIR 1956 MB 49 : 1956 Cr LJ 224.

2. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Magistrate of the first class.

3. Charge.—"I, (*name and office of the Magistrate, etc.*) hereby charge you, (*name of the accused*) as follows :—

That on or about the .... day of .... at .... you dishonestly misappropriated (or converted to your own use) certain property, to wit .... knowing such property was in the possession of *A.B.*, a deceased person, at the time of his death, and had not since been in the possession of any person legally entitled to such possession ; (and that you were at the time of the death of the said *A.B.* employed by him as a clerk or servant) and that you thereby committed an offence punishable under Section 404 of the Indian Penal Code and within my cognizance (or the cognizance of the Court of Session or High Court).

And I hereby direct that you be tried on the said charge.

OF CRIMINAL BREACH OF TRUST

Distinguishing of the offences.—"This offence like the offence of criminal misappropriation is characterised by an actual fraudulent appropriation of property. There is not originally a wrongful taking or moving as in theft, but the offence consists in wrongful appropriation of property, consequent upon a possession which is lawful. The offence is distinguishable from criminal misappropriation because the subject of it is not property, which by some casually or otherwise, but without criminal means, comes into the offender's possession ; but the property, which is entrusted to the offender by the owner or by other's lawful authority and which the offender holds subject to some duty or obligation to apply it according to the trust"—*Morgan and Macpherson.*

* * * * *

Sec. 405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

Explanation 1.—A person, being an employer, [1][of an establishment whether exempted under Section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) or not] who deducts for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount for the contribution so deducted by him and if he makes default in the payment of such contribution to the said fund in violation of said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

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[1] *Added* by Act 33 of 1988, Section 27 (w.e.f. 1.8.1988).

[1][*Explanation* 2.—A person, being an employer, who deducts the employee's contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employee's State Insurance Act, 1948 (34 of 1948) shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.)

Illustrations

(a) *A* being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will. and appropriates them to his own use. *A* has committed criminal breach of trust.

(b) *A* is a warehouse-keeper. *Z*, going on a journey, entrusts his furniture to *A*, under a contract that it shall be returned on payment of a stipulated sum for warehouse room. *A* dishonestly sells the goods. *A* has committed criminal breach of trust.

(c) *A*, residing in Calcutta, is agent for *Z*, residing at Delhi. There is an express or implied contract between *A* and *Z*, that all sums remitted by *Z* to *A* shall be invested by *A*, according to *Z's* direction, *Z* remits a lakh of rupees to *A*. with directions to *A* to invest the same in company's paper. *A* dishonestly disobeys the directions and employees the money in his own business. *B* has committed criminal breach of trust.

(d) But if *A*, in the last Illustration, not dishonestly but in good faith, believing that it will be more for *Z*s advantage to hold shares in the Bank of Bengal, disobeys *Z's* directions, and buys shares in the Bank of Bengal for *Z*, instead of buying company's paper, here, though *Z* should suffer loss, and should be entitled to bring a civil action against *A* on account of that loss yet *A*. not having acted dishonestly, has not committed criminal breach of trust.

(e) *A*, a Revenue Officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. *A* dishonestly appropriates the money. *A* has committed criminal breach of trust.

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1. *Inserted* by Act 38 of 1975. Section 9 (w.e.f. 1.9.1975).

(f) *A*. carrier is entrusted by *Z* with property to be carried by land or by water, *A* dishonestly misappropriates the property. *A* has committed criminal breach of trust.

Synopsis

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1. **Amendment.**—Explanation added by the Employees Provident Funds and Family Pension Fund (Amendment) Act, 1973 (40 of 1973) (with effect from 1.11.1972).

Existing Explanation I thereof and after the explanation as so renumbered Explanation 2 inserted by the Employees State Insurance (Amendment) Act. 1975 (38 of 1975) (with effect from 1.9.1975).

2. Civil and criminal liability.—In dealing with a case of criminal breach of trust the jury should bear in mind the difference between civil and criminal liability. AIR 1940 Mad 329 : 41 Cr LJ 824. But civil proceedings is no bar to criminal prosecution. AIR 1939 Lah 340 : 40 Cr LJ 910. Criminal proceedings cannot be started for civil wrong AIR 1939 Sind 48 : 40 Cr LJ 278 ; AIR 1939 Sind 21 : 40 Cr LJ 246. Every breach of trust is not criminal. It may be intentional without being dishonest or may appear to be dishonest without being really so. AIR 1955 Trip 35 : 1955 Cr LJ 1636. Where in the allegations contained in the plaint, it is manifest that the complainant's age was that the accused acted dishonestly, it is a circumstance which distinguishes a civil from a criminal liability. 1957 All WR (HC) 255. In every case of criminal breach of trust a breach of contract is implied. The determining factor is judging whether a case is one of criminal breach of trust or a criminal breach of contract is whether the person proceed against and acted dishonestly. 1976 Cr LJ 449. It must be proved that the accused in an offence under Section 405 was entrusted with the property or with any dominion over the property and the same was dishonestly misappropriated or converted to his own use. 1977 Cr LJ 1416. Merely because there is a civil remedy a complaint for criminal breach is not to be entertained. 1978 Cr LJ 609 ; 1984 Cr LJ 261 : 1984 Raj Cr C 41 : 1960 BLJR 145 ; 1980 BBCJ 136 but *see* (1951) ILR 3 Assam 63 ; (1984) 1 Gau LR 28 ; (1984) 25 Del LT 146 ; (1983) 2 Crimes 109.

There was a business dealing between parties in which complainant had been supplying goods and the accused had been making the payments of goods supplied to them by cash/draft on different intervals. The complainant supplied goods to accused also and accused No. 2 being proprietor of accused issued cheque in favour of the complainant for the goods supplied to the accused. The cheque was dishonoured by the Bank. The complainant filed a complaint for cheating and criminal breach of trust. The Court held that it was a business dealing between two concerns between whom, there had been business dealings earlier also and no dispute arose. Criminal prosecution under Section 406 and 402 IPC by the complainant was abuse of the process of law. *Sneh Lata v. M/s Swastika Agro Industrial Corporation, Jalandhar* 2001 Cri LJ 4432 (P&H).

3. Applicability of.—In the case accused were charged of criminal breach of trust for having disposed of pledged goods with dishonest and fraudulent intention. Ingredient of the offence of criminal breach of trust are (1) accused must have been trusted with property or domain over it, and (2) accused must have misappropriated property or disposed of that property in violation of such trust. Goods pledge by pledger constitute entrusted of property. There may be circumstances where alleged breach is so gave and wanton as to warrant an inference of dishonest and fraudulent intention on part of pledge in disposing of pledged goods in which case it will constitute criminal breach of trust. It was observed that the act of pledge disposing of jewel ornaments pledged by debtor without notice to pledger for a price for below the real value might constitute criminal breach of trust. 1987 Cri LJ 447 (Del).

Requirement for Applicability. The terms of the section are very wide. They apply to one who is in any manner entrusted with property or dominion over property. The section does not require that the trust should be in furtherance of any lawful object. It merely provides, *inter alia*, that if such a person dishonestly misappropriates or converts to his own use the property entrusted to him; he commits criminal breach of ust. This section requires, (1) Entrusting any person with property or with dominion over property; (2) That person entrusted (a) dishonestly misappropriates or converts to his own use that property; or (b) dishonestly uses or disposes of that property or willfully suffers any other person so to do in violation – (i) of any direction of law prescribing the mode in which such trust is to be discharged, or (ii) of any legal contract made touching the discharge of such trust.

The most essential ingredient of proof of criminal breach of trust, therefore, is misappropriation with a dishonest intention. *R. Venkatakrishnan vs. Central Bureau of Investigation*, 2009 (11) SCC 737 : 2009 (10) JT 597 : 2009 (12) SCR 762 : 2009 (11) Scale 102 : 2009 (6) SLT 375.

4. Scope.—"The offence, as here defined, appears to include any dishonest misappropriation by persons in whom confidence is placed as to the custody or application of particular property whether it be by legal authority or private contract or consent. Persons as clerks, agents, servants or otherwise, under whatsoever name have a confidence reposed in them by their employers and are, whether in the ordinary course of their employment or only occasionally entrusted with the property and persons whose employment does not extend beyond the particular occasion on which they are so entrusted, seem to be within this section. Those who technically called trustees if they commit a breach of trust are responsible as criminals for acts done by them dishonestly for their own gain to the despoiling of the persons for whom they are in trust, or for acts causing wrongful gain to themselves or wrongful loss to such persons. Sections 407-409 make special provisions for various cases in which property is entrusted to agents or contractors who commit this offence.

'This definitions includes those who are entrusted in any manner with property, as warehouse-keepers, *etc.*, are entrusted only with the possession or custody of property. Persons who are empowered to take or deliver possession of property whether such power is derived from the owner or from any other person, and persons who are entrusted with any dominion over property are also included. Property which is bulky or which cannot, for other reasons be delivered from hand to hand, is usually represented by some writing or other thing. Thus the key of the warehouse or place where goods are lodged, the bill of lading, delivery order, or other document however called, which is used in the ordinary course of business to show the possession or control of property and which enables the holder to transfer or receive or otherwise deal with it, are made to represent the property itself. A person entrusted with such a document or thing has a dominion over the property thereby represented."—*Morgan and Macpherson*, 365. Evidence of trust and dishonest misappropriation are sufficient to constitute an offence under this section. 1 Weir 460 ; 16 WR Cr 39 ; 9 All 666 ; 3 WR Cr 44 ; 1914 MWN 894 : 16 MLT 505 : 15 Cr LJ 688 ; AIR 1957 All 122 : 1957 All LJ 147 : 1957 Cr LJ 170 : AIR 1955 Pat 338 : 1955 Cr LJ 1096. The value of property is immaterial. 27 All 28 ; AWN 1881-82.

"Negligence or other misconduct causing the loss of the entrusted property may make the person entrusted civilly responsible, but will not make him guilty of this offence. There must be the intention so cause wrongful gain or wrongful loss to constitute a criminal breach of trust."—*Morgan and Macpherson. See* also 106 Ind Cas 682. To constitute an offence of criminal breach of trust there must be an entrustment, there must be misappropriation or conversion of one's own use or use in violation of any legal direction or of any legal contract and thirdly the misappropriation or conversion or disposal must be with a dishonest intention. AIR 1940 Mad 329 : 41 Cr LJ 824. The accused, a receiver of a cotton mill appointed by the High Court. In the exercise of his discretion demanded and received payment over and above the market rate in respect of bales allotted to a shopkeeper. The accused however failed to account for the extra- payment. *Held*, as the sum was paid by way of illegal gratification, there could be no question of entrustment in such payment. The criminality of the act consisted in illegal payment of the money and the subsequent misappropriation or conversion of the same did not arise. AIR 1953 SC 478 : 1954 Cr LJ 102. Where a Court trying a person for an offence of criminal breach of trust finds that the case is not covered by Section 84, I.P. Code. It should consider another aspect of the case namely whether even if Section 84 did not cover the case. The state of mind in which the accused did not exclude the existence of a dishonest intention which is an essential ingredient of the offence of criminal breach of trust. AIR 1939 Mad 407 : 40 Cr LJ 642. To constitute an offence under this section, the prosecution must prove entrustment. AIR 1951 *A*jm 15 ; AIR 1951 Cal 206.

But for the purposes of this section it is not necessary that the entrustment should be express. *A*n implied entrustment will suffice. AIR 1950 *A*jm 76. *A*lthough the burden of proving entrustment of money rests on the prosecution, if it is proved that the accused was not in possession of the amount entrusted to him, it is for the accused to prove satisfactorily that he had not embezzled or misappropriated the amount but the amount had been stolen or that he had been robbed of it. It is not for the prosecution to prove how he disposed of it. AIR 1950 Sau 13. This section does not apply to partners. 146 Ind Cas 416 : 37 CWN 982 : 1933 Cr C 953 : 34 Cr LJ 958 : AIR 1933 Cal 582 ; but *see* 35 Bom LR 1518. This section does not enforce case of a person taking on hire. AIR 1932 All 324 : 33 Cr LJ 866 : 1932 *A*LJ 213.

When a person allows others to misappropriate the money entrusted to him, that amounts to a criminal breach of trust as defined by Section 405, 1952 Cr LJ 46 : 1952 BLR Kut 7 : AIR 1951 Kut 81. The section consists of property is a positive part and a negative part. The positive part deals with criminal misappropriation or conversion of the property and the negative part consists of dishonestly using or disposing of the property in violation of any direction of law or any contract concluding the discharge of trust. AIR 1966 All 619 ; 1956 Cr LJ 1165 ; *see* also 1960 Cr LJ 1250 ; AIR 1960 SC 889 (in a charge of criminal breach of trust the prosecution is not obliged to prove the presence page of conversion). There must be an entrustment and dishonest misappropriations in an offence under this section. AIR 1961 SC 761 : (1961) 3 SCR 519 ; AIR 1965 All 233 ; AIR 1970 Goa 7. In the absence of proof of entrustment of property or of dominion over the property of another, the section will not be applicable. 79 CWN 538 ; 74 CWN 782 ; 1979 Chand LR (Cr) 43. The expression "entrusted" is used in a wide sense and includes all cases in which the property of voluntarily handed over for a specified purpose and is disposed of dishonestly contrary to the purpose. AIR 1972 SC 1490 : 1973 Cr LJ 897 ; AIR 1968 SC 709 : 1968 Cr LJ 803 : (1983) 1 Crimes 385 ; 1978 Cr LJ 1379 ; 1967 Cr LJ 1599 : AIR 1967 Cal 568 ; AIR 1981 SC 81 : 1980 Cr LJ 1329 (misappropriation of provident funds) ; AIR 1961 SC 751 : 1961 (1) Cr LJ 773 (currency notes handed over to the Police Sub-Inspector or during search). But power to operation funds in bank in entrustment. 1962 (2) Cr LJ 805 : AIR 1962 SC 182 ; *see* further discussion under the head "entrusted" supra.

Requirement for. This section classes together public servants, bankers, merchants, factors, brokers, attorneys and agents. The duties of such persons are of a highly confidential character, involving great powers of control, over the property entrusted to them and a breach of trust by such persons may often induce serious public and private calamity. High morality is expected of these persons. They are to discharge their duties honestly.

The following are the essential ingredients of the offence under this section : (1) The accused must be a public servant; (2) He must have been entrusted, in such capacity with the property; (3) He must have committed breach of trust in respect of such property. *R. Venkatakrishnan vs. Central Bureau of Investigation*, 2009 (11) SCC 737 : 2009 (10) JT 597 : 2009 (12) SCR 762 : 2009 (11) Scale 102 : 2009 (6) SLT 375.

Petition against complaint was devoid of essential ingredients—*Prima facie* no offence made out against accused order of Magistrate taking cognizance was quashed. *Manoranjan Tripathy* v. *Ganesh Prasad Singh*, 1994 Cr LJ 204 (Ori).

According to Section 405, I.P.C. a dishonest misappropriation or conversion to his own use or dishonest use or disposal of property in violation of any direction of law or of any legal contract is a necessary ingredient of offence of criminal breach of trust. *Jugal Kishore Saraf* v. *State of Assam*, (1994) 2 GLR 174 (Gau).

To make out offence under Section 405, I.P.C. it must be established that he was either entrusted with or entrusted with domain over property. *Alagiri* v. *State*, 1996 Cri LJ 2978 (Mad).

Where complainant was allotted a plot measuring 3,600 square feet by society—Society renumbered the plots at request of allottee—Plot measuring 1,800 sq. ft. was only handed over—Offence under Section 405, I.P.C. was made out and the members of managing committee have not discharged the trust reposed by the complainant and wilfully sold half of the plot to some third party and thus satisfied the ingredients of Section 405, I.P.C. *Madhosingh* v. *Kamla Devi*, 1994 (1) Bom CR 165.

5. Criminal Breach of Trust—Proof of mens rea.—In *Kanhaiya Lall* v. *Emperor*, 168 Ind Cas 58 : 38 Cr LJ 491 : 1937 OLR 202 : 1937 OWN 505 : AIR 1937 Oudh 331, the Court observed : "My principal reason for holding that the facts of this case do not constitute the offence of criminal breach of trust is that there is no satisfactory evidence on the record which convinces me that the accused, *B. Kanhaiya Lall*, at the time when he is said to have misappropriated certain sums of money had guilty of knowledge or *mens rea* as to convert what at best amounted to a civil wrong or tort into a penal offence' amounting to criminal breach of trust by a servant. The distinction between a civil wrong, which gives rise to a suit for damages for that wrongful act or tort, and a criminal offence punishable under the Penal Code is very clear. Every breach of trust gives rise to a suit for damages, but it is only where there is evidence of a mental act of fraudulent misappropriation that a commission of embezzlement of any sum of money becomes a mental offence punishable as criminal breach of trust under Sections 408 and 409, I.P. Code. It is the mental act of fraudulent misappropriation that clearly demonstrates an act of embezzlement which is a civil wrong or tort from the criminal breach of trust punishable under Section 408, I.P. Code. This is clearly brought out in the observations of *Coleridge. J.*, in *R.* v. *Williams Sarah*, 7 C & P 338 and in *R.* v. *Lynch*, 6 Cox CC 445. This malicious intent on the part of a servant to deprive his master of some of money due to that latter and the fraudulent misappropriation as included by such mental act or intent to deprive the master of his property without any outward or visible trespass in the fraudulent mental distinction between a civil wrong arising out of a breach of trust and the offence of criminal breach of trust..... Every offence of criminal breach of trust involve a civil wrong in respect of which the complainant may seek his redress for damages in the Civil Court but every breach of trust, in the absence of *mens rea*, cannot legally justify a criminal prosecution". 1957 MPWN 495. A deprivation even for a short time is within the meaning of the criminal breach of trust. If the Managing Director of a Bank entrusted with securities owned by the pledger disposes of their securities against the stipulated terms of the contract entered into by the parties, with the intents of causing wrongful loss to the pledger and wrongful gain to the bank, there can be no question but that the Managing Director has necessary *mens rea* required by Section 405. AIR 1956 SC 575 : 1956 SCA 941 : 1959 SCJ 613 : 1956 SCR 483 : 1956 Cr LJ 1116 ; (1961) 2 Guj LR 262 : (1961) 1 Cr LJ 654.

Where the accused is able to establish that due to incessant rain the paddy supplied to him by Government for milling it into rice was damaged resulting in short delivery of rice, than there is no *mens rea* on the part of this accused and hence an inference regarding dishonesty of the accused will not be justified. AIR 1955 Trip 35 : 1955 Cr LJ 1636.

6. Property.—The property referred to in this section must, as in Section 403, be moveable property and criminal breach of trust cannot be committed in respect of immoveable property. 23 Cal 272 ; AIR 1930 Rang 158 : 8 Rang 13. Cancelled cheques are property. 27 All 28 : 1 Cr LJ 603. No criminal breach of trust can be committed in respect of immoveable property. AIR 1926 Lah 428 : 27 Cr LJ 760 : 95 Ind Cas 280 ; 56 Punj LR 521 : ILR 1955 Punj 710.

The word "property" is used in the Penal Code in a much wider sense than the expression 'moveable property'. There is no good reason to restrict the meaning of the word 'property' to moveable property only when it is used without any qualification in Section 405 or in other section of the Penal Code. AIR 1962 SC 1821 : (1962) 32 Com Cas 699 : 1962 (2) Cr LJ 805 (funds amount to property). The property 'must belong to person other than the accused. *Ibid* : 1964 (2) Cr LJ 496 : 1961 Jab LJ 731 : 1962 MPLJ 765. The property includes things purchased with money entrusted. AIR 1965 TC 271 : 1955 Cr LJ 1539 : 1955 Ker LT 509 ; 1957 Cr LJ 265 ; 1956 All WR (HC) 583 (money paid to share broker specially for purchase a share is not, property of the person to whom it is paid but he is a mere trustee). The word 'property' appearing in Section 406, I.P.C., is comprehensive enough to include the sale proceeds of property entrusted to a bailee. 1961 Raj LW 347 : ILR (1960) 10 Raj 1527 : AIR 1932 Sind 169 : 54 Cr LJ 57. The word "property" is wide enough to include a chose in action. 1980 Cr LJ 388 : AIR 1980 SC 439. The cognate section commencing with Section 403 relate only to moveable property. 36 Cal 758 *contra* 27 Cr LJ 331 ; 1932 Mys 1353 : (1897) BUC 928. The view that the offence under the section only relates to moveable property was not approved in AIR 1962 SC 1821.

After hearing the parties complaint was dismissed—Revision against dismissal who filed case was remanded—Revision against remand was held—Allegation that dowry was handed over to the accused—Pleaded that it was given to husband, mother and father of the accused—Hence, order was not held illegal. *Lakhbir Singh* v. *(Smt.) Paramjit*

Kaur. (1994) 1 CC Cases 194 : (1994) 1 SLJ 528 : (1994) 1 Recent Cr R 188 : (1994) Cr LT 64 : (1994) 1 Crimes 285 (P&H).

7. Entrusted.—The term "entrustment" is not necessarily a term of law. It may have different implications in different context. In its most general signification, all it imports is the handing over the possession for some purpose which may not imply the confessing of any proprietary right at all. 1935 Cr 1210 : AIR 1935 Rang 453. The words "in any manner" in the section show that the entrustment of property with the accused may be brought about in various ways. 159 Ind Cas 656 : 1935 MWN 914 : 42 LW 923 : 1935 Cr C 1314 : 69 MLJ 681. Sub-ledge by pledgee of goods pawned to him to the extent of his interest therein is not criminal breach of trust. AIR 1938 Mad 551. Moneys due to a customer from a banker are simply due to a customer as debts and are fully at the disposal of the banker. The latter is not, therefore, guilty of criminal breach of trust in using them for his own purpose. 32 PR 1901 (Cr). Failure to account for money by the person to whom it has been entrusted may constitute the offence of criminal breach of trust under this section. UBR 1909, 1st Qr. Penal Code. Where the accused, to whom silver had been entrusted for making an ornament, introduced copper, *held*, that an offence under this section has been committed. 4 BHC Cr 16. In a case under this section trust is essential. 75 Ind Cas 89 ; 72 Ind Cas 172 ; 1923 Lah 321 ; 25 CWN 838 ; 1928 Sind 106 : 1953 Cr LJ 1289 : AIR 1923 Pat 225 ; AIR 1953 SC 478 : 1954 Cr LJ 102, where it was held that to constitute the offence of criminal breach of trust it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. *See* also 1964 MPLJ 750 : 1964 Jab LJ 724 (*contra* the offence of criminal misappropriation, where no entrustment is required for the offence to be constituted). Entrustment need not be in furtherance of a lawful object. AIR 1927 Nag : 10 NLJ 72 : 28 Cr LJ 506 : 23 NLR 106 : 101 Ind Cas 890. Where property attached is given for sale custody, deliberate refusal to produce it is repudiation of trust and accused is guilty of criminal breach of trust. AIR 1934 Lah 31. Advances made to brokers on pronote creates no trust. 6 LBR 62 : 17 Ind Cas 834 : 13 Cr LJ 888 (FB) ; *see* also 14 Cr LJ 145 : 19 Ind Cas 145 : 7 LBR 16 : 6 Bur LT 209 (FB) ; 15 Cr LJ 452 : 24 Ind Cas 332 : 7 Bur LT 139 (FB) : 15 Cr LJ 452 ; 6 LBR 46 : 13 Cr LJ 269 : 14 Ind Cas 658. An auctioneer cannot be said to be liable for criminal breach of trust if he does not punctually carry out every term in the agreement, *e.g.*, if he did not hold the sale on the agreement date, or if there was delay in payment. 41 Cal 844 : 15 Cr LJ 683 : 26 Ind Cas 141. The word "entrusted" in this section is used in its legal and not in its figurative or popular sense. The sentence makes no distinction between different kinds of moveable property. 108 Ind Cas 663 : 29 Cr LJ 431 : AIR 1928 Sind 106 ; *see* also 30 Bom LR 1270 : A1R 1928 Bom 521 ; ILR 1949 Nag 620 ; AIR 1950 Ker 52. Where there is no dispute as to title and property entrusted for a particular purpose is converted to the use of the holder the offence of criminal breach of trust is clearly made out. 3 Luck 494 : 112 Ind Cas 103 : 29 Cr LJ 983 : AIR 1928 Oudh 277. The question whether the property in the goods has or has not passed to the purchaser under a trust receipt is relevant to the decision of cases under Section 406 or Section 409, but it is not necessarily decisive. The decisive test is whether there was an entrustment within the meaning of Section 405 and the necessary criminal intention. AIR 1939 Sind 1 ; *see* also AIR 1939 Sind 27 ; AIR 1957 Ori 268 : 23 Cut LT 410 : 1957 Cr LJ 1431 (not only entrustment but also dishonest misappropriation has to be made out). When goods are received by a partner of a firm.

they are received by him on his own behalf and as agent of the firm. They are received by him personally and it does not matter for the purpose of Section 405, that he received them also as agent of the firm. AIR 1951 Kut 66 : 52 Cr LJ 814. The nature, character and incident of partnership property are such that during the subsistence of the partnership there cannot be any entrustment or dominion ; for the partnership property is not a specific ascertainable property and is of so equivocal and problematic nature that it is not suspectible to be used in a manner to bring in to operation Section 405 of the Penal Code. 55 CWN 541 : 52 Cr LJ 723 : AIR 1951 Cal 69.

The distillers who worked under licences granted to them required molasses as raw material, for movement of molasses they obtained permits from the Excise Commissioner ; they paid for molasses as also for the transport of the molasses to the distillers ; they manufactured spirit out of the molasses and sold their spirit to the warehouses or licensed vendors under the terms of the licences granted to them. *Held*, that the property in molasses or any dominion over them was not entrusted to the distillers. 1953 Cr LJ 1289 : AIR 1953 Pat 225 (a mere breach of contract or a breach of the conditions of a permit is not necessarily synonymous with criminal breach of trust). There is no entrustment with the meaning of Section 405, when a payee or the mortgagee receives payment from his debtor or the mortgagor. 1955 Andh LT (Cr) 224 : 1955 Andh WR 537.

There is nothing either in the complaint and/or in the sworn statement of the complainant and the three witnesses that any property was entrusted to any of the appellants at all or the appellants had dominant over any of the properties of respondent No. 2 which they dishonestly converted to their own use so as to satisfy the ingredients of Section 405, IPC punishable under Section 406. IPC. Further the agreement also did not require entrustment of any property to the appellants. Taking the complaint and the statements of the witnesses as they are, it cannot be said even *prima facie*, that the appellants committed any offence punishable under Section 406 IPC, since the ingredients of that offence were not satisfied. *S.N. Palanitkar v. State of Bihar* 2001 Cri LJ 4765 (SC) AIR 2001 (SC) 2960 : 2001(9) JT 151 : 2001(7) Scale 430 : 2001(3) Supreme 216.

Directors are not only agents but in some sense and to some extent are in the position of trustees. AIR 1962 SC 1821 : (1962) 32 Com Cas 699 : 1962 (2) Cr LJ 805.

Once *T* made an application to the Superintendent of Police that one *L* and one *B*. a police sub-Inspector met him on the way and *L* said to *B*, the sub-Inspector that though *T* appeared to be clad in rags he had considerable money after this the person of *T* was searched and the sub-Inspector having opened the bundle of currency notes with *T*, handed them over to L, one by one, for being returned to *T*, but out of the same the amount of Rs. 250/- was not returned. *Held*, as the currency notes were taken by the Sub-Inspector in discharge of his duty for inspection and return he was certainly entrusted with the notes within the meaning of Section 405. 1961 SC 751 : (1961) 1 SCA 593 : (1961) 2 SCR 679 : 1961 (1) Cr LJ 773 ; *see* also AIR 1957 Cal 148 : 1957 Cr LJ 367 (power of police officer to seize property).

For proof of entrustment *see* (1961) 2 Guj HCR 117 : (1961) 2 Guj LR 296 : 1961 (1) Cr LJ 654 ; AIR 1957 Ori 268 : 23 Cut LJ 410 : 1957 Cr LJ 1431 : AIR 1957 Cal 148 : 1957 Cr LJ 367 ; AIR 1957 Madh B 33 : 1957 Cr LJ 179 : AIR WR (HC) 255 : AIR 1956

Bom 314 : 1956 Cr LJ 979 (a dealing between bank and customer) ; 1957 MPC 334 : 1957 Jab LJ 706 (receipt of money by son on behalf of father an office-bearer of the society) ; AIR 1956 Raj 20 : ILR (1955) 5 Raj 907 : 1956 Cr LJ 107 (giving money to goldsmith for preparing ornaments) ; AIR 1956 Mad 6 : 1956 Cr LJ 71 (employer investing provident fund money in his own business).

For entrustment *see* notes under "scope" *ante.* In criminal breach of trust of property by one spouse against the other, the essential requisite under Section 406 would be wanting. 1983 Chand LR (Cr) 638 : AIR 1982 Punj 372. Entrustment need not be express, it may be implied. 1964 MPLJ 750 : 1978 Cr LJ 1379. The term "entrusted" govern not only the words "with the property" but also the words "or with a dominion over the property. AIR 1965 SC 1463 : (1965) 2 SCR 429 ; *see* also 1974 Cr LJ 413. A mere transaction of sale cannot amount to transaction. AIR 1968 SC 700. In 1956 SCR 483 : AIR 1956 SC 375, it was stated that an entrustment need conform to all the technicalities of the law of trust. *See* also (1967) 70 BLJR 280 ; AIR 1953 SC 478 ; 1972 MLJ (Cr) 656 ; AIR 1961 SC 751 ; 1977 Cr LJ 309 ; 1978 Cr LJ 1379 (being entrusted with the doing of a job is not the something as being entrusted with the property) ; AIR 1953 SC 478 : 1953 Cr LJ 102 : ILR 1953 SC 181 (no question of entrustment of property and he had no subsequent misappropriation or conversion of the property) ; 1981 Cr LJ 259 (entrustment of the property or same kind of trust is required).

Deduction from the wages of the employees for the purpose of crediting the deducted amount to provident fund or a family pension fund, it amounts to entrustment. *State of Gujarat* v *Shyamsunder Radhakisan Mungata,* (1995) 2 GLH 677 (Guj).

When wife driven out from matrimonial home without her *stridhan* property as same not returned to her by husband, it is *prima facie* case of entrustment. *Rashmi Kumar* v. *Mahesh Kumar Bhada,* 1997 (2) SCC 397 : 1996 (11) JT 175 : 1996 (9) Scale 388.

8. Actual abandonment or destruction.—If an article is abandoned it becomes *res nullius,* and there can be no theft or breach of trust. But a very clear distinction is to be drawn between an intention to destroy and to abandon and an actual destruction and abandonment. The very fact that the owner of the property intends to destroy or abandon that property and hands it over to some person to effect those purposes is a clear indication that he still maintains his right as owner of that property and those right subsist until the abandonment or destruction is completed. As long as the destruction or abandonment is not fulfilled and so long as it is still in the hands of the owner to countermand such destruction or abandonment the property is still the property of the owner and taking it out of his possession is theft and improper use of it is breach of trust. AIR 1951 Nag 150. Rice which had become rotten and which had been ordered to be destroyed is not property. 2 CWN 216. *See* (1904) 1 Cr LJ 903 (purchase of the thing is immaterial) but *see* 1894 All WN 197 (condemned pony).

9. Sections 405 and 415.—Property obtained by cheating cannot be capable of being fraudulently converted under Section 405, I.P. Code. The notion of a trust is that there is a person trustee or entrustee, in whom confidence is reposed by another who commits property to him ; this again supposes that the confidence is freely given. A person who obtains property by a trick from another bears no resemblance to a trustee and cannot be regarded as a trustee under Section 405. The essence of the offence under Section 405 is the dishonest conversion of the property entrusted, but the act of cheating itself involves a conversion. Conversion signifies the depriving of the owner of the use and possession of his property. When the cheat afterwards sells or consumes or otherwise uses the fruit of his cheating he is not committing an act of conversion, for the conversion is already done, but he is furnishing evidence of the fraud he practised to get hold of the property. Therefore cheating is a complete offence by itself. 162 Ind Cas 592 : 37 Cr LJ 637 : 1936 Cr C 637 : 43 LW 548 : 1936 MWN 281 : AIR 1936 Mad 353 : 70 MLJ 635 (FB) in the same case *Lakshman Row, J.*, observed : "More offences than one were committed, *viz.*, obtaining delivery of property by cheating under Section 420, I.P. Code, and criminal breach of trust under Section 406, I.P. Code, and as stressed by the Crown Prosecutor, acts constituting the offence of obtaining property by cheating cannot by themselves constitute the offence of criminal breach of trust. The ingredients of the offences are different and so is the evidence requisite to establish them. There can be a breach of trust independently of cheating and the offences are distinct and separate. The offence under Section 420 is complete as soon as delivery is obtained by cheating, and without further act of misappropriation there can be no breach of trust." *See* also 159 Ind Cas 656 : 1935 MWN 914 : 42 LW 923 : 1935 Cr C 1314 : 69 MLJ 681. The offence of criminal breach of trust may be broadly defined as the fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come. It is akin to cheating, theft and criminal misappropriation but differs from them in important respects. In criminal breach of trust the property is lawfully acquired or acquired with the consent of the owner, but dishonestly misappropriated by the person to whom it is entrusted. In cheating the property is wrongfully acquired in the first instance by means of a false representation. In theft the property is taken without the consent of the owner and the dishonest intention to take property exists at the time of such taking. In criminal misappropriation the property is innocently acquired, often equally by chance, but by a subsequent change of intentions and the retaining becomes wrongful and fraudulent. The expression "entrusted" has a corresponding meaning and embraces all cases in which goods are entrusted. AIR 1951 Punj 103 : 54 PLR 18. To constitute a breach of trust the property must in the first instance have come into the hands of the accused in a lawful manner or with the consent of the owner. (1977) 4 Cr LJ 244. Criminal intention is necessary in cheating at the time of entrustment. 1978 Cr LJ (NOC) 33. Proof of entrustment is sufficient in criminal breach of trust but in cheating the dishonest or the fraudulent intention must be shown to be present from the very inception. 1970 Pat LJR 600.

10. Dishonestly.—The word "dishonestly" means the doing of an act with the intention of causing wrongful loss or wrongful gain, and wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled. For either in wrongful loss or gain, the property must be lost to the owner or the owner must be wrongfully loss or gain, the property must be lost to the owner or the owner must be wrongfully kept out of it. 1 Weir 416 : 3 MHC App 6. Great caution ought to be used in drawing the inference of dishonesty from a breach of duty imposed by civil law. 1 Weir 461 : 6 MHC App 28. In an offence under this section the dishonest intention is an essential ingredient. 30 PR 1879 Cr ; 50 MLJ 94 : 27 Cr LJ 331 : AIR 1926 Mad 99 : 92 Ind Cas 747 ; AIR 1933 Lah 235. A taking under a colour of right under a *bona fide* claim would not be an offence however much the claim turns out to be unfounded. 1933 MWN 246 ; *see* also 38 CWN 474 : 35 Cr LJ 537 : AIR 1934 Cal 425. Loss not essential for an offence under this section. Intention to cause wrongful loss is enough. AIR 1924 Lah 353 : 69 Ind Cas 631. Too narrow interpretation of the word "dishonest" should not be placed leading to substantial injustice. AIR 1933 Pat 554. Mere retention of money is not an offence under this section. 2 CPLR 161 ; 1 Weir 462 ; 17 MLJ 413 ; 16 Cr LJ 543. In a case of criminal breach of trust the over act of the accused showing his dishonesty is essentially necessary to be proved to establish the offence and till the time arrives when the act is done it cannot be said with certainty that the offence was committed. *Lanter* v. *The King*, 1913 AC 221 ; *see* also 41 CLJ 280 : 29 CWN 492 : 86 Ind Cas 213 : 26 Cr LJ 725 : AIR 1925 Cal 613. A public servant who being entrusted with Government funds for the purpose of constructing a building obtains the materials free of cost, from somebody and appropriates a certain amount to himself as their price, is guilty of criminal breach of trust. 4 Pat 488 : 6 PLT 154 : 86 Ind Cas 459 : 26 Cr LJ 811. In order to establish a charge of dishonest misappropriation or criminal breach of trust it is not necessary that the accused should have actually taken tangible property such as cash from the possession of another and transferred it to his own possession. AIR 1926 Lah 385. Where an agreement is a wager and void under the contract law, a person cannot be convicted under the 2nd part of this section for dishonest use and disposal of entrusted property in violation of express or implied contract if based on such agreement. 100 Ind Cas 989 : 28 Cr LJ 381 : AIR 1927 Mad 425. But in such a case he may be convicted under 1st part of this section. *Ibid.* The trust contemplated by this section & Sec. 406 need not be in furtherance of a lawful object. 23 NLR 106 : 101 Ind Cas 899 : 28 CrLJ 506 : AIR 1927 Nag 225. Where goods are entrusted to the accused for selling and obtaining money which he was to hold for complainant subject to certain deduction the accused was entrusted with the money received. 1928 Bom 521.

Dishonest misappropriation might sometimes be inferred from the circumstances without direct evidence. 2 Cr LJ 478. Where a person makes use of money belonging to another with latter's consent, and contrary to the purpose for which possession thereof has been given by the latter to the former the intention of the person so making use of the money must *prima facie* be dishonest within the meaning of Section 24. AIR 1935 Rang 453 : 1935 Cr C 1210. It is only from the circumstances that intention can be inferred. In case of criminal breach of trust failure to render a satisfactory account on the part of the accused is a circumstance pointing to the guilt of the accused ; AIR 1949 Pat 69 ; AIR 1958 Pat 272 : 1958 Cr LJ 66. Presumption of dishonest intention was made in case of failure to account regarding money received or giving false accounts in AIR 1954 Madh B 21 : 1954 Cr LJ 448 ; Madh BLR 1955 Cr 504 : 1956 Madh BLR 111; Madh BLR 1954 Cr 280 ; Madh BLR 1954 Cr 382 ; Madh BLR 1954 Cr 382.

A matter is *ex facie* a civil dispute should not be entertained by the Criminal Court unless the prosecution is able to prove clearly and beyond doubt that the accused acted dishonestly and with a view to enrich himself clandestinely at the expense of those with whom he was working and with whom he was found by a fiduciary relationship 55 Ind Cas 409. it is not a criminal offence in every case for a pleader to retain fee the legal recovery of which is time-barred. 6 NLJ 119.

Dishonest intention is one of the essential ingredients of the offence of criminal misappropriation and also of the offence of criminal breach of trust. AIR 1959 SC 1390 :

1959 Cr LJ 1508 ; AIR 1965 SC 1319 : 1965 (2) Cr LJ 421 (in the absence of proof of dishonest intention, the section, will not apply). Mere retention or delay in payment of money due to another does not necessarily shows a dishonest intention. 1961 (1) Cr LJ 654 ; AIR 1956 Mys 40.

11. Disposal of property in violation of any direction of law, etc.—A person; who pledges what is pledged to him, may guilty of criminal breach of trust. There are two elements to constitute the offence : (l) the disposal in violation of any direction of law or contract express or implied describing the mode in which the trust ought to be discharged. (2) and such disposal must be made dishonestly. Great caution ought to be used in drawing the inference of dishonesty from a breach of duty imposed by civil law. 1 Weir 461 : 6 MH Cr App 28 ; 1 Weir 464 ; UBR (1897-1901) Vol. I 345 ; 17 Bom LR 670. When the contract between the complainant and the accused is that the pledged amount would be returned to the complainant on payment of entire dues, and the accused inspire of the payment retains it and uses the ornaments as a pledge in respect of a completely independent transaction, he definitely uses the ornaments in violation of the legal contract between the parties creating the trust. AIR 1955 Ori 145 : 1955 Cr LJ 1371. *See* also (1979) 2 Malayan LJ 152 ; (1978) 1 Malayan LJ 240 (who it was held that the disposal of the property was in violation of intention of the law and in violation of the legal contract). Disbursement of money of the society by the secretary was held to be in contravention of the bye-laws. (1978) 2 SCJ 461 ; *see* also AIR 1953 SC 478 : 1954 Cr LJ 162 ; 1975 Cr LJ 734 (in violation of the contract touching the discharge of a trust) ; 1983 All Cr R 317 : 1983 All LJ 1087 (held to be breach of contract and not of trust).

Expression "direction of law" in context of Secs. 405 and 409. It must be noted in this respect that Banking norms and established practices and procedures would contain directions of law prescribing the mode in which the trust is to be discharged. The expression direction of law in the context of Secs. 405 and 409 would include not only legislations pure and simple but also directions, instruments and circulars issued by an authority entitled therefore. *Mir Nagvi Askari vs C.B.I.*, AIR 2010 SC 528 : 2009 AIR SCW 7089

12. Proof required.—It is incumbent upon the prosecution in order to establish a charge of breach of trust to prove : (l) that the accused was entrusted with property and (2) that he dishonestly misappropriated or converted to his own use of that property. The facts like any other fact may be proved either by direct evidence or by circumstantial evidence 1935 Cr C 1210 : AIR 1935 Rang 453 ; *see* also 157 Ind Cas 208 : 36 Cr LJ 1112 : 3 RS 28. The usual evidence of breach of trust in regard to the moneys received for the purpose of payment over is either non-payment or non-accounting or false accounting. Breach of trust is a definite act, like theft or misappropriation, and the above circumstance does not constitute it, but merely evidence it. AIR 1956 Mad 452 : 1956 Mad WN 929 : 1956 Cr LJ 1079 ; ILR (1956) 6 Raj 942 ; AIR 1959 Ori 159 : 25 Cut LT 269 : 1959 Cr LJ 1197 and AIR 1954 HP 33 : 1954 Cr LJ 833 (misappropriates or converts to his own use). AIR 1960 All 180 : 1960 AWR (HC) 1065 (conviction held bad in law).

In case of criminal misappropriation the prosecution must prove dishonest misappropriation. AIR 1954 Madh 21 : 1954 Cr LJ 448 : ILR 1954 Hyd 901.

Onus is not on accused to prove non-payment but on the prosecution to prove payment. 1954 RLW 93 : ILR (1953) 3 Raj 706. In the absence of any allegation of misappropriation or conversion the offence under Section 405, I.P. Code is not proved. 1954 (2) Cr LJ 730 : AIR 1954 Punj 267.

The onus rests on the prosecution and it may be discharged by prescription arising from the condiment and acts of the accused. (1974) 76 Punj LR 780 ; (1974) 40 Cut LT 873 : AIR 1980 SC 889 : 1980 Cr LJ 1250. Dishonesty may be proved or presumed for circumstances. AIR 1951 Kutch 81 : 52 CrLJ 46.

13. Cases.—This section does not cover misappropriation by person of sale-proceeds of property, *i.e.*, furniture entrusted to him. 41 Cal 814 : 15 Cr LJ 683 : 26 Ind Cas 131. Where a master settles his account with a tradesman for a specific sum and he sends his servant with the money, and the servant after making the payment asks the tradesman for a present, then if the servant takes the present and keeps it, he is not guilty of stealing because he has no intention to steal. 8 All 120. A refusal by the accused to give up land alleged to have been mortgaged to them, the mortgage being denied, could not be treated as a misappropriation of the documents of title amounting to criminal breach of trust under Section 405, I.P. Code. 2 BHC 127. To convict an accused under this section not merely a civil breach of trust, but also a fraudulent intent or a wilful violation of trust with fraudulent design should be proved. Rat Un Cr C 484. Return of deposit to brother-depositor with best intention and absence of moral turpitude does not amount to criminal breach of trust. 117 Ind Cas 157 : 39 Cr LJ 735 : AIR 1929 Sind 119. This section is couched in broad terms and covers any person who is in any manner entrusted with any property. 7 OWN 663 : 126 Ind Cas 395 : AIR 1930 Oudh 401. Under this section the property entrusted or part of it must be actually misapplied where the fraudulent intention of the accused did not result in actual misappropriation. AIR 1934 Cal 843 ; AIR 1934 Lah 419 : 1934 Cr C 1184. Joinder of charges more than three is illegal. 146 Ind Cas 175 : 1933 Cr C 1172 : AIR 1933 Rang 325. The property in respect of which criminal breach of trust can be committed must be the property of some person other than the accused or the beneficial interest or ownership of it must be in some person the offender must hold such property in trust for such other person or in some other way for his benefit. 1930 MWN 790 : 1931 Cr C 331 : AIR 1931 Mad 235. Mere delay in payment of money entrusted to a person where there is particular obligation to pay it at a certain day, does not amount to and does not furnish by itself a sufficient proof of misappropriation so as to make him guilty of the offence of criminal breach of trust. AIR 1930 Mad 507 : 58 MLJ 649. Loss to the principal or anybody else is by no means a necessary ingredient of the offence. 321 Bom LR 1195 : AIR 1930 Bom 490 (FB). Where an amount is deposited by the employee with the employer as security on condition that the employee would get it back on the termination of his services provided that there are no discrepancies in the accounts handled by him and the evidence discloses discrepancies which the employee does not explain and there is nothing to show that the employer has converted the money to his own use or that he has not the money in his possession, mere failure to return the money on a demand by the employee does not establish an offence under Section 405, I. P. Code. 48 CWN 734. Where a tailor to whom cloth was given by the complainant for preparing shirts out of it, refuses to deliver either the shirt or the cloth to the complainant and claims a lien upon it for the price, he can not be convicted for criminal breach of trust, unless the complainant establishes that the accused had never worked in the material and had disposed of it in some other way. AIR 1950 Cal 35. Where a thing is utilised for a purpose not intended against an express agreement or implied understanding there will be an offence under Section 406. AIR 1950 Mad 49. Where a person hypothecating goods in his shop as collateral security against an advance agrees to hold goods and proceeds thereof in trust for another, he commits an offence under this section if he deals with proceeds in violation of terms of trust. AIR 1938 Sind 73. Partner can be convicted of criminal breach of trust in respect of partnership property. But if chief matter is dispute between complainant and accused is dispute between partners and allegations under Sections 403 and 420 are made merely to squezee out money from accused, dispute being of civil nature, criminal complaint does not lie. AIR 1938 Sind 21. Where a person holding a winning lottery ticket has lodged it with the authorities for the purpose of drawing the prize money, no criminal case under Sections 409 and 511, I.P. Code, is sustainable against him, at the instance of another person claiming a share, in the ticket and alleging that the holder is now denying his interest. 42 CWN 648.

Money deposited with a stake holder are moneys entrusted with him and misappropriation by him dishonestly will make him liable under this section. (1904) 1 Cr LJ 730. With regard to the provident fund, the law is that the particular sum deducted out of the wages of the employee can not be, for the purposes of Section 405 I.P.C. regarded as having been entrusted with the sum. 1977 Cr 309 : 1980 Cr LJ 1329.

Both being distinct offences and involving dishonest intention before mutually exclusive and different in basic concept. *Vadivel* v. *Packialakshmi*, 1996 Cri LJ 300 (MP).

Allegations in complaint that goods in respect of which floating charge was created in favour of banks were disposed of by debtor company, no offence of criminal breach of trust is committed on such allegations. *C.B.I.* v. *Duncans Agro Industries Ltd., Calcutta*. 1996 Cri LJ 3501 (SC) : AIR 1996 (SC) 2452 : 1996(5) SCC 591 : 1996(6) JT 227 : 1996(5) Scale 99 : 1996(5) Supreme 462.

Where entrustment of money to be accused-driver of the company is not proved by any documentary evidence, mere vague statement that certain amount was given to the accused is not sufficient to prove the offence under Section 406, IPC. *Bhikha Bhai Patel* v. *State*, AIR 2004 Jhar 662 : 2004 Cr LJ (NOC) 177 (Jhar) : AIR 2004 Jhar HCR 662 : 2003(2) East Cri C 631.

14. Debtor and creditor.—The only underlying idea in Section 405 is undoubtedly this that the property which is the subject matter of entrustment, or in respect of which dominion is passed over to the accused, does not even for the time being become the property of the accused which he could use for his own purpose. Thus the section does not cover the case of a loan or of an advance money when the borrower or the depositor intends to use or utilise that money, for the time being, till he is in possession of it, although he may have to return an equivalent amount latter or in to person making the advance with or without interest, or compensation for the use thereof AIR 1954 All 583 : 1954 Cr LJ 1293 : 1954 All LJ 97 ; 29 Cut LT 415 : ILR (1963) 399. The relation between the parties was that banker and custom which is in law that of banker and customer the moneys due are simply debts. So if the bank fails he will not be proceeded under this Section. AIR 1941 Cal 713 : 43 : 51 : 45 CWN 1071 ; 1982 Cr LJ 1343 : 1982 Raj LR 54, but *see* 1982 Punj LR 51 (where the banker was convicted). It all depends upon the question in whom property in the fund vests. *See* AIR 1953 Nag 301.

15. Agent.—In case of an agent entrusted with money by the principal for a specific purpose to be completed before a specified period his criminal liability could not arise before the expiry of that period. Therefore, no question of attaching any criminal liability to the accused could arise. 24 Cut LT 455 : ILR 1958 Cut 580. Director of company are not only agents but in some sense and to some extent they are trustees. AIR 1962 SC 1821 : 1962 (2) Cr LJ 805 ; AIR 1963 Cal 64 : 1963 (1) Cr LJ 156. He is not a trustee of a debt due or payable by the company and hence had no duties to call back the dues from the debtors. (1973) 75 Bom LR 323. But *see* (1979) 1 Malayalam LJ 73 (the person who effected the payment had converted the money to his own use is guilty under the section).

16. FIR against Director of company.—FIR lodged against director of a company disclosing *prima facie* case of cognizable offence under Sections 406 and 409, IPC cannot be quashed merely on ground that some one wrongly arrayed him as an accused. *Sushil Kr. Bagla* v. *State of WB*, 2004 Cr LJ 171 (Cal) : 2004(2) All Cri LR 192 : 2003 Cal Cri LR 274 : 2003(2) Cal HN 324 : 2003 (3) Cal LT 470.

17. Prosecution against company by making character as accused director.—contention that the accused being a director cannot be proceeded against and it is the company only which can be proceeded against for the offences under Sections 406/409 sounds like an absurd proposition and the same is untenable in law as the company being a juristic person it can act on his own but through a human agency. *Sushil Kr. Bagla* v. *State of WB*, 2004 Cr LJ 171 (Cal) : 2004(2) All Cri LR 192 : 2003 Cal Cri LR 274 : 2003(2) Cal HN 324 : 2003 (3) Cal LT 470.

18. Prosecution of Director of company for criminal breach of trust.—Since the Directors of the Company cannot be regarded principal employer they cannot be prosecuted under Section 406, IPC for not depositing ESI contributions deducted from the wages of the employees. *R.L. Kanoria* v. *State*, 2004 Cr LJ 867 (Cal) : 2003 (3) Cal HN 400 : 2004 (1) Cur LR 401.

19. Element of entrustment in the matter of Provident Fund.—In view of Explanations 1 and 2 to Section 405, IPC which are self explanatory for the element of entrustment, the plea of the accused that in the complaint alleging default of payment of provident fund, there is total absent of entrustment is not tenable. *M/s. Rita Agencies* v. *Enforcement Officer Employees Provident Fund Organization*, 2004 Cr LJ 1304 at p. 1307 (Mad) : 2004(3) Rec Cri R 796.

20. Employees' Provident funds and Miscellaneous Provisions Act, 1952, Section 14—Constitution of India, Article 20(2)—Quashing of complaint on ground of doubt jeopardy.—Where the complaint under Section 14 of 1952 Act is yet to be registered the complaint for under Section 406, IPC against accused for default of payment of Provident Fund contribution will not affect the principle of the 'double jeopardy' and there is no flaw in filing the complaint under the provisions of IPC. *M/s. Rita Agencies* v. *Enforcement Officer, EPF Organization*, 2004 Cr LJ 1304 at p. 1306, 1307 (Mad) : 2004(3) Rec Cri R 796.

21. Effect of writ petition for quashing complaint.—Where there is no specific order against either filing of a complaint or registering a case or investigating the same, the filing of a writ petition would not be an impediment for proceeding with a complaint under Section 406, IPC against the defaulter company for non-payment of Provident Fund dues. *M/s Rita Agencies* v. *Enforcement Officer, EPF Organization*, 2004 Cr JL 1304 at p. 1307 (Mad) : 2004(3) Rec CriR 796.

22. Hire-purchase agreement.—Mere failure to make payment of instalment of hire will make out a criminal breach of trust. 64 WN 210 : ILR (1958) 1 Cal 282. The distinction between a hire purchase agreement and agreement for sale was pointed out in 1955 BLJR 1944.

Section 405 of the Penal Code clearly contemplates being done with respect to the property indicating either misappropriation or conversion or its use or disposal of the contract express or implied. The real dispute between the parties in the instant case was as to the nature of the agreement between the party when the motor was entrusted to the appellant. The appellant only put forward his version of the agreement, in the letter which did not show any charge in the use charge in the use of the motor. The appellant was in possession both before or after the letter. No misappropriation or conversion occurs as a result of the letter. (1965) SCJ 183 : MLJ (Cr) 516 : (1965) 1 SCWR 484 : 1965 (2) Cr LJ 421 : (1965) 2 SCJ 183 : AIR 1965 SC 1319. Mere retention of property without misappropriation does not constitute criminal breach of trust nor does a mere breach of contract give rise to a criminal prosecution. 1953 Nag LJ 347 : 1953 Cr LJ 1956 : AIR 1953 Nag 301. The mere failure to pay statement by him is not criminal breach of trust. 61 CWN 210. If the hirer retains the hired property with dishonest intention, he commits a criminal offence apart from civil liability. 1974 Cr LJ 207.

23. Jurisdiction of Court.—If there be uncertainty as to place where offence is committed whether Section 182, Cr. P. Code is to be applicable. AIR 1957 SC 196 : 1957 Cr LJ 322.

24. Analogous law—Prevention Act, 1947.—The offence under Section 405 (1) of the Prevention of Çorruption Act is a distinct offence from one under Section 405. AIR 1957 SC 457 : 1957 Cr LJ 575. *See* also Section 105 of the Insurance Act, Section 15 (4) of the Punjab Gram Panchayat Act, 1952, Section 14 (1) of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 ; *see* AIR 1961 SC 578 : (1961) 1 Cr LJ 725 (Section 405, 406 and Section 105 of the Insurance Act), 1984 Lah SC 213 (Section 406 and Section 14 (1) of the Employees' Provident Fund Act).

When a Special Act creates a functional entrustment falling short of entrustment as contemplated under it, there can be no conviction under Section 405. 1974 Lah IC 691 ; 1974 Lah 1C 685.

25. Ingredients of offence under.—Criminal breach of trust is defined in Section 405 of IPC. The ingredients of an offence of the criminal breach to trust are :

1. Entrusting any person with property or with any dominion over property.
2. That person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or willfully suffering any other person so to do in violation—

(i) of any direction of law prescribing the mode in which such trust is to be discharged, or

(ii) of any legal contract made touching the discharge of such trust.

Sharon Michael vs. State of Tamil Nadu, 2009 (3) SCC 375 : 2008 (17) SCR 1412 : 2008 (13) JT 551 : 2009 (1) Scale 627 : 2009 (1) SLT 593.

26. Criminal breach of trust and cheating.—As essential ingredients of Sec. 405 and Sec. 420 were missing, no offence is made out against appellants.

Appellants, partners of firm in which Complainant was also a partner, allegedly conspired and cheated him to deprive him of share in profit by dissolving firm behind his back. Partnership firm in question was constituted on premises that four persons of a Company would represent firm. Partnership stood dissolved at very inception as it was never acted upon. In view thereof, question of any wrongful act on part of accused does not arise

We, however, in this case are satisfied that the appellants by no stretch of imagination can be said to have committed an offence particularly when admittedly the new firm has been cancelled from its very inception. If the new firm has not derived any income, the question of depriving the claimant therefrom does not arise. Whether the constitution of the said firm was illegal, or *mala fide*, thus, need not be gone into as by reason thereof the respondent cannot be said to have suffered any loss.

We may notice that as regards commission of an offence in terms of Sec. 405 of Indian Penal Code, this Court in *Indian Oil Corpn. v. NEPC India Ltd. and others*, (2006) 6 SCC 736 : 2006 AIR SCW 3830] held that where the first ingradient of criminal breach of trust, that is, entrustment is missing, the same would not constitute a criminal breach of trust.

As regards essential ingredients of the offence of cheating, it was stated :

> "(i) deception of a person either by making a false or misleading representation or by other action or omission, (ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property."

The aforementioned ingredients of Sec. 420 of Indian Penal Code are also absent in the instant case. [See also *Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd. and Ors.*, 2008 (1) SCALE 331 : 2008 AIR SCW 1956]. *V.R. Dalai and Ors. v. Yogendra Naranji Thakkar and Anr.*, AIR 2008 SC 2793 : 2008 (9) SCR 107 (SC) : 2008 (6) JT 564 (SC) : 2008 (8) Scale 156 (SC) : 2008 (4) Supreme 374 (SC) : 2008 (5) SLT 289 (SC) : 2008 (2) JCC 1418 (SC).

27. Partnership—Criminal breach of trust.—A perusal of Section 405 of the Penal Code indicates that four ingredients have to be satisfied before an act can constitute an offence of criminal breach of trust. The essentials of the offence of criminal breach of trust are : (i) entrustment of property or dominion over the property by one person to another; and (ii) a dishonest misappropriation or conversion of that property by the agent for his own use; or (iii) a dishonest use of disposal of the property in violation of the mandate of law prescribing the mode in which the entrustment is to be discharged; or (iv) a dishonest use or disposal of property in violation of the terms through any legal contract either expressed or implied regarding the discharge of the entrustment or wilfully allowing some other person to do so.

Thus, the fact of entrustment of the property must be established before a charge under Section 405 can be made out. In the present case, the property belonged to the accused and the complainant. They had jointly purchased the property in order to develop the same. It was to be developed by the partnership firm when both the accused and the complainant were partners of that firm. Therefore, the question of the accused being entrusted with the property does not arise as one partner cannot entrust the property of the firm to another. So far as the question of having dominion of the property is concerned, all the partners have dominion over the property of the partnership concern. In the present case, the property though purchased by the accused and complainant, jointly, it was to be developed by the partnership concern and therefore the accused and complainant have dominion over the property. As these basic ingredients which constitutes an offence under Section 405 are not fulfilled, the order issuing process in the matter was not proper. *Mahindra Dipchand Jain v. Ashok Sardarmal Parekh and Ors.*, 2008 CriLJ 3825 (Bom).

* * * * *

Sec. 406. Punishment for criminal breach of trust.—Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Synopsis

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1. Scope of.—It is difficult to say how Section 24 (2) of the Indian Sales of Goods Act. 1930 can be attracted where the delivery of amount was not to the accused in her capacity as buyer ; 1964 Raj LR 193 ; *see* also AIR 1957 Mad 65 (Section 630, Companies Act 1956 does not bar an investigation or prosecution for offences punishable under Sections 406 and 409, I.P.C.

In absence of dishonest intention, no offence under Sections 406 and 420, I.P.C., is made out. *Ghansham Dass* v. *State of Haryana*, (1993) 1 Recent CR 34 (P&H).

Criminal prosecution can not be used as tool to score private disputes. *Desari Narayana Rao* v. *Smt. B.V.S. Lakashmi.* 1994 (2) APLJ 150.

If both offences were alleged to be not case of one single transaction plea of two offences being mutually exclusive could be urged. M/s. *Laxmi Sales* v. M/s. *Bakemen's Hare Projects Pvt. Ltd.*, 1994 (2) CC Cases 435 (P&H).

A person charged with an offence under Section 420, IPC, cannot be convicted for offence under Section 406, IPC. *Satish* v. *Kamruddin.* (1993) 1 RecentCR 476 (P & H).

When it is not established as to how and when gives, parents spent alleged amounts on her marriage, as alleged in complainant, no interference in order of summoning accused. *Vinod Kumor Gahir* v. *Pawan Kumari*, 1991 (1) CCCases 198 (P&H).

Where there was charge of misappropriation of dowry articles by husband—Petitioner helped the husband of the bride in the act—Offence under Section 406 I.P.C. is made out against petitioner. If husband left along with all articles and petitioner helped in taking the articles no offence under Section 406, I.P.C. can be established. *AJaib Kaur* v. *State of Punjab*, (1994) 1 Recent CR 376 (P&H).

When transport company detained consignment for realisation of arrears, freight charges, there is no Criminal Breach of Trust. *M/s Rourkela Construction Pvt. Ltd.* v. *Ravindra Kumar Goyal*, 1993 Cri LJ 1510 (Ori).

When petitioner who was husband and his parent was summoned for offence—Private complaint was made and sisters made accused in complaint not summoned—Petition for quashing of the same was filed. There were specific allegations regarding entrustment of some articles to petitioner. They were, therefore, rightly summoned by Trial Court to stand trial for offence under Section 406, IPC. *Paramjit Singh* v. *Harbans Kaur*, (1994) 2 Crimes 261 (P&H).

Breach of trust is not only of criminal nature case. It is the case of both civil and criminal nature. *D.C. Jain* v. *Union Territory. Chandigarh*, (1994)1 RecentCrR 202 (P&H).

Where there was no specific allegation of entrustment of the articles to the petitioner and wife was in suspicion as husband bestowing his love and affection to other lady. No offence was made out. *Gurdip Singh* v. *Gurjit Kaur.* (1994) 3 CC Cases 551 (P & H).

When story of entrustment of gold ornaments to accused not proved beyond reasonable doubt, no offence made out. *Renukana Sengupta* v. *Delejani Sengupta,* 1996 Cri LJ 28, 39 (Cal).

When civil matters are being motivated brought into Criminal Trial Court to quash F.I.R. for abusing process of Court. *Rajesh Aggarwal* v. *State of Bihar.* 1996 (2) Crimes 465 (Pat).

There was no entrustment of properties or that they committed an offence punishable either under Section 406 or 420, I.P.C. Ultimately, from the overall reading of the complaint, it can easily be measured that if at all there is anything, it is only a breach of agreement which would lead to civil litigation and not criminal case. If the Magistrate has applied his mind to these allegations, he could have easily come to the conclusion that no criminal offence is made out from the allegations made in the complaint. On the other hand, the learned Magistrate was swayed away by the fact that all allegations made in the complaint that *prima facie,* is a matter to be investigated by the police. Even from the reading of the prayer, it is seen that the respondent has requested the Court to refer to the police under Section 156(3), Cr.P.C. and there is no prayer to take action against the petitioners. *Nandakishore and others v. State and another,* 2002 Cri LJ 2746 (Kant.) : AIR 2002 Kant HCR 1570 : 2001(1) Crimes 184 : 2002(4) Kant JT 490.

2. Question of wrongful loss or wrongful gain in complaint for criminal breach of trust.—At the initial stage, the point that the ingredients of wrongful loss or wrongful gain is not in the petition for complaint cannot be answered at the primitive stage since on the very face of the complaint it is vivid that the wrongful loss has been accused to the complainant. *M/s. Rita Agencies* v. *Enforcement Officer, EPF Organization,* 2004 Cr LJ 1304, 1307 (Mad) : 2004(3) Rec Cri R 796.

3. Agreement.—An agreement allowing a person who had committed criminal breach of trust to refund the property misappropriated, cannot operate to bar a subsequent prosecution for the offence of criminal breach of trust. 1 weir 463 : *see* (1909) 10 Cr LJ 417 because the complainant gave time for repayment, that is no ground for acquittal.

Where compromise was settled between the parties—Claim was also settled—Continuation of criminal proceedings was not held justified. *Jag Mohan. Singh* v. *Union Territory of Chandigarh and others,* (1994) 3 CC Cases 562 (P&H).

Refusal to refund money to depositors on the date, amounts to breach of contract which is civil liability. *B.D. Kalra* v. *State of Haryana,* 1992 Cr LT 254 (P&H).

4. Breach of contract does not necessarily result but offence under Section 406 or 420.—In a case where there is a breach of an agreement executed between the parties merely because there is a breach and several amounts which are due and payable by one party to the other are not paid it cannot be said that the offence punishable under Section 420 or that the offence of criminal breach of trust is committed by the accused. There are catenas of judgments of the Supreme Court wherein it has been observed that in order to attract the provisions of Section 406 or Section 420 of the Indian Penal Code the ingredients of the said offence have to be established. It is, no doubt, true that in a given case of a breach of contract a prosecution could be launched under the provisions of Section 406 or Section 420 and at the same time simultaneously a civil suit could also be filed. However, this is not always true and in order to establish that the breach of contract had resulted into an offence punishable under 406 or Section 420, IPC, there should be sufficient material on record on the basis of which such inference can be drawn. *National Small Industries Corporation Ltd.* v. *M/s. Samudra Corporation,* 2005 Cr LJ 3432 (Bom) : 2006 All MR (Cri) 168 : 2006(1) East Cri C 74 : 2005 (4) Rec Cri R 597 ; *Kotak Mahindra Bank Ltd.* v. *Nabitetto Finlease and Indvestment Pvt. Ltd.,* 2005 Cr LJ 3500 : 2005 All MR (CRI) 1983 : 2005(2) Bom CR (Cri) 219 : 2006(1) East Cri C 184.

5. Partnership.—In a partnership, it is open to a partner to spend the money he receives and account for it in dealing with the partnership, and such a partner is plainly entitled to be called upon for an account of the expenditure of the money which he has received. In a case where it was not satisfactorily made out that this was not done, and it would not be made out in the absence of a proper demand for an account, it was held that no dishonest conversion could be found, which would justify the conviction of a partner under this section. 35 Cal 1108 ; *see* also 145 Ind Cas 416 : 37 CWN 982 : 1933 Cr C 953 : 34 Cr LJ 958 : AIR 1933 Cal 582 ; AIR 1956 UP 7 : 1956 UP 7 : 1956 Cr LJ 919 but *see* AIR 1932 Bom 57 : 1932 Cr C 81 : 33 Bom LR 1518 : 138 : 136 Ind Cas 493. When one partner is given authority by the other partner to collect money or property of the firm he is entrusted with dominion on that property, and if he dishonestly misappropriate it, then he comes within Section 405. AIR 1962 SC 1821 : (1962) 32 Com Cas 699 : 1962 (2) Cr LJ 805 [AIR 1949 Pat 69 distinguished]. During the subsistence of the partnership there cannot not be, except by special agreement, any entrustment of a partnership property with a partner. AIR 1959 J & K 19 : 1959 Cr LJ 322 ; AIR 1951 Cal. 69 (FB) ; AIR 1958 AP 555 : ILR 1957. AP 853 : 1958 Cr LJ 1114 : AIR 1954 HP 46 : 1954 Cr LJ 1202 ; AIR 1964 Raj 267 : 1964 (2) Cr LJ 730 (partner not rendering accounts withholding where or property is not guilty of offence under Section 436).

When clause in partnership deed shows that one partner could sign on behalf of others, signing of document by one without consent of others' does not amount to criminal breach of trust or cheating. *Anwarul Islam* v. *State of-West Bengal*, 1996 Cr LJ 2912 (Cal).

When partnership deed provides that one partner can sign on behalf of others, document signed by one partner affording sub-contractor without consent of other partners, cannot be breach of trust. *Anwarul Islam* v. *State of West Bengal*, 1996 Cri LJ 2912 (Cal).

6. Burden of proof.—Where in a charge of criminal breach of trust, the accused pleads payments to the proper person, the burden of proving non-payment is on the prosecution and not on the accused. Rat Un Cr C 872 ; *see* also 28 SLR 84 : AIR 1934 Sind 22 : 1934 Cr C 220. The prosecution must prove that trust has been created in respect of the property. 85 Ind Cas 839 ; 25 CWN 831 : 65 Ind Cas 1004 ; AIR 1950 Kutch 37.

7. Evidence.—"The evidence in support of a charge of criminal breach of trust must show : (1) that the accused person was in some manner entrusted with the property or with a domain over it. The offence consist in the betrayal of some trust or confidence reposed in the offender. Dealing concerning property between independent persons in the course of which debts or claims by one against the other arise are not subject of this offence. There can be no criminal misappropriation unless some trust or confidence exists, (2) It must be proved that the accused has dishonestly misappropriated or disposed of the property in violation of his duty. As to the proof of the criminal misappropriation in cases where money has been misappropriated, it will often be of the following kind either the offender has wilfully made false entries in his books or else he has denied or wilfully omitted to acknowledge the receipt of money. A person, who keeps the accounts, or otherwise duly acknowledges the receipt of money, cannot ordinarily be supposed to intend to commit a criminal breach of trust. On the other hand the mere fact of his making an entry in the books of account will not protect him. The fact of not paying over money or not accounting for it, will not probably of itself be thought sufficient to justify a conviction, even though the accused person sets up a frivolous excuse or advances a claim wholly unfounded. But the absconding of the accused, coupled, with a refusal to account or a false account, furnishes strong evidence of criminal misappropriation of the money. If the evidence in support of the charge leaves it doubtful whether the offence which has been committed is theft or criminal breach of trust, the Court may nevertheless proceed to judgment and award punishment (*see* Section 72)".—*Morgan and Macpherson.*

Where money was paid to a person for a particular purpose and in the case of the purpose, failing, it was appropriated towards a debt due to him, there is no offence of criminal breach of trust. 92 Ind Cas 895 : 27 Cr LJ 383. Where money is advanced in respect of a contract, and there is no entrustment in fiduciary form, any dispute arising out of the breach of contract is one of civil nature and capable of settlement not in the Criminal but in the Civil Courts. 95 Ind Cas 501 : 27 Cr LJ 949. The question whether the property in the goods has or has not passed to the purchaser is relevant to the decision of cases under Section 409, I.P. Code, but it is not necessarily decisive. The decisive test is whether there was an entrustment within the meaning of Section 405, and the necessary criminal intent. AIR 1939 Sind 1 : 40 Cr LJ 173. A person can not be said to be entrusted with property within the meaning of Section 405, when he obtains possessions by trick. AIR 1942 Sind 162 : 44 Cr LJ 123. A trust implies confidence placed by one man in another. It implies necessarily that the confidence was freely given and that there is a true consent. There is no true consent if confidence is obtained as a result of a trick. If there was a trick or deceit, a true consent arise ; there can be no entrustment, and no offence under Section 406, I.P. Code, because an essential element of the offence is an entrustment. *Ibid., see* also 42 CWN 648. The question whether *A* entrusted property to *B* is one which depends upon the actual facts of the case and not merely upon the legal terms employed by the parties. AIR 1938 Sind 57 : 39 Cr LJ 399. Under certain circumstances criminal breach of trust can be committed in respect of his own property. AIR 1938 Sind 73 : 39 Cr LJ 500. The mere payment by a debtor to a creditor is not entrustment. AIR 1940 329 : 41 Cr LJ 824. Where a customer pays a sum into the current account at a particular bank, the sum becomes to all intends and purposes, the money of the banker, subject to the liability of the bank to return to the customer an equal sum of money. AIR 1941 Cal 713 : 45 CWN 1071 : 43 Cr LJ 451. It is difficult to hold that the money deposited by an employee with the employer as security is not property dominion over which is entrusted to the employer. 48 CWN 734. Where money is paid to the creditor to discharge his debt, there is no entrustment. 24 Pat 128 : 1945 PWN 73 ; *see* also 79 CLJ 126. Where some partners withhold the share of profits due to another partner the latter's remedy is to use for dissolution and accounts. 52 CWN 441 : AIR 1948 Cal 292 : 49 Cr LJ 543 ; AIR 1950 Cal 523 ; AIR 1950 Nag 99.

To establish an offence of criminal breach of trust it must be proved that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit. 1963 Raj LW 638 : ILR (1963) 13 Raj 1124 : 1964 (1) Cr LJ 614. (Case of sale of skimmed milk powder outside the area for which the accused was appointed agent—No offence of criminal breach of trust) ; *see* also 1964 (1) Cr LJ 421 : AIR 1964 Ori 93 (absence of dishonest intention) ; AIR 1965 Trip 36 : 1965 (2) Cr LJ 418. (case of entrustment); ILR 1963 Cut 399 : 299 Cut LT 415 (no dishonest intention). Where the accused completely denies having received the money given to him in trust and it is proved that the money was received by him, that is the strongest possible circumstance to show that the accused has misappropriated the money or converted it to its own use. 1952 RLW 194.

It is not for the accused to prove his innocence. 1975 UCR Bom 174, but in case of *prima facie* case being established, there it will be for the accused command that how he is not liable. AIR 1953 Raj 117 : 1953 Cr LJ 835. Onus is on the prosecution whether by direct evidence or from presumption arising for the conduct and acts of the accused. AIR 1960 SC 889 : 1960 Cr LJ 1250 ; (1974) 40 Cut LT 873 : (1974) 1 Cut WR 176.

The non-payment of the amounts entrusted to the accused will give to a prosecution of misappropriation or conversion of the amount by the accused to his own use. 1978 Cr LJ 1394 , (1963) 2 Cr LJ 216 : 1976 Cr LJ 930 (when a reasonable explanation is given).

Mere failure to account or delay in accounting or in payment or omission to pay will not constitute an offence under this section unless dishonest misappropriation or conversion to the accused's own use is proved. AIR 1977 SC 1766 : 1977 Cr LJ 1158 ; *see* also AIR 1976 SC 1132 : 1976 Cr LJ 847 : 1979 WLN 277 ; 1976 Raj Cr C 250 ; AIR 1967 Ori 135 : 1969 Cr LJ 243 (criminal Prosecution dropped) ; 1982 (2) Bom Cr R 214 ; 1983 (1) Crimes 890 (evidence of criminal breach of trust) ; (1978) 80 Punj LR 737 ; (1980) 2 PLR 39 (offence under Section 406 is ante-these of offence under Section 420) 1961 MPLJ 765 (burden of proof) 1975 ODD 42 (failure to account and the account stands falsified by prevarication, inference of misappropriation) ; *see* also (1974) 76 Punj LR 780.

8. Cases.—To make out a case for criminal breach of trust, it is not sufficient to show that the money has been returned. It must also be shown that the accused disposed of it in some way other than that in which he was bound to apply it, and that he did so dishonestly. UBR (1897-1901) Vol. 1 345. The mere retention of money did not necessarily raise a presumption of dishonest misappropriation to one's own use.

but such dishonest misappropriation might some times be inferred from circumstances without direct evidence. UBR 1905, Penal Code, 19 : 2 Cr LJ 478. No person on the pretence of being an heir to a deceased, can take the law into his own hands by taking forcibly his property from the person in actual possession and dealing with it as he likes. 41 PWR 1910 Cr : 6 Ind Cas 490 : 11 PLR 1910 : 11 Cr LJ 364. An accused can not be convicted under this Section for non-fulfilment of promise to let vaccinator take lymph from child, even when she has received annas two from the vaccinator. Rat Un Cr C 557. Failure to pay a wagering transaction is not an offence under this section LBR' (1872-1819), 130. The complainant gave money to the accused on condition that he would purchase a motor car, sell it and return her money wilh half the profits. *Held*, that the accused was not guilty of criminal breach of trust. 15 Cr LJ 284 : 23 Ind Cas 492 : 12 ALJ 730. An accused commits an offence under this section, if he pledges a motor car. which he has purchased in hire-purchase system and while the hire-purchase agreement is in force. 17 Bom LR 670 : 3 Bom Cr C 84 ; *see* also 15 Cr LJ 425 : 24 Ind Cas 161. But the mere non-payment of monthly instalments cannot be considered as a criminal offence, and conviction under 406 in such a circumstance is unsustainable. 165 Ind Cas 827 : 1938 Cr C 931 : A1R 1936 Cal 674. In a prosecution under Section 406, I.P. Code, on the allegation that the complainant *Baldeva* gave to the accused *Barmanand,* who is a goldsmith, a pair of gold bangles in consideration of the latter agreeing to give one and three-quarter *tolas* of gold and eight and half *tolas* of silver in lieu of the bangles the Court observed : "The crucial question in the case is whether *Baldeva* had transferred his rights in the bangles to *Barmanand* so that the property in those articles passed from *Baldeua* to *Barmanand :* or *Baldeva* retained his ownership of the bangles which they were in the custody of *Barmanand*, who had agreed to hand over to *Baldeva* the identical gold and silver to be obtained by melting the bangles. In the former case, it is clear, as the learned District Magistrate has pointed out, that no offence under Section 406, I.P. Code, can be said to have been committed. In the latter case, Section 406 is clearly applicable". If a surety to whom property attached by a Civil Court is entrusted, deliberately refuses to produce the same when called upon to do so, such refusal amounts to a repudiation of his trust and he is guilty of the offence of criminal breach of trust. AIR 1952 Lah 270 : 1952 Ind Cas 513 : 53 Cr LJ 119 : 1955 Cr C 21 : AIR 1935 Lah 131.

Where it is the duty of a Municipal Water Works, he has dominion over the water belonging to he employers. If he deliberately misappropriates such water for his own use for the use of his tenants for which he pays no tax and gives no information to his employers, he is guilty of the offence of criminal breach of trust. 11 ALJ 369 : 14 Cr LJ 415 : 35 All 361 : 20 Ind Cas 239. The loan of a chattel does not constitute the borrower a person entrusted with the chattel or with dominion over it within the meaning of Section 406, for the borrower is not a trustee but has a beneficiary interest given him in thing lent. 6 Bom LR 1903. The fact that the complainant entrusted the accused with his flicks in order to evade the payment on the execution of a decree, which might be issued, is not a legal defence which will justify the accused in selling the animals and appropriating the sale proceeds to his own use. 1 Weir 463. The Shroff of a Battery holds the position of a cashier with reference to the custody of Government monies entrusted to him, and his failure to cash for the entire balance due out of the amount so entrusted amounts to a criminal breach of trust. 19 PR 1908 Cr. The holder of the stakes of a wager who appropriates them or coverts them to his own use without the consent of the depositor or the winner of the wager, is liable to conviction under Section 406. Penal Code 2 LBR 216. Although temporary intention or money may in certain cases be sufficient to constitute an offence under Section 406 of the I.P. Code, yet it is incumbent on the prosecution to prove that the retention was a dishonest one. 11 Pat LT 319 : 121 Ind Cas 321 : 31 Cr LJ 249 : AIR 1930 Pat 209. The essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intention or not. As the question of intention is not a matter of direct proof, the Courts have from time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had or had not *mens rea* for the crime. *Ibid*, In a case under this section question of trust may be fully inquired into and whole of prosecution evidence should be recorded before discharging the accused on the ground that the case is of a civil nature. AIR 1939 Rang, 377 : 41 Cr LJ 25. The words of this section is large enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property or with dominion over it and has dishonestly misappropriated it, or converted it to his own use. AIR 1940 Cal 371 : 44 CWN 650 : 41 Cr LJ 796 ; AIR 1941 Rang 342 : 43 Cr LJ 263 ; AIR 1940 Rang 265 : 41 Cr LJ 398 ; 44 CWN 872. Sub-pledge by pledgee of goods pawned is not criminal breach of trust. AIR 1942 Rang 62. A pledgee exercising his right of sale, under the contract, is not guilty under this section. AIR 1942 Rang 59 ; *see* also AIR 1939 Sind 27 : 40 Cr LJ 238 ; AIR 1938 Mad 551 : 39 Cr LJ 716. When the transaction appears to be merely one of a loan and failure to repay the loan, an offence under this section has not been committed 230 IC 154 : 48 Cr LJ 552. An offence of conversion punishable under this section in only committed when a man does an unauthorised act which deprives another of his property permanently or for an indefinite period. AIR 1949 Pat 326 : 50 Cr LJ 682 : 4 DLR Pat 90. The relationship between a depositor and a bank is simply one of creditor and debtor. 4 DLR (Cal) 48. Compensation money paid for compromise of case, is not money paid in trust. 1 DR 79. An offence under this section is committed where jewel taken from goldsmith as sample for approval was retained towards debt due by goldsmith. 4 DLR (Mad) 248 : (1949) 2 MLJ 269. Withdrawal of security deposit by clerk on leaving service without master's consent is an offence under this section, ILR (1946) 1 Cal 17.

In a case though accused received advance but did not commence the work entrusted to them. He thus misappropriated public money advanced to him for his own benefit and there was no material contradiction on the evidence of the prosecution witnesses. It was held that conviction for criminal breach of trust of trust was proper. *Puna Chand Mahto v. State of Bihar*, 2004 Cr LJ 1358 (Jhar) : 2004(1) All Cri LR 25 : 2003 Cul Cri LR 1035 : 2004(1) Cul LJ 134.

In a prosecution under Section 406, I.P. Code, the prosecution must prove that a trust had been created in respect of the property and that the accused had violated that trust. 85 Ind Cas 839 : AIR 1923 Lah 321. In the absence of a contract to the contrary, it is open to a pledgee to make a sub-pledge of the property pledged and if he does so, he does not commit an offence under Section 405, I.P. Code. 9 OLJ 421 : 1922 Oudh 280. But when the pledgee denied the person and misappropriates the pledged ornament even after the payment of the loan, he commits an offence under this section. 165 Ind Cas 905 : 62 Cr LJ 487 : 1936 Cr LJ 930 : AIR 1936 Cal 673. An offence under this section is committed when goods taken from a person for approval is sold before payment of price. 51 Cal 796 : 25 Cr LJ 1236 : 82 Ind Cas 163 : 1924 Cal 816. Where goods have been delivered to a person in pursuance of a contract of sale and accepted, all that remains is to ascertain the money due to the vendor the rate being already fixed by the contract. There is no question of any entrustment or of a trust. Consequently the mere fact that the purchaser subsequently denies receipt of the goods does not make him guilty of the offence of criminal breach of trust or misappropriation. 72 Ind Cas 172 : 24 Cr LJ 332. Where an estate is entrusted to an Administrator by the Court in the exercise of its intestate jurisdiction, a complainant charging him with criminal breach of trust under Section 406, I.P. Code, in respect of the goods entrusted to him cannot be entertained without the sanction of the Court appointing him. 33 CLJ 252 : 22 Cr LJ 295 : 60 Ind Cas 791. Person intermeddling with estate of deceased person or doing any other act which belongs to office of executor where there is no rightful executor or administrator in existence is made accountable not on basis of entrustment but on basis of that not being entrusted he has no business to intermeddle. Application of the latter doctrine in no way depends upon absence of bad faith in person intermeddling and such person cannot be held guilty under Section 406 and charge under Section 406 on such facts amount to misdirection. 132 Ind Cas 145 : 35 CWN 425 : 1941 Cr C 248 : 32 Cr LJ 830 : 58 Cal 1051 : AIR 1931 Cal 184 (FB).

In a case of criminal breach of trust if the prosecution could not prove how the accused came by the money, they did not establish one of the first essentials of the offence charged that he was entrusted with the money. 25 CWN 883. The gist of the offence under this section is the dishonest misappropriation by one to his own use of the property of another which has been entrusted to him. 52 Ind Cas 480 : 20 Cr LJ 654. A chairman of a Co-operative Society is not a public servant as such criminal breach of trust by him is not punishable under Section 409, I.P. Code, but under Section 406. 36 Bom LR 1133.

When the accused were entrusted by a Court Officer with certain moveable property attached in execution of a decree, but at the time of sale they did not produce the property and evaded the service of notice. *Held*, that they could not be guilty of criminal breach of trust inasmuch as they did not misappropriate the property or convert it to their own use or dispose it in any manner contrary to the terms of the trust. 16 ALJ 600 : 47 Ind Cas 875 : 19 Cr LJ 474. No offence under this section is committed when the mortgagee, after payment of mortgage money does not return the bond. 22 CWN 1005. Property in respect of which criminal breach of trust can be committed must be property of some person other than accused. AIR 1931 Mad 235.

No criminal breach of trust is committed where gold was entrusted with goldsmith against receipt but the goldsmith neither making the ornaments nor returning the same to the goldsmith. It is a case of civil liability. ILR 1963 Cut 589 : 29 Cut LT 319 : (1963) 50 JD 201 : 1963 (2) Cr LJ 474. The accused admitted receipt of the money but later on having misappropriated or converted it to his own use, he kept on making. promises for payment and finally refused to pay, the act of the accused comes within the definition of Section 406, I.P. Code. 1957 MLJ (Cr) 235 : (1957) 1 Andh WR 242. Where cement bags are available in moment and where the bags in respect of which the alleged offence was alleged to have been committed were not proved to be the cement bags of the Government the charge is not proved. 1979 Cr LJ 393. It is for the prosecution to establish that the monies were in the accused's trust or domain. 1966 Cr LJ 970 : 1975

UCR Bom 216 ; see also 1980 Cut LJ (Cr) 263 : 1982 Cr LC 8 (failure to establish the entrustment of money with the accused). Mere failure or omission to return the property to the owner is not sufficient to constitute the offence. AIR 1972 SC 1146 : 1977 Cr LJ 1158 : AIR 1978 SC 1132 : 1976 Cr LJ 867 (president of a co-operative having key to the stores is not sufficient to prove the offence. Failure to account for giving false accounts will be regarded as strong circumstances. 1979 WLN 275 : 1976 Raj Cr C 250 ; ILR 1979 Bom 2104.

Offence of cheating and criminal breach of trust are mutually exclusive and could not co-exist in absence of specific allegations of entrustment. *Harbans Lal* v. *State of Punjab*, 1991 (2) CC Cases 130 (P&H).

Where there was wife's complaint for misappropriation of *stridhan* and husband's suit for divorce but there was pendency of the civil suit for divorce does not bar the prosecution of the husband under Section 406, I.P.C. *Giani Harjit Singh* v. *Parmjit*, 1995 Cr R 859 (P&H).

Transfer of land by petitioner by assuring that land was free from all sorts of encumbrances. Actually any land in that area could not have been transferred as being in violation of provisions of Act, 1953, complainant was induced to purchase the said land and make part payment under circumstances proceeding against petitioner justified. *Anil Kumar Katyal* v. *State of Punjab*, 1994 XXI Cr LT 207 (P&H).

When complaint was due to undue pressure—Petitioner was educated lady—Petition was to quash the FIR. It was held that FIR should be quashed as it will be an abuse of process of the Court to prolong the agony of petitioner any further. *Raj Rani* v. *State of Haryana*, (1994) 3 CC Cases 357 (P&H).

When cheque was dishonoured as no sufficient funds cheque was issued by servant of a partner of firm, offence should be considered on the basis of allegation contained therein. *A. Veerabhadra Rao* v. *Government of Andhra Pradesh*, 1994 (XXXVIII) MLJ (Cri) 277 (AP).

On the ground that specific article was not mentioned in the complaint proceedings cannot be quashed. Petition under Section 482, was dismissed. *Sandeep Sharma* v. *Neha Sharma*, (1994) 2 Recent CR 72 : (1994) 2 CC Cases 907 (P&H).

When the allegation was of charging more than price fixed, other partner may be liable vicariously for the commission of offence by other partner. Other partner and employee were rightly discharged. *Mohan Singh* v. *State of Punjab*, (1994) 1 Recent CR 455 : (1994) XXI Cr LT 346 (P&H).

Where there was prosecution for not depositing the employees' contribution under Section Insurance Act in the employees' account it can not be dropped on the ground that the accused were being prosecuted for violation of provision of Employees' State Insurance Act. *Employees' State Insurance Corporation* v. *M/s. Hukumchand Mills Ltd.*, (1995) 1 Crimes 812 (MP).

Though once a challan has been presented the interference of High Court is rare yet in the circumstances of the case it appears that the two brothers of the husband have been arragned as accused without substance. Whether at all there was a return of any article according to the alleged agreement, shall be looked into during the course of trial before, there is no presumption of trust attached to it and it has been challenged and controverted on behalf of the respondent-wife. The conclusion was that the petition partly succeeded and the FIR in question was quashed only *qua* the two brothers of the husband it stands disposed of. The parties were directed to appear in the trial Court on such date as may be fixed there. *Satish Kumar Gogia* v. *State of Haryana*, (1994) 1 Crimes 431 at p. 432 : (1994) 3 CC Cases 25 (P&H).

From the provision of the agreement entered into between the petitioner and the Government it is clear that there is only entrustments of the materials to the petitioner which he is liable to account to the department at the time of completion of the work or termination of the contract. There is no stipulation of payment of sales tax *etc*. By the petitioner to the Government for the materials supplied so as to attract the characteristics of sale. Merely because of the fact that the agreement provides right to the respondents to realise double the value of the materials found short with the petitioner the entrustment will not become a sale and it will only mean the penalty provided for the failure of the return of the entrusted materials. Therefore in view of the fact that the terms of the contract involved in this case clearly established that the department materials are entrusted to the petitioner so as to attract the offence of breach of trust punishable under S. 406, I.P.C., the contention raised by the petitioner that the facts and circumstances of the case and the materials on record do not disclose even *prima facie* the offence punishable under S. 406, IPC, alleged against him is not sustainable. The fact that another case is instituted by the respondents against one Krishnan Nair alleging offence punishable under S. 378, IPC with regard to certain materials alleged to have been committed in breach of trust by the petitioner herein is no ground for the petitioner to seek discharge in this case on the ground that no case is made out against him. The fact that the provisions of the agreement contain a clause for arbitration and respondents had resorted to arbitration and the arbitration proceedings are pending against him is also no ground to discharge the petitioner in this case. Further the fact that a civil remedy is available to the respondents to realise the amount due from the petitioner to the respondents in respect of which breach of trust is alleged to have been committed by the petitioner in this case will not in any way affect the right of the respondents to prosecute the petitioner for the criminal liability of breach of trust. *C.K. Sreedharan* v. *State of Kerala* 1999 Cri LJ 758 (Ker).

9. Compounding of Offences.—Accused charged for criminal breach of trust but later on accused entered into a compromise and compromise deed was signed, however payment was made outside the court. In such circumstances permission for compounding the offence can be granted. Without expressing any opinion on merits of the case, it is stated that in the present case the accused respondent was acquitted on the basis of compromise and since payment was made outside the Court, therefore, no purpose will be served in proceeding further against no call any interference by the Court. *State of Rajasthan v. Akhlesh Kumar Sharma*, 2002 Cri LJ 2347 (Raj).

10. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable—Triable by Court of Session.

11. Charge.—I *(name and office of the Magistrate, etc.)* hereby charge you *(name of the accused)* as follows :

That on or about the .... day of............. at............. you being entrusted with .... (*mention the property*) committed criminal breach of trust, and that you thereby committed an offence punishable under Section 406 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

12. Conviction and sentence.—A man of unsound mind should not be convicted under this section. AIR 1939 Mad 407 : 40 Cr LJ 642. Where sentence is inadequate, *vide* AIR 1943 Sind 164 : 44 Cr LJ 798. In AIR 1972 SC 1809, it has held that while a Magistrate's powers are specifically limited by Section 33 of the Criminal Procedure Code, they must also be exercised as not to contravene Section 65 of the Indian Penal Code.

13. Practice and procedure.—On being summoned in a complaint case, one of the accused filed a revision. It was found that the accused-petitioner was unaware of the specific. The complaint against him was, therefore, quashed. (1986) 2 Crimes 449 (Del).

Where the Magistrate in a complaint case issued a process to the accused who moved for quashing it on the plea that the dispute related to a civil matter. The complaint did not contain the allegation that the property was purchased at Nayagaon, may the property in question did not lie in Assam. *Held*, no case was made out and there was no reason to hold him guilty of any offence. (1986) 2 Crimes 408 (Gau).

14. Jurisdiction.—Dispute relating to dowry articles, *stridhan*, permanent alimony and any property presented to husband and wife at the time of marriage. The police has no jurisdiction to adjudicate upon the matrimonial matters which are exclusively under the jurisdiction of Matrimonial Courts. *Kiran Mandal* v. *(Smt) Mohini Mandal*, (1994) 1 Recent Cr R 329 (P&H).

Where there was family dispute due to *stridhan*—Application to withdraw the complaint. Which was allowed—Dispute may be decided out of Court. *(Mrs.) Shashikala Deshpande* v. *State of Maharashtra*. 1994 Cr LR (Mah) 228.

When accused agreed to sell plot of land, situate at *P* and executed sale agreement at *C* without disclosing that his brother is also joint owner of land, complaint lodged at *P* is maintainable and not at *C*, as property is situate at *P* and sale-deed was to be registered at *P*. *Narinder Singh* v. *Yesh Pal Singh*, (1994) 2 Recent Cr R 714 (P&H).

Only the Court in whose jurisdiction the incident occurs. Section 498-*A* contains no exception in Cr. P.C. *Hari Ram Rastogi* v. *Union Territory, Chandigarh*. (1994) 1 Recent Cr 5 (P&H).

The gravamen of the offence of criminal breach of trust lies in dishonest misappropriation. Mere entrustment, with no dishonest misappropriation, would not make the offence. The offence would be taken to have been committed only at the place where the alleged dishonest misappropriation of the entrusted property was done *Vijay Kumar* v. *Sumita* 2000 Cri LJ 4116 (M.P.).

Where allegation was of dowry—Allegation was made after two days of marriage. Police of Ludhiana or Ambala has investigated the case. It was held that police of Ludhiana has no jurisdiction to investigate the case. *Krishna Devi* v. *Rajni Bala*, (1994) 1 Recent Cr 493 (P&H).

Trial Court has no jurisdiction to try the offence committed outside the

Jurisdiction of the Court. The trial of the offence under Section 498-*A* and 406 may be done where the marriage has been performed. *Tilak Raj Sood* v. *(Smt) Sudesh Sood*, (1994) 2 CC Cases 179 : (1994) 2 Recent Cr R 407 (P&H).

15. Probation.—On the mere fact that petitioner is not previous convict, would not be sufficient to give benefit of probation or for reduction of sentence. Allegation and nature of offence should be considered. *Krishnan Kumar* v. *State of Punjab*, (1994) 1 CC Cases 169 : (1994) 1 Recent Cr R 148 (P&H).

16. Quashing of Criminal Procedure.—When offence was made by petitioner against wife respondent for misappropriating dowry articles and cruelty—Complaint was filed by wife—Divorce-petition was also filed by wife—In divorce proceedings parties compromised and wife made statement that she will not pursue her complaint filed earlier. It was *held* that continuation of criminal proceedings against petitioner will be futile exercise and harassment to petitioner—Criminal proceeding under I.P.C. liable to be quashed. *Prakash Singh* v. *(Smt.) Santosh Kaur*, (1994) 1 Crimes 929 : (1994) 2 SLJ 1596 : (1994) 1 CC Cases 20 : (1994) 1 Recent CR 519 (P&H).

Where there was quashing of summoning order in complaint under Section 406, I.P.C.—Court was to see if any *prima facie* case arises and not to enter into detailed discussion of merits and demerits of case. It was *held* that as *prima facie* case is made out on the basis of complaint allegations and evidence led, summoning order not to be quashed petition dismissed. *Paramjit Singh* v. *Harbans Kaur*, (1995) 1 CCR 197 (P&H).

Provision under Section 498-*A*, Indian Penal Code can not be given effect to retrospectively. Complaint for offence under Section 498-*A*, I.P.C. quashed. *S. Singh* v. *Sarbijit Singh*, (1994) 1 CC Cases 51 : (1994) 1 Recent Cr R 90 (P&H).

Where there was allegations of entrustment of articles and cash. It was *held* that it is sufficient for taking cognizance of the offence, High Court was not justified in quashing the complaint. *Radha Rani w/o Parmod Kumar Oberoi* v. *Parmod Kumar Oberoi, s/o Charanit Oberoi*, 1995 SCC (Cr) 396 (SC) : 1995 Supp(4) SCC 491.

Where there was application for quashing of proceedings in criminal complaint filed under Section 406, I.P.C. Civil proceedings for the recovery of articles given in marriage pending. Contention that criminal proceedings cannot go during the pendency of civil proceedings. It was finally held that there is no authority for the proposition during the pendency of civil suit. Criminal case cannot be filed. *Abdul Salam* v. *A.C.J.M.*, (1995) 2 CCR 545 (Alld).

On the ground of delay in filing the complaint *held* liable to be quashed. *Jaswinder Kaur and others* v. *Harjinder Kaur*, (1994) 1 CC Cases 166 (P&H).

When petitioner promised to sell house and received part of sale money but subsequently he transferred said house to another person and money already received not refunded to complainant, complaint cannot be quashed. *Shri Bipei Kumar Bhatnagar* v. *Pt. Raghbir Sarma*, 1992 Cr LT 66 (P&H).

As wife left matrimonial house in 1988 while husband was away and took away articles belonging to her from herin-laws with police help. Wife lodged F.I.R. in 1992 involving herin-laws after gap of more than 3 years being unable to take action against her husband. Hence F.I.R. is liable to be quashed. *Ujagar Singh* v. *State of Punjab*, (1995) 3 CCR 247 (P&H).

Prosecution need not be quashed when contentions can be decided on evidence yet to be produced. *Ghanshyam Das Kuffepar* v. *State of Bihar*. 1994 (2) East Cr C 210 (Pat).

Where the complaint was pending before Magistrate for offences under Sections 406, 409, 420. 467 and 468—Petition under Section 482, Criminal Procedure Code for quashing of the same was filed since necessary facts constituting offence are not indicated in the complaint and was due to personal grudge against appellant, the summoning order is quashed. *Mohd Habibur Rehman Faizi* v. *State*, 1995 JIC 672 (All).

Where there was complaint against husband and petitioner, brother-in-law of respondent—Petition under Section 482, Criminal Procedure Code for quashing of the same was filed—High Court finds that petitioner who is complainant's husband's brother has been arranged as an accused in this complaint with oblique motive. There is no *prima facie* evidence against him to show that he committed offences under Section 406 or 498-A, I.P.C. Hence complaint quashed. *Satinder Kumar* v. *Asha Rani*, (1995) 3 CCR 567 (P&H).

Offence by petitioner against wife respondent for misappropriating dowry articles and cruelty—Complaint by wife—Petitioner summoned—Divorce petition also filed by wife—In divorce proceedings parties compromised and wife made statement that she will not pursue her complaint filed earlier—*Held*, continuation of criminal proceedings against petitioner will futile excess and harassment to petitioner—Criminal Proceeding under I.P.C. liable to be quashed. *Prakash Singh* v. *Smt. Santosh Kaur*, 1994 (1) Crimes 929 (P&H).

Where neither ingredients of cheating nor of criminal breach of trust were present the proceeding were quashed. In *re Juneja* v. *State*, 2004 Cr LJ 3664 (Del.) : 2004(5) Al Ind Cas 179 : 2003(108) DLT 761 : 2004(4) Rec Cri R 840.

The accused insurance company has no criminal intention in repudating the claim of factory where building had collapsed due to heavy rains. The repudation of claim was based on report submitted by surveyor and investigator. The proceedings was quashed as it was abuse of process to prosecute the officials. *Oriental Insurance Co.* v. *State* 2004 Cr LJ 145 (Pat.) : 2003 MR (CRI) 2430 : 2004(2) DMC 365.

17. Investigation.—High Court cannot interfere with investigation, as investigation of offence is statutory function of police and State and it cannot be interfered with unless there is compelling and Justifiable reasons. *Krishnawanti* v. *State of Punjab*, (1994) 3 Recent CR 593 (P&H).

In such offence while rescising power under Section 482, Criminal Procedure Code High Court is not justified in embarking upon an enquiry as to reliability or genuineness of allegations made in F.I.R. or complaint. *Mushtaq Ahmad* v. *Mohd Habibur Rehman Faizi*, 1996 (1) Crimes 80 (SC) : AIR 1996 (SC) 2982 : 1996(7) SCC 44 : 1996(1) JT 656 : 1996(1) Scale 606.

18. Bail.—Complaint was filed by wife 3 months ago as her husband was missing—Application under Section 438, Criminal Procedure Code for issue of direction for grant of anticipatory bail. Exceptional Circumstances are made out for grant of anticipatory bail. Hence the petitioner, if thus arrested, shall be released on bail by the arresting officer. *Ajmer Singh* v. *Deputy Commissioner*. 1994 (2) SLJ 1121 (P&H).

In absence of any proof that firm made any misrepresentation in their statements, balance-sheet etc. and rehabilitation package negotiations were going on between parties, anticipatory bail may be granted to accused applicant. *Sarvesh Kumar* v. *State*, 1996 (1) Crimes 362 (Raj).

19. Limitation.—View of lower appellate court while setting aside conviction on ground that cognizance of offence taken by Court was based by limitation, is wrong. *State of Punjab* v. *Balwinder Singh*, 1992 (2) Crimes 555 (P&H).

Complaint filed for offence .within 3 years from date of demand and refusal by respondent-husband, is not barred by limitation. *Rashmi Kumar* v. *Mahesh Kumar*, 1997 (2) SCC 397 : 1996(11) JT 175 : 1996(9) Scale 388 : 1997(1) CCR 168 (SC).

20. Revision.—Summoning order issued by Magistrate being an interlocutory order, no revision against is competent. *Rajesh Kumar* v. *Mahendra Jain*, (1994) 2 Recent Cr R 135 (P&H).

21. Liability—Nature of.—When accused took recess loan from bank by misrepresenting and inflating figures of hypothecated stock and accused not rationing loan, both criminal offence and civil liability made out. *B.L. Dalmia* v. *State of Haryana*, (1994) 2 Recent Cr R 305 (P&H).

When complaint disclosed conviction of offence it cannot be rejected on plea of civil nature. *Ajai Kumar* v. *Raj Narain*, 1993 JIC 529 (All).

22. Compromise.—Court may allow prayer for compromise if it is satisfied that it will meet the ends of justice. *Jai Prakash Chaurasia* v. *State of Bihar*, (1995) 1 PLJR 66 (Pat).

Where petition was filed under quashing complaint filed by respondent against petitioner—Offences was held under I.P.C.—Offences were non compoundable—Respondent's wife filing application before Magistrate to dismiss her complaint. Since offences are non-compoundable application not allowed. However, since parties have compromised it will be mock trial ultimately resulting in acquittal. Complaint quashed. *Rajpal* v. *Smt. Rani*, (1995) XXII Cr LT 76 (P&H).

23. Acquittal.—When certain amount was withdrawn from Co-operative Society of which accused was *Sanchalak*, it would create civil liability only and hence accused acquitted. *Nathu Singh* v. *Ram Singh*, 1994 (31) ACC 835.

The accused while working as secretary of Cooperative Bank failed to distribute the cash amongst the loanee members and misappropriated the same. He had accepted the entrustment of money but pleaded that the same was not distributed as while returning from bank the money was robbed from him. It was found that money had been recovered and robbery case against four persons was still pending. Prosecution had also failed to prove his case beyond reasonable doubt. Hence acquittal of accused was proper. *Sadasiv Mahapatra* v. *Prafulla Kumar Das*, 2003 Cr LJ 3947 (Ori) : 2003(25) OCR 606 : 2003(2) Orissa LR 122.

24. Nonpayment of Provident Fund dues—Offences by Companies.—A Company is primarily liable for an offence under the Act. The said liability may extend to other persons only under the conditions laid down in the aforesaid Section. In other words, vicarious liability only arises to the directors if the conditions laid down for the

Provision under Section 14-A are fulfilled. A director of a company may be concerned only with the policy to be followed and he may not have any role in the management of the day-to-day affairs of the company. Such persons are, in other words immune from prosecution. In the instant complaint/report filed, apart from the allegation and the statement made by the informant that the Directors of the Company have legal duty to deposit the provident fund, there is no other averment or material from which the Magistrate could have satisfied himself that petitioners are either responsible for the conduct of the business of the Company or they took part in the running of it. Furthermore, there is a specific bar against the Court taking cognizance and proceeding with trial of such offences, under Section 14-AC of the Act of 1952, except on a report in writing of the facts constituting such offence made with previous sanction of the Central Provident Fund Commissioner or such other officer as may be authorized by the Central Government. Therefore, making of bald allegations in the complaint, is not enough to attract the provisions under the Act of 1952. The facts essential to constitute the offence attracting the provisions have to be stated. Therefore, in the absence of necessary allegations of the facts attracting the provisions of the Act of 1952 or the Penal Code, it cannot be said that the prosecution launched and cognizance taken by the Magistrate against accused-petitioners is proper. Thus, order of cognizance and process issued against accused-petitioners deserve to be set aside. However, the order of cognizance passed by the Magistrate as against the Company would be proper. *Mod Alkalies and Chemicals Ltd. and Ors. v. State of Rajasthan*, 2008 CriLJ 2879 (Raj).

* * * * *

Sec. 407. Criminal breach of trust by carrier, *etc.*—Whoever, being entrusted with property as a carrier, wharfiger or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Synopsis

1. Scope 2602
2. Procedure 2603
3. Charge 2603

1. Scope.—"Those who receive property under a contract, express or implied, to carry it or keep it in safe custody are by this section made punishable for a criminal breach of duty with respect to such property. Carriers by water who run their boats or vessels as shore, intending to misappropriate the cargo, and punishable under Section 439".—*Morgan and Macpherson*, 368. Where property is entrusted to a person as a carrier, it is necessary to show at least, in order to convict him of criminal breach of trust, that some of the property could not be accounted for by him. 9 Bom LR 229. Appropriation of money with dishonest intention attracts Section 407. AIR 1942 Mad 182 : 43 Cr LJ 395. Where a transport company with which the accused persons were associated were entrusted with a delivery order in respect of 100 tons of cement in their capacity as such carrying contractors, and criminal breach of trust was alleged to have been committed by them in respect of a part of there 100 tons of cement. It is a case under Section 409 and not under Section 407. 1957 Cr LJ 124. Section 407 makes no distinction between and common carrier. 1981 Cr LJ 824. Where a corporate body, it cannot be prosecuted for an offence under Section 407, as there is no *mens rea*. (1972) 1 Cal HC 400 ; (1976) 78 Bom LR 677 : 1975 Cr LR (necessary ingredients in the offence of criminal breach of trust under Section 405, must be established) ; 1981 Cr LR (Guj) 151 : (1980) 21 (2) Guj LR 341 (Section 154 not attracted when no question of trust arises) ; 1881 MPLJ 678 : 1982 Jab LJ 445.

2. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable—Triable by Court of Session.

3. Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

That on or about the.............. day of.................... at................you being entrusted with....... (*mention the property*) as a carrier or wharfinger or warehouse-keeper committed criminal breach of trust in respect of it, and that you thereby committed an offence punishable under Section 407 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 408. Criminal breach of trust by clerk or servant.—Whoever, being a clerk or servant or employed as a clerk or servant and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Scope 2603
2. Charge of general deficiency..2605
3. Cases. 2605
4. Sentence. 2608
5. Procedure...2609
6. Charge. 2609
7. Quashing of prosecution. 2609
8. Conviction...2610
9. Probation. 2610
10. Acquittal. 2610

1. Scope.—"A clerk or servant who takes his master's property is punishable for theft (See Section 381). The present provision seems to apply to cases in which there is some special trust, as where the clerk or servant is entrusted with his master's property that he may sell or dispose of it, or where he is appointed to collect money and to pay it over to his employer. The criminal misappropriation by such person of the particular property entrusted to him, is an offence here made punishable in the same manner as the taking of master's property by a servant when the property taken is not in his possession or charge in the time of his service or employment, as the theft by a menial servant of money or other property from his master's house."—*Morgan and Macpherson*, 369. Under this the intention of the accused misappropriate is sufficient to convict him 26 Cr LJ 1149. Presumption of criminal misappropriation can be raised against servant failing to property account for property entrusted to him. 26 Cr LJ 267 : 84 Ind Cas 331. A working partner who has not contributed anything to the partnership business is a "servant" or "clerk". 28 SLR 84 : 1934 Cr C 220 : AIR 1934 Sind 22. Where waterproof is supplied to Railway servant on condition that in case of damage or loss, it will be received at the cost of such servant the contract is one of bailment. Where the servant pawns it he is guilty under Section 408. 148 Ind Cas 814 : 35 Cr LJ 788 : AIR 1934 Rang 41. But definite of finding of definite sum tracked to the accused is necessary. 85 Ind Cas 372 : 26 Cr LJ 532 : AIR 1925 Cal 260. An offence under this section is committed. Even where the act of the accused was to cause wrongful loss to the complainant for a time only. 8 Bom LR 851 : 5 Cr LJ 5 ; *vide* 22 MLJ 112 ; 24 Cal 193 ; 9 Cr LJ 257 ; 7 ALJ 319 ; 31 Cal 928 ; 24 Ind Cas 161 ; 9 PLR 1902 ; 14 Bom LR 306 ; 7 ALJ 225 ; 16 CWN 1155 ; 40 Cal 318 ; 16 Bom LR 80 ; 42 All 552 ; 51 Ind Cas 673 ; 2 Rang 476 ; 29 CWN 54 Ind Cas 303 ; 40 All 565 ; 65 Ind Cas 1000 ; 96 Ind Cas 388 ; 1928 Bom 557 ; 1928 Lah 926. A partner holding partnership property does not hold it in a fiduciary capacity and therefore cannot be convicted under Section 408, 1952 Cr LJ 291 : 4 DR 34 ; AIR 5 Cr D 713 : 6 DLR 149(Pat).

The Complainant a displaced person, was allotted a shop by Rehabilitation Department. He was not allowed to enter us own shop by the accused person. The complainant had been harassed for almost four decades and was compelled to spend most of his life in the court proceedings all these years, the complainant was pushed from pillars to posts. Perhaps that was one of the most exceptional cases in which admittedly the real owner of the shop was deprived of its possession and use for almost four decades and during this period, he was not paid a penny as a rent or compensation in any form. It was held that even if the entry into the shop was lawful and the accused persons retained it unlawfully and dishonestly for more than 37 years and therefore they were clearly guilty of committing continuous trespass for all these years which is punishable under Section 448, IPC. *Kripal Singh* v. *Wazir Singh* 2001 Cri LJ 1566 (Delhi) : 2001(1) CCR 486 : 2001(1) JCC 104 (Del.).

House trespass is punishable under Section 448, IPC. When entry into or upon property in possession of another is lawful then unlawfully remaining upon such property with the object of intimidating insulting or annoying the person in possession of the property would be criminal trespass. The offence would be continuing so long as the trespass is not lifted or vacated and intimidation, result or annoyance of the person legally in possession of the property is not stopped. *Gokak Patel Valkart Ltd.* v. *Dundayya Gurushiddaih Hiremath*, 1991 (2) SCC 141 : 1991 AIR SCW 505.

Where a Director is not employed as a servant he cannot be charged under this section for criminal breach of trust with regard to the company's money alleged to have been entrusted to him. 1980 Chand LR (Cr) 18 ; 1982 Chand Cr C 179 : 1983 (2) Chand LR (Cr) 403 (accused a cashier) ; (1983) 1 Crimes 385 (Managing Director and Society are neither servants or clerk) 1980 82 Punj LR 438 (a salaried employee of a co-operative society). Offence is established if the prosecution proves that the servant received the goods and is under a duty to account for. 1964 Mad LJ (Cr) 719 ; (1979) 1

Malayan LJ 73 (clerks who is in possession of firm's money with a duty to bank it or pay it over to a purchaser).

Where the relationship of the complainant and the accused is one of partnership the section is not attracted. 1982 Cr LJ 1342 : (1982) 21 Del LT 364 (money appropriated by a partner) ; 1980 All Cr R 150 : 1980 Cr LJ (NOC) 981. Mere entry in the books unsupported by any evidence does not prove entrustment. AIR 1974 SC 388 ; AIR 1976 SC 432 SCR 32 : 1976 Cr LJ 484 : 1976 SCC (Cr) 101 ; AIR 1975 SC 222 ; 1974 Cr LJ 614 (SC) (breach of trust and falsification of account).

A citizen cannot, for his whole life, be kept in mental torture of facing criminal trial with no fault on his part or of delaying the trial. (1988) 15 Reports 202 (Raj).

Employee is not a public servant to Investigating Officer was not examined—Section 408, I.P.C. will affect. *State of Haryana* v. *Brij Singh*, (1994) 2 Recent CR 477 (P&H).

In a case of criminal breach of trust though the burden of proof never shifts from the prosecution to the defence, nevertheless the fact that the accused fails to show what has happened to the money, coupled with other circumstances, may justify an inference that he misappropriated it. 1936 Cr C 715 : AIR 1936 Nag 160.

When clerk collected donations and not deposited same requisite dishonest intention is inferred. *State of Maharashtra* v. *Bhuvanendra Mallapa Akiwate*, 1997 Cri LJ 177 (Bom).

Availability of civil remedy under Co-operative Societies Act, does not debar criminal prosecution. *State of Haryana* v. *Nawabuddin. Khan*, 1997 Cri LJ 1629 (P&H).

2. Charge of general deficiency.—On a charge under Section 408, I.P. Code, of general deficiency in a certain fund handled by the accused. It is open to the Court to examine the evidence in respect of each item of money embezzled which went to make up the total sums embezzled as entered in the chargesheet. This is a way of examining the facts of the case which is most favourable to the accused; and he certainly cannot complain that he has been in any way prejudiced thereby. 164 Ind Cas 302 : 37 Cr LJ 941 : 1936 OWN 607 : Cr C 985 : AIR 1939 Oudh 376.

When accused deposited alleged misappropriated amount before it was completed and charge framed after 7 years also found vague and defective and no charge of temporary misappropriation was made, charge is misconceived and quashed. *Ganapati Dnyanu Patil* v. *State of Maharashtra*, 1997 Cri LJ 485 (Bom).

3. Cases.—In order to sustain a conviction for the abetment of criminal breach of trust by a servant, it must be proved that the accused knew that in respect of such transaction, the servant was acting dishonestly and was committing a breach of trust, and that the accused abetted the servant in doing it. 4 CWN 306. Where a person, entrusted with some blocks of wood engraving for the purpose of having a catalogue, printed for the complainant, allowed his brother to use the block to print, his catalogue, *held*, that such act constituted criminal breach of trust. 6 CWN 203. Where a village officer delayed for four or five months, in remitting the *kist* amount to the treasury, *held*, that the officer was guilty of an offence under Section 408. 1 Weir 464. Where a servant committed criminal breach of trust ; *held*, that the circumstance the employer had taken a bond for the amounts misappropriated, would not prevent the prosecution or conviction of the accused for the offence. 1 Weir 465. Where the accused who was a clerk admittedly received money belonging to the estate and was asked to account and to give satisfactory explanation which he failed to do he was criminally as well as civilly liable to his master. AIR 1942 Oudh 89 : 43 Cr LJ 153. Broker working under or for a firm is not a servant of the firm. AIR 1941 Rang 189 : 42 Cr LJ 776. Where a Bank manager returns to constituent security taken from him for overdrafts before they are satisfied and without making any entry in the books of the bank he commits an offence under this section. AIR 1944 Cal 92 : 45 Cr LJ 431. On a Court Inspector having no authority to delegate to constable the custody, *etc*., of Government money delegating to him the said functions, taking no doubt private security for his safeguarding, and on the constable dishonestly converting the money to his own use, *held*, that the case fell under Section 408, Penal Code, notwithstanding subsequent restoration by the constable. 8 WR Cr 1. In case of criminal breach of trust under Section 408, a count based upon a general deficiency was struck out of the indictment by the presiding Judge after consultation with Chief Justice. 24 Cal 193. *A* servant received from his employers a firm in Calcutta, some bags of waste paper with an order to take them to their yard and there to burn and destroy the papers. The servant of destroying them brought some of them to Bowbazar in Calcutta, *held* that the act committed by the accused did not amount to an offence under Section 408 29 Cal 489. Where a clerk of a Co-operative Bank received moneys from some of the members of the bank with instructions to pay the said sums to another affiliated bank but, instead of so paying the amount to the said bank, became a member of the society and took a loan from the society which would cover these amounts, *held*, that he could not be convicted of an offence under Section 408, I.P. Code simply because he disobeyed the instructions of the members, as there was no evidence of an intention to misappropriate the amount to his own use. 117 Ind Cas 632 : 30 Cr LJ 812 : AIR 1920 Pat 506. Mere retention of money or mere failure to return it does not necessarily raise a presumption of dishonest misappropriation. The mere fact that the payment was delayed is no ground for imputing a criminal intention. Though the ingredients of the offence of criminal breach of trust are some what broadly stated there can be no doubt that the section was intended to punish an offence of which dishonesty is the essence. AIR 1930 Oudh 321 : 7 OWN 556 : 1930 Cr C 726. Where an employee of a *Zemindar*, at the time of leaving the service, renders account to the *Zemindar* deducting his security money there from, he is not guilty under this section, because no dishonest intention could be made out on the part of the employee. 165 Ind Cas 720 : 1936 Cr C 747 : AIR 1936 Cal 520. Where servant receives sums for master and neither pays them nor accounts for them he is guilty of misappropriation. 136 1932 Oudh 145. Where prosecution is outcome of dispute regarding liabilities of partners, conviction under Section 408 cannot be sustained. AIR 1931 All 449 : 1930 ALJ 849 : 125 Ind Cas 589. It is necessary for the accused to show exactly what has become of the missing property he was entrusted with. It is sufficient if he can give a credible account of its disappearance. 35 Cr LJ 849 : AIR 1934 Rang 42. Charges of falsification and embezzlement can be linked together. AIR 1931 Pat 349 : 12 PLT 696 : 32 Cr LJ 1026 : 133 Ind Cas 460. *A*n agent whose salary is not paid, and who, therefore refuses to pay the monies collected by him on behalf of his principal, cannot properly be convicted under Section 408, I.P. Code as under Section 221 of the Contract Act, he is entitled to retain goods or other property of his principal until the amount due to him for services in respect of the same has been paid or accounted for him 1935 AWR 930 : 1935 Cr C 1139 : AIR 1935 All 922. There can be no misappropriation under Section 408, I.P. Code, where no amount has been left with accused or entrusted to him as servant. 18 NLJ 345. If before his account have been submitted, an employee who has deposited security with his employer in cash, withdraws the amount of the security from the funds of the employee in his possession without the knowledge of the employer and goes off with it on leaving a note that he is taking the money as his security deposit, there is at least a temporary misappropriation and the employee is guilty under Section 408 of the I.P. Code 42 CWN 618.

Where in a trial for one offence under Section 408, I.P. Code, with regard to a gross sum said to have been misappropriated within a year and composed of items more than three in number, the Judge instead of inviting verdict in respect of charge under Section 408, asked the Jury to give their verdict in respect of the charges as laid against the accused on the several items and the jury returned a verdict of guilty as regards some of its items only and not guilty as regards others and the judge convicted the accused under Section 408, *Held*, that though the form in which verdict was asked for and expressed was wrong, proper form being simply to ask jury their verdict in respect of an offence under Section 408, the defect was one of form and did not prejudicially affect the accused. 34 CWN 901 : AIR 1930 Cal 717 : 1930 Cr C 1117. The accused who was a clerk was entrusted as such by his master with certain sum of money which it was his duty to apply in a particular manner. He misappropriated the monies and failed to apply them as directed and he was charged under Section 408, I.P. Code, in respect of specific sum. *Held*, that the accused was rightly convicted for the offence of criminal breach of trust. 30 Bom LR 1530 : AIR 1928 Bom 557 ; *see* also 36 Bom LR 1120. Loss to one person owing to misappropriation by another is not essential ingredient of "criminal misappropriation." AIR 1931 Rang 164 : 32 Cr LJ 1120 : 1931 Cr C 66 : 9 Rang 338. Section 179 ; Criminal Procedure Code, has no application to offence committed under Section 408, *Ibid.*

A servant acts under the direct control and supervision of his master and is bound to conform to all reasonable orders given to him in course of work while an agent though bound to exercise his authority in accordance with the lawful instruction which may be given to him from time to time by his principal is not subject in its exercise to the direct control or supervision of the principal. AIR 1956 SC 149 : 1956 Cr LJ 322 : (1957) 2 Andh WR 83 : 1957 MLJ (Cr) 535 ; 1983 (1) Crimes 385 (criminal breach of trust by clerk or servant) ; AIR 1957 Mad 722 (servant's liability) ; AIR 1974 SC 222 : 1974 Cr LJ 310 ; AIR 1975 SC 222 (inference of misappropriation deducible from making wrong cross entry) ; 1974 Cr LJ 614 (breach of trust and falsification of accounts) ; AIR 1964 SC 388 (withdrawal of security money). The acquittal based upon compounding of an offence which is not compoundable is to be set aside. 1983 Cr LJ 109. Conviction of chairman of the society for vicarious liability under Sections 406, 408, 409 and 407, I.P. Code is improper. AIR 1984 SC 151 : 1984 Cr LJ 162.

Where Executive Magistrate recorded the statement of the accused statement recorded by Executive Magistrate is not inadmissible in evidence. Statement should be recorded byJ.M. or M.M. *State of Haryana* v. *Parmanand*, (1994) 2 CC Cases 265 (P&H).

The accused was a clerk and charged for offence of criminal breach of trust but documents produced showed that accused at no time was entrusted with money of society. Witness examined on behalf of prosecution also did not say about such entrustment of money. Since entrustment of money was not proved, the acquittal of accused for offence charged was held proper. *Mancheswar Service Cooperative Society Ltd.* v. *Anand Narayan Mishra*, 2003 Cr LJ 4390 (Ori) : 2003(25) OCR 646.

When accused deposited full amount before audit was completed and charged framed after 7 years being vague and defective and there was no charge of temporary misappropriation charge liable to be quashed. *Ganapati Dnyanu Patil* v. *State of Maharashtra*, 1997 Cri LJ 485 (Bom).

It was alleged against the accused who was working as cashier-cum-accountant in the complainants company that he made wrong totals and misappropriated the amount belonging to the complainants. It was found that accounts on which the presention relied were not regularly kept though the entries were made by the accused himself the accounts books were always in the custody of the complainant and his other two clerks working in the office. The compulsion made by the accused was found not to be voluntarily made. It was inferred from the circumstances that it was made under threat and coercion. The accused was held entitled to acquittal. *Dwarkadas Rameshwar Paldiwal* v. *Satyanarayan Makhanlal Gododiya* 1999 Cri LJ 4425 (Bom).

In *Nandlal Lakhata* v. *State of Bihar*, 2001 Cri LJ 1900 (Pat) by virtue of a fresh deed of 1992 the petitioner was made a working partner and also was getting salary from the firm. He was made sole incharge of the business and all transactions of the firm were to be carried on by him in the capacity of the working partner. The complainant alleged that the statement regarding stock and its amount was found to be false on physical verification. When the stock was verified it was found that the article which were available on that date were of Rs. 5,75,555.12 p., whereas according to the statement prepared by the petitioner the materials in the stock were available of worth Rs. 4,22,625.16 p. Thus, according to the complainant there was less stock of materials found in the firm premises. Moreover, subsequently it was found that the complainant left Patna after locking the firm. The argument that being a partner of the firm the petitioner cannot be said to have committed criminal breach of trust and, therefore, it was a case of civil liability only cannot be accepted and the accused was held liable for committing criminal breach of trust.

4. Sentence.—*Vide* 171 Ind Cas 708 : AIR 1937 Siind 242 for circumstances under which sentence should be reduced.

Where revision petition was filed against conviction. Imprisonment of two years' with fine of Rs. 2.000/-. He was not a previous convict—Benefit of probation was on demand—Agony of trial was held for 8/9 years—Sentence was justified to be reduced. *Bhup Singh* v. *State of Haryána*, (1994) 1 CC Cases 159 : (1994) 2 CC Cases 527 (P&H).

Where there was misappropriation of money by manager—Incident 13 years old manager remained three months in jail. Final disposal of appeal was delayed. The same was entitled to get sentence reduced to period already undergone. *Khoddas Manjibhai Savriaya* v. *State of Gujarat*, 1994 SCC (Cri) 1410.

Where petitioner was thrown out from the job due to conviction he suffered 13 years of protracted trial—Sentence was reduced to that period already under gone. *Surjan Singh* v. *State of Haryana*, (1994) 3 CC Cases 351 (P&H).

Where there was misappropriation of amount's same was deposited within four months—Accused/Accountant was in jail for sometime—Accused having paid the fine-amount and sentence was modified to the period already undergone. *Atma Ram* v. *State of Haryana*, (1995) 3 Crimes 416 (P&H).

Traditionally a conviction under section 409, IPC would invariably a jail sentence of varying duration according to the amount involved, the inevitable result being that the accused spends a period of time in jail at the state expense, benefit by virtue of retention of the property and the complainant or the aggrieved institution is the worst affected having to writ off the loss that has occurred. A court must aim at off setting these factors while in no uncertain terms conveying the message that crime does not pay by ensuring that there is no unjust enrichment occurring to the accused and that the party is made to part with much more than what has been taken away. In property offeneces and where misappropriation of money is involved, an accused would cheerfully sit in jail at state expense and then come out and benefit from the unjust enrichement and it is this aspect that the courts need to take cognizance of while it is unfair and unnecessary to burden the state by maintaining the accused in a jail for years together and increasing the number of unemployed thereafter. It appears far more rational that the three fold objective would be acheved by imposing a fine on the accused of at least three times the amount involved in the offence and by not prescribing the money in default sentence because again experience has shown that many an accused would find it more profitable to stay in jail for sometime rather than pay up a heavey fine. Also by following such a procedure the aggrieved party of the institution can be adequately compensated. *State* v. *Hanamappa*, 2000 Cri LJ 2428 (Kant) : ILR 2000 Kant 1974 : 2000(2) Kant LJ 362 : 2000(3) Cur Cr R 328 (Kant).

Benefit of probation may not be given—Sentence-reduced to period already undergone. *Pritam Singh* v. State *of Punjab*, (1994) 2 CC Cases 178 (P&H) : (1994) 1 CC Cases 355 : (1994) 1 Recent Cr R 514 : (1994) 2 Recent Cr R 304 : (1994) 1 Recent Cr R 172 (DB).

5. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable except when the value of the property does not exceed Rs. 250/—Triable by Magistrate of the first or second class.

6. Charge.—I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :

That on or about the .... day of ....at ....you being a clerk of *A.B.* (or servant or employed as a clerk or servant by *A.B.*) and in such capacity entrusted with (or with dominion over) certain property, to wit .... committed criminal breach of trust with respect to the said property and thereby committed an offence punishable under Section 408 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

A joinder of charges under this section and Section 477-*A* would be a misjoinder vitiating the trial. AIR 1971 SC 1543.

7. Quashing of prosecution.—Where there was misappropriation of public fund—Speedy trial—Prosecution of appellant—There was also inordinate delay of 16 years in filing charge-sheet—Appellant already dismissed from service on same charges—His provident fund and gratuity forfeited—It was finally held that prosecution after 16 years and calling accused to enter defence will cause him prejudice and thus prosecution liable to be quashed. *Biswanath Prasad Singh* v. *State of Bihar.* 1994 Cr LJ 242 (SC) : 1994 Supp(3) SCC 97 : 1994 SCC (Cr) 1663.

Criminal action may be quashed if the civil suit is pending—Revision was allowed. *Kartar Singh* v. *State of Punjab*, (1994) 2 CC Cases 221 : (1994) XXI Cr LT 173 (P&H).

8. Conviction.—Accused, a branch manager of Transport Company delivered a consignment to co-accused without receiving consignee copy and thus without following instructions of head office—Conduct of accused *prima facie* dishonest—Conviction under Section 408 was fully affirmed. *Banwarilal Agarwal* v. *A. Suryanarayan.* 1994 Cr LJ 370 (Ori).

9. Probation.—Where the embezzlement took place about 20 years back and audit report submitted in 1972 but case registered after seven years—Petitioner suffered mental agony and physical harassment—He can be released on probation. *Baljit* v. *State of Punjab.* (1995) 1 CCR 26 (P&H).

10. Acquittal.—Where accused secretary of co-operative society charged of not producing necessary cash balance—Complaint was filed after six months. No complaint to Registrar by any office-bearer of society—No evidence about timing of amidst report—Prosecution case not established benefit of doubt must go to accused and was held to be dismissed. *State of Gujarat* v. *Jerubhai Fuljibhai*, 1994 (1) Crimes 721 (Guj).

* * * * *

Sec. 409. Criminal breach of trust by public servant, or by banker, merchant or agent.—Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with *imprisonment for life*, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Synopsis

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1. **Amendment.**—The words in italics were substituted for the words "transportation for life" by Act 26 of 1955, Section 117 and Sch. with effect from 1.1.1956.

2. **Scope.**—"The criminal breach of trust which is here punishable is committed only when the banker, merchant, *etc.*, is entrusted in the way of his business with property or with documents which give him dominion over property, and not otherwise it seems that the property must be entrusted to him in such manner that he becomes subject, by contract, express or implied, or by force of law, to a certain duty in regard to it. A factor or agent who sells the goods of his employer and receives the money on his behalf, if he commits a criminal breach of trust by dishonestly misappropriating his

principal's money will be punishable under this section. But the relation between a banker and his customer is not necessarily of the same fiduciary kind. The money which the customer place in his banker's custody becomes the banker's money ; he may employ it as he pleases and he commits no breach of trust even he puts it in jeopardy ; only he is of course answerable for the payment of the amount which he has received. It seems that a banker would be criminally liable under the present section only in case he under took some particular duty (in the way of his business) in relation to the property entrusted to him ; as if he received Government paper or other securities into his custody, undertaking to keep them safely, and to receive interest, etc.—" *Morgan and Macpherson*, 369, 16 All 88. For a conviction under this section all the elements laid down as constituting the offence must be provided and if the charge is that a worthless property has been substituted for a valuable one, it must be positively shows that there was some valuable property in the package when it came under the control of the accused. 41 Cr LJ 37 : 86 Ind Cas 38 : 26 Cr LJ 662 : 29 CWN 260 : AIR 1925 Cal 501. To make out an offence under this section a criminal intention is necessary and this is a matter of inference from the facts proved. But it cannot be sustained in respect to the acts from an agent. 87 Ind Cas 962 : 26 Cr LJ 1042 : AIR 1925 Oudh 675. If the property under the control of the public servant disappears and his connection with the conspiracy is proved, conviction will follow, even when there is not the slightest evidence of any money having been received by him. 28 OC 230 : 88 Ind Cas 830 : 26 Cr LJ 1217. When a postmaster received a V.P. letter and handed over the same to the addressee without getting payment on or before 20-10-25 and then altered his account so as to make it appear that he only handed it over again on 20-10-15, *held*, that he was guilty of criminal breach of trust and falsification of accounts in the absence of proof by him of the absence of dishonest intention. 102 Ind Cas 488 : 28 Cr LJ 522 : 52 MLJ 703. Where it was found that the accused was a "tax- *daroga*" and cashier of the Municipality, that the amounts which he is said to have embezzled were received by him and that he failed to account for them, *held*, that all the elements constituting an offence under this section were present. 45 CLJ 207 : 28 Cr LJ 469 : AIR 1937 Cal 409. A conversion is nonetheless a conversion because no cash passes. 11 Lah LJ 384 : 118 Ind Cas 650 : 30 Cr LJ 954. A person accused of offence under this section is not protected by Section 136, Bombay Local Boards Act. AIR 1942 Sind 45 : 43 Cr LJ 514.

An offence under Section 409 presupposes an entrustment. But in the case of a deposit with a banker, it becomes the money of the bank he is only under a contractual obligation to pay the sum deposited when demanded. 5 AI Cr D 53 : 1950 ALJ 808 : 1951 AWR (HC) 85. Though the *Tahsildar* and the Treasurer were ultimately responsible for the cash and the cashier had only the cash-book, yet it cannot be denied that he was entrusted with the cash when he handled the cash day to day and was responsible for cash in the sub-treasury. AIR 1951 Am 15. *See* (1956) 9 Sau LR 323, where it was held that the gist of the offence under the section is that the accused, though he might be a public servant, must be shown to have been either required or authorised to receive the property in respect of which the breach is alleged.

Section 409 is limited to a class and does not apply to every one who may happen to be interested as prescribed by the section, but only to the class of persons therein pointed out. PCA No. 38 of 1952, dated 3.3.1953 (PC).

In the case of a public servant, the property must have been entrusted to him in his capacity as a public servant. In case of others it must have been made in the course of their respective business. (1980) 82 Punj LR 435 ; AIR 1981 SC 1646 : 1981 Cr LR 303 : 1977 Punj LR (Cr) 208. The word "trust" in Section 409 has a comprehensive meaning. 1984 Cr LJ 76 : 1983 All Cr R 529. It is not necessary that entrustment should be one that is attended by all legal formalities of the section. AIR 1956 SC 575 : 1956 Cr LJ 1116 ; 1961 (1) Cr LJ 773 : AIR 1961 SC 751 (police officer receiving from the complainant during search currency notes) ; AIR 1979 SC 1841 : 1979 Cr LJ 1367 ; AIR 1974 SC 794 : 1974 Cr LJ 678 (entrustment to a public servant) ; AIR 1962 SC 1821 : 1962 Cr LJ 805 (banker etc. in the way of his business) ; AIR 1974 SC 1354 : 1974 Cr LJ 614.

3. Intention.—So far as the present case is concerned, the accused respondent handed over the charge to P.W.3 Badri Dan on 17.1.1984 and in the charge handing over report he wrote that the above mentioned amount was with him and he would deposit the said amount and the same was deposited by him on 3.2.1984 and the reason for depositing that amount on 3.2.1984, as stated by the accused respondent, is that his father died on 25.1.1984. In these circumstances to say that the accused respondent committed criminal breach of trust for that amount cannot be accepted as there was no dishonest intention on the part of accused respondent. Had there been dishonest intention, he would not have mentioned in the charge report about that amount. *State of Rajasthan v. Magar Ram*, 2002 Cri LJ 3307 (Raj.) : 2002(3) Raj Cri C 1406 : 2002(3) Raj LR 247 : 2002(3) WLC 252.

4. Section 409 and Prevention of Corruption Act.—In 1954 Cr LJ 96 : AJR 1954 All 80, the validity of the provisions of the section were challenged on the ground of discrimination in case of the prosecution of a person for an offence under Section 409, I.P.C. and not for an offence under Section 5 (1) (C) of the Prevention of Corruption Act. It was held that the provisions do not offend Article 14 of Constitution and are not void in view of Article 13 (1) of the Constitution : *see* also AIR 1954 All 80 : 1954 Cr LJ 9 : AIR 1957 Punj 110 : 1957 Cr LJ 659 ; AIR 1957 SC 458 : 1957 SCJ 229 : 1957 Cr LJ 575 ; AIR 1957 SC 592 : 1957 SCJ 519 : 1957 Cr LJ 892 (where it was held that the offence under Section 5(2) of the Prevention of Corruption Act and Section 409 of Penal Code are not identical). The question again arose whether Section 5(l)(c) of the Prevention of Corruption Act prior to amendment in 1952, protanto repeals Section 409 and it was answered in the negative in 1957 MLJ(Cr) 599 : 1958 Cr LJ 15 and AIR 1957 458 ; AIR 1955 Bom 451 : ILR 1955 Bom 484 ; AIR 1954 HP 76 : 1954 Cr LJ 1481 ; AIR 1954 Raj 211 : 1954 Cr LJ 1446 : AIR 1954 Hyd 56 : ILR 1953 Hyd 573 : 1954 Cr LJ 464 ; AIR 1953 Cal 681. The offence created by Section 5(1) of the Prevention of Corruption Act, 1947 is distinct and separate from this section. AIR 1960 SC 397 : 1960 Cr LJ 539 : AIR 1958 AP 29 : (1957) 2 Andh WR 332. *See* in this connection the offence under this Section and Section 4 of the Employees Provident Funds Act, 1973 which can not be deemed to be the same offence. 1976 Cr LJ 838.

If the Special Judge has no jurisdiction to try an offence under Section 5(2) of the P.C. Act for want of valid sanction, he lacks jurisdiction to take cognizance of allied offences and to try the same, in view of the specific powers on a Special Judge with limitations specified in Section 7(3) of the Amendment Act. Where there is no valid sanction for prosecution under Section 5(1)(c) read with Section 5(2) the conclusion becomes inevitable that, the orders of conviction recorded against the accused in respect of the charges under Sections 409 and 468 of the IPC and the sentences passed against him thereunder cannot be sustained and thus, are liable to be set aside. *Duryodhan Patra vs. State of Orissa*, 2010 (3) CrLJ 2505 (Orissa).

5. Criminal breach of trust or cheating.—*Held*, on fact that the applicant could be held liable for the offence of cheating ,and obtaining delivery of property by commission of that offence, which would be punishable under Section 420 and Section 409 would not apply. AIR 1957 All 122 : 1957 Cr LJ 110 : 1957 All LJ 147.

When accused departed from terms and exhibited film publicly without consent of complainant as owner of film, accused committed the offence of breach of trust. *Krishna Rao Keshav* v. *State of U.P*, 1997 Cri LJ 1129 (Alld).

As correctly pointed out by the learned Special Public Prosecutor and as laid down in the decision in *Vishwa Natn v. State of J. & K.* AIR 1983 SC 174; 1983 Cri LJ 231, after committing the criminal breach of trust in respect of the money over which the accused had complete dominion, the refund of the amount after detection would not absolve him of the offence. Once it is proved that the amount was entrusted to him, then under Section 106 of the Evidence Act, he was to establish as to what happened to the said amount and that fact lies within the knowledge of the accused and as such, the burden of establishing the said fact is upon him. In this case, according to the defence, the appellant never received any amount from the loanees. But alternatively, it is contended that the amount had been paid back. This cannot be accepted because the person, who received back the amount from the appellant himself, has come to the box and deposed that after receipt of the money, the appellant made false entries in the pass-books. He had also stated that after the entire loan amount had been discharged, the appellant made entry in the passbook to the effect that the entire loan had been paid to the Bank. *S. Jayaseelan v. State by SPF, C.BI, Madras*, 2002 Cri LJ 732 (Mad.) : 2002(2) Rec Cri R 484.

Where in a scheme for sale of Canadian gold coins, there was neither entrustment of any property nor act of deceiving any person fraudulently or dishonestly, involved in the scheme. It was held that ingredients of both offence were absent and offences under Sections 409 and 420 were not made out. *Lambert Krofer* v. *NCT of Delhi*, 2004 Cr LJ 992 (Delhi) : 2004(2) Cur Cri R 68.

6. Essentials of the offence.—Before a person can be said to have committed criminal breach of trust within the meaning of Section 405 I.P.C., it must be established that he was either entrusted with dominion over property which he is said to have converted to his own use. In order, to establish "entrustment of dominion" over property to an accused person the mere existence of that person's dominion over property is not enough. It must be further shown that his dominion was the result of entrustment. (1965) 1 SC WR 586 : 1965 (2) Cr LJ 431 : (1965) 2 SCJ 186 : AIR 1965 SC 1433 (nature of the dominion of the partnership was not one of the kind contemplated in the section). *See* also (1963) 1 SCR 253 : 1962 (2) Cr LJ 805 : AIR 1962 SC 182 (in case of director of the company) where it was held that what Section 409 requires is that the person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property or with dominion over that property in the way of his business as an agent. The expression in the way of his business' means that the property is entrusted to him in the ordinary course of his duty. It is not correct to say that the word 'agent' refers to a professional agent. 1953 AC 407 and (1985) 16 QBD 487 and 1935 Mad WN 649 distinguished.

Criminal breach of trust can still be established in the absence of any evidence showing the *modus operandi* in committing embezzlement or showing how and by whom goods were removed. 1965 (1) Cr LJ 539 : AIR 1965 All 233.

Any dishonest removal of materials in charge of a public servant by himself or by some one else at his instance, amounts to criminal breach of trust under Section 409 I.P. Code, Pak LR 1950 Lah 417 : AIR 1950 Lah 199. In a case of goods consigned by railway found to be rotten and owner not turning up, the station master ordered destruction of potatoes but the goods clerk instead of destroying the same sold it. *Held* the goods clerk was guilty of offence under Section 409. ILR 1950 Nag 957 : AIR 1951 Nag 150 : 52 Cr LJ 36.

Where there was no offence under Section 420, I.P.C., conviction has been made out against the respondents and prosecution has failed to prove the ingredients required to be established by prosecution to convict the accused persons under Sections 465/471, I.P.C. Therefore the respondents cannot be convicted on the basis of evidence brought on record by prosecution. No offence under Sections 409, 420/465 and 471 is made out. *State of Haryana* v. *Prem Singh*, (1994) 2 Recent CR 725 : (1994) 3 Recent Cr R 69 (DB) (P&H).

7. Trust.—The existence or non-existence of trust in any particular case does not depend upon the use of legal terms employed by the parties but upon the actual facts of the case. AIR 1938 Sind 57. Failure by *Lambardor* to deposit land revenue collected by him does not constitute offence under Section 409. *Lambardor* does not stand in position of trustee but that of quasi-lessee. AIR 1938 Pesh 25. Proof of entrustment is necessary for offence of criminal breach of trust. AIR 1983 SC 631 : 1983 Cr LJ 975. Entrustment implies that the person handing over the property continues to be the owner and has placed confidence in the other to create on fiduciary relationship between them. AIR 1968 SC 700 : 1968 Cr LJ 803.

8. General deficiency.—A person accused under this section might be legally convicted of the offence defined in that section in respect of a general deficiency in the accounts. 18 All 166 ; 17 All 153.

9. Dishonesty.—When a person misappropriates to his own use property that does not belong to him, the misappropriation is dishonesty even though he intended to restore it at some future time. LBR (1827-1892) 505. The prosecution is not bound to prove the actual mode of misappropriation. 8 Ind Cas 687. Dishonesty is an essential ingredient in the offence of Criminal Breach of Trust under Section 409, I.P. Code, and must be proved before there can be conviction. Such dishonesty, of course, may be inferred from the surrounding circumstances and the terms upon which the accused had the money in his hands. 164 Ind Cas 270 : 37 Cr LJ 904 : 40 CWN 128 ; *see* 15 Pat 108 : 164 Ind Cas 74 : 37 Cr LJ 877 : 17 Pat LT 302 : 1936 Cr C 543 : AIR 1936 Pat 350 ; *see* also AIR 1938 Nag 445. Dishonest intention is an essential ingredient. 1982 Cr LJ (NOC) ; AIR 1977 SC ; 1977 Cr LJ 1158 ; (1973) 1 Malyalam LJ 154.

On several occasions, the accused who was a cashier in the Bank. made entries in the passbooks on various loanees accounts and received the cash amounts and did not choose to show the payments on the ledger books. The court held that the elements of dishonesty was explicit and the accused was liable to be concocted under Sections 409 and 477A, IPC. S. *Jayascelan v. State* 2002 Cri LJ 732 (Mad) : 2002(2) Rec Cri R 484.

10. Public servant.—*A naib nazir* is a public servant. 2 NWP 298. *A* police servant is a public servant. UBR (1892-1896) Vol I 253. *A mauzadar* in Assam, who is a subordinate official engaged by Govern-ment under a contract for "the purpose of collecting local land revenue in the county district" is a Government servant and hence a "public servant" within the meaning of Section 409, I.P. Code. 40 CWN 1154.

In view of the definition of 'public servant' in clause (4) of Section 21 of the Penal Code, a Receiver in insolvency is a public servant. 27 Cut LT 406 : 1961 All WR (Supp.) 88 : 1961 All Cr R 402 : 1960 All LJ 524.

11. Breach of trust by agent.—The offence of criminal breach of trust by an agent is made out if it is shown that the person charged was entrusted with the property or money in question in his capacity of an agent. Section 409 does not require that he should still be an agent at the time of the commission of the breach of trust. Once it is shown that the property or money was entrusted to the accused in his capacity of an agent, the offence falls under Section 409, 15 Pat 108 : 164 Ind Cas 74 : 37 Cr LJ 877 : 17 Pat LT 302 : AIR 1936 Pat 350.

Where accused had not only a share in the profits but he had a share in the losses the accused cannot be regarded as a servant or agent within the meaning of Section 409, ILR 1952 Hyd 753. The Directors of the Company are agent of the Company. AIR 1980 SC 439 1980 Cr LJ 388 : AIR 1962 SC 1821 : 1962 (2) Cr LJ 805 (in some respects the Directors of a company are also trustees).

Secretary of Co-operative Society is an agent of the society with in the meaning of Section 409, I.P.C. (1988) 1 Crimes 662 (SN).

12. Sale Transactions.—The complainant who is a dealer and supplier of raw materials for pharmaceutical Industries supplied certain material to accused. These goods were supplied on credit. After the accused fell in arrears in respect of the bill relating to those goods, the complainant approached the accused to make payment on which thirteen cheques were issued towards payments of amount due by the accused to the complainant. The cheques were bounced. It was on the basis of the said allegation that the comlainant sought to prosecute the accused of offences under section 409, IPC. The court observed and held as under: "Admittedly the goods in question were sold by the comlainant to the accused which means that the title in the property passed to the accused the moment the sale was completed. It may be pertinent to remember that passing of the in title in the movable property is not dependent on the payment of sale consideration and it is completed when an offer to purchase at a price is accepted by the buyer and the delivery of goods or payment of price or both may be postponed under the agreement as contemplated in Section 5 of Sale of Goods Act. Thus the question of commission of any offence under section 409 or even under section 406 of the IPC in respect of goods sold in this case does not arise. *M/s HICEL Pharma Ltd* v. *State of AP*, 2000 Cri LJ 2566 (AP) : 2000(2) An LT (Cri) 260(262).

13. Principal and Agent.—In the instant case, the accused was appointed as sales organiser meaning thereby that he was working as agent. The accounts were settled and a sum of Rs. 23.37 lacs was found outstanding against the accused. It was held that there was a dispute of accounting between principal and agent and that the agent could not be hasassed for such a dispute by resort to the criminal proceedings. *S.K. Agarwal v. Manoj Dalmia*, 2001 Cri LJ 3343 (All).

14. Guidelines value under Stamp Act for determination of value of property.—If for the purpose of Stamp Act guidelines value alone is not a factor to determine the value of property its work will not be any higher in the context of assessing the true market-value of properties in question to ascertain whether the transaction has resulted in any offence so as to give a pecuniary advantage to one party or the other. *R. Sai Bharathi* v. *J. Jayalalitha*, 2004 Cr LJ 286 (SC) : (2004) 2 SCC 9 : 2004 SCC (Cri) 377 : AIR 2004 SC 692.

15. Splitting up and Joinder of charges.—*A* Secretary of a Co-operative Central Bank and the Assistant Secretary between them embezzled the deposits which were sent from other Central Banks. The offences alleged were conspiracy to commit criminal breach of trust and also specific charges with regard to definite sums of money. When the case came on for trial the prosecution split up the case to be tried into four separate trials. In the first trial, the Secretary was given three years under Section 409. He was also convicted of conspiracy. No separate sentence was passed upon him. In the second trial, he had been given two years under Section 409. No separate sentence for conspiracy was passed upon him. Assistant Secretary was given three years under Section 409 in the first trial and four years in the second trial. No separate sentence was passed upon him on the conspiracy charge. The prosecution in the first trial alleged a separate conspiracy to embezzle a particular sum of money. In the second trial, they went a little further and alleged a separate conspiracy to embezzle money coming from a certain Bank ; *Held*, that the method of splitting up the charges as adopted by the prosecution was improper. AIR 1938 Cal 697.

Offence of misappropriation in respect of several items may be joined with charge of falsification which is one of series of acts. AIR 1935 Cal 312. But where six items of money were embezzled by six different persons they constitute six different offences and one single trial after framing of one single charge is a defect which cannot be cured by Section 537, Cr PC, AIR 1935 Oudh 273.

Two charges under Section 409 and two alternative charges under Section 420 in respect of the same cannot be validly joined together. AIR 1952 Bom 177 : 1952 Cr LJ 799. For joint trial under Section 5 (1) (c) read with Section 5 (2) of the Prevention of Corruption Act (which is the same as under Section 409, I.P.C.) and offence of falsification of accounts under Section 477-*A* both in respect of several items are illegal. 1970 Raj LW 529. *A* charge and trial of an offence under Section 409 is not barred by search of the Act that offence under Section 16 (7) of the Madras Pawn Brokers Act 1943. AIR 1966 Mad 368 : 1966 Cr LJ 417.

16. Cases.—The prosecution is not bound to prove the actual mode of misappropriation of the money. 8 Ind Cas 687 : 8 ALJ 88 : 11 Cr LJ 699. Where it was alleged that the first accused who was employed by a firm to sell certain bags and make over the sale-proceeds to a creditor of the firm, sold the bags, and that he and the second accused together misappropriated the money with a view to cause wrongful loss to the firm and gain to themselves. *Held*, that the allegations, if proved, would make the two accused guilty of the offence of criminal breach of trust and criminal misappropriation and that the complaint ought to have been dismissed. 9 MLT 332 : 12 Cr LJ 123 : 9 Ind Cas 726 : 1911 MWN 125. Where the managing director of a bank misrepresented to the shareholders as to the real state of the bank and induced them to declare a dividend of 6 per cent. Instead of 3 per cent, he is guilty under this Section 23 PWR 1915 Cr : 167 PLR 1915 : 16 Cr LJ 477 : 29 Ind Cas 105. Where a clerk entrusted with the document in a record room, gave a document in his custody stealthily to a person entitled to it, he commits an offence under this section as the Government by this action is deprived of its fees. 27 All 260. Where the accused, a revenue Patel, who received from Government small sums of money to be paid over as temple allowances, took formal receipts from the person to whom those payments were to be made, and forwarded those receipts to the authorities in due course, but the money was not paid over to the person entitled to receive it, as they were willing to trust him ; *held*, that the accused had fulfilled the trust reposed in him by the Government, and that he was not guilty of an offence under this section. 10 Bom 256. *A kanungo* appointed to collect rents for the *Maharaja of Benares* and receiving his salary through the Government is punishable under Section 409 of the Penal Code for criminal breach of trust. AWN 1884, 105. Section 409 does not require that property in respect of which criminal breach of trust had been committed, is to be the property of the Government but only requires that it shall be entrusted to a public servant in his capacity as such. 2 CLR 515 ; *see* also 8 Cr LJ 160 : 1 SLR 38 Cr. Where a public servant forges ticket books and misappropriates proceeds, he is not guilty under this section. 60 Bom 148 : 162 Ind Cas 399 : 37 Cr LJ 688 : 38 Bom LR 106 : 1936 Cr C 338 : AIR 1936 Bom 154. Where a head constable enquiring into theft, finds out property but enters into agreement with possessor and reports case as not traceable, he commits an offence under this section. 31 NLR 312 : 156 Ind Cas 184 : 36 Cr LJ 867 : 1935 Cr C 667 : AIR 1935 Nag 139. Where unclaimed rice lying at the Kidderpore Docks was advertised for sale, but before sale it was condemned as being in a rotten condition and was handed over to the Superintendent of the Health Department of the Calcutta Corporation ; *Held*, that the latter had not committed the offence of criminal breach of trust by selling the property and retaining the sale-proceeds instead of destroying it. 2 CWN 216. The owner of an estate, on assuming management thereof, is competent to prosecute a servant of the Court of Words for criminal breach of trust committed during the management of the estate by the Court. 5 CWN 268.

Where the inordinate delay in trial and several adjournments—Petition was filed under Section 482, CrPC—Fair and speedy trial was made—Time specified by the Court to lead on speedy trial. *Radheshyam* v. *State of M.P*, 1994 Cr LR (MP) 159.

When accused affixed his thumb impression on muster roll against names of daily labourers and there is no evidence that account was misappropriated and not paid to labourers, conviction not proper. *Dulal Chandra Baruah* v. *Union of India*, 1992 Cri LJ 3118 (Gau).

Where there was falsification of account—The surcharge proceedings and appeal thereon and findings of the appellate Court exonerating them of these items would not operate as bar to launching of the criminal Proceedings. *Kachbeswaran* v. *State*, 1994 Mad LJ (Cr) 127 (Mad).

17. Banker.—For an offence under Section 409, the fist esential ingredient to be proved is that the property was entrusted. When Section 405 which speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technologies of the law of trust. It contemplates the creation of a relationship whereby the owner of the property makes it over to another person to be retained by him on the happening of certain event. The person who transfers possession of the property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party, the person so put in possession only obtaining as a special interest by way of a claim for money advanced or spent upon the safe keeping of the thing or such other incidental expenses as may have been incurred by him. When securities have been delivered with a view to cover the repayment of any overdraft by the pledger Bank to the pledge Bank and it is agreed that they are to be disposed of the arising of stipulated contingency only then by the very fact of the delivery of the securities to the bailee, the latter becomes a trustee in terms of the contract not for all purposes but only for the limited purposes indicated by the agreement between the party. AIR 1956 SC 575 : 1956 SCA 941 : 1956 SCJ 613 : 1956 SCR 483 : 1956 Cr LJ 1116. The word 'banker' includes any person who discharges any of the functions of the customer's business of banking and would therefore include a firm. 1960 Cr LJ 188 : AIR 1960 All 103, 248.

Conviction under Section 409 upheld against the Manager of the Bank that for fictitious entries bank was not able to show repayment. AIR 1974 SC 1354 : 1974 Cr LJ 614 ; *see* also 1984 Cr LJ 969 ; AIR 1956 SC 575.

Unless a person has a direct witness of writing of another person, the evidence of such a person cannot be considered, as a truthful witness unless circumstances justify that he had an opportunity to see the accused at the time of writing. In the instant case the informant though had a chance to see the accused petitioner at the time of writing when he was discharging his official duties, but there is no statement made by PW 3 that he had any occasion to see the accused petitioner at the time of writing or putting his signature. Not only that he also did not identify writing of the torn cheque on the basis of which the handwriting expert gave his opinion and PW 3 though at the relevant time was the Incharge Manager of the Bank had the opportunity to see the hand writing of the accused petitioner, he stated he had no occasion to go through the hand writing of the accused petitioner. Therefore, the sole basis of conviction on the basis of the alleged hand writing of the accused petitioner fails.

It is settled law that in a criminal case, if the prosecution fails to produce any witness like in the instant case, the handwriting expert, an adverse presumption is to be drawn against the prosecution for non-production of the said witness. In the instant case, the prosecution even did not try to examine the handwriting expert. Not only that the trial Court also did not feel it necessary to examine handwriting expert even when the Apex Court observed that without examining the expert as a witness in Court no reliance can be placed on the opinion evidence. In the instant case, there can be no doubt that relying on the opinion evidence and the evidence of PW 1, the Courts below committed an error and acted on emotion and sentiments, rather without legal admissible and trustworthy evidence to influence their judgment. The evidence on record does not establish the case against the accused petitioner beyond reasonable doubt. *Satyajit Roy vs. State of Tripura*, 2010 (3) CriLJ 3397 (Gau).

18. Breach of trust by employee of post office.—Where the accused who functioned as sub-post Master did not take requisite care before passing vouchers and did not care to verify whether the vouchers were genuine or forged thereby permitted a large number of fraudulent withdrawals on the basis of forged vouchers, it was held, even though, it could be said that accused acted in a negligent manner but that by itself would not constitute an offence under Section 409, IPC, though it may expose the accused to disciplinary action under the relevant rules. *L. Chandraiah* v. *State of AP*, 2004 Cr LJ 365 (SC) : (2003) 12 SCC 670 : AIR 2004 SC 252.

19. Criminal mis-appreciation of money by bus-conductor of corporation.—Where the records show that the accused bus-conductor was not on duty from the date of the offence and he had sent the amount of sale of tickets to the corporation through his relatives after 11 days of the date of offence but the prosecution has failed to establish that during the said period the accused retained the amount wrongfully or that the absence of the accused was not for a valid reason. Hence, since no loss has been caused to the corporation the accused is entitled to the benefit of doubt. *State* v. *N.R. Anthony Raj*, 2004 Cr LJ 2252 (Kant) : 2004 AIR Kant HCR 1072 : 2004(3) All Cri LR 616 : 2004(3) Cur Cri R 558.

20. Criminal mis-appreciation of property.—Where while the accused was incharge of stock godown as Junior Manager working at State Civil Supplies department, stock in the godown was found short and on detection of the shortage, the accused undertook to remit the value of the shortage and deposited a part payment, his conviction for offence under Section 409, IPC cannot be interfered with since it was not only on the basis of the undertaking the conviction was recorded but the other evidence on record also unerringly proved the entrustment. *N. Bhargavan Pillai (dead) Rep. by LRs* v. *State of Kerala*, 2004 Cr JL 2949 at p. 2498 (SC) : 2005 SCC (Cri) 142 : AIR 2004 SC 2317.

21. Purchase of land by Chief Minister.—Tamil Nadu Small Scale Industries Corporation Ltd. (TANSI) a Govt. company decided to sell its defunct units for which tenders were invited. The firm of which Chief Minister of State (TN) was a partner was highest tenderer. The highest tender was accepted and land was sold to Chief Minister's firm. The foundation of charge was that the property in question was deliberately sold for less value with a view to confer pecuniary advantage to Chief Minister's firm which resulted in loss to the state company and gain to Chief Minister. The trial Court convicted all the accused but High Court acquitted them in appeal. Further appeal having been preferred to Supreme Court, it was held that in view of failure of the prosecution to show that the guide line value is Rs. 7.32 lakh per ground and in view of the positive evidence as brought out showing that the value of land of TANSI foundry unit could be about 3 Lakhs per ground particularly when the sale was by way of open tender, it cannot be said beyond reasonable doubt that the property in question had been under sold and there was loss to TANSI. Though Court held the accused Chief Minister not guilty but advised her to return the property to TANSI uncondition-ally. *R. Sai Bharathi* v. *J. Jayalalitha*, 2004 CR LJ 286 (SC) : AIR 2004 SC 692 : 2003 AIR SCW 6349 : 2004(1) Crimes 43 : 2003(9) JT 343.

22. Other cases.—Where a land owner paid money to *lambardar* in discharge of his liability for land revenue and the *lambardar* instead of depositing it in Government Treasury, convicted the same to his own use, he commits an offence under this section. AIR 1939 Lah 340 : ILR 1939 Lah 119 : 40 Cr LJ 910 : 184 1C 318. A case of breach of trust is inconsistent with a case of cheating. 1937 MWN 729. Public exposure of malpractices in connection with banking concerns and punishment of delinquents should be the first concern of the State. AIR 1939 Bom 129 : 40 Cr LJ 579. A partner can be convicted of criminal breach of trust of the circumstances brought on the record favour that conclusion. AIR 1939 Lah 406 : 40 Cr LJ 942 ; AIR 1939 Sind 21 : 40 Cr LJ 246 ; but *see* AIR 1933 Cal 582 : 34 Cr LJ 958. In the absence of entrustment no offence under this section can be committed. ILR 1943 Nag 436 : 44 Cr LJ 423. In a case under this section, the prosecution must prove dishonesty on the part of the accused. The prosecution will have to further establish that the circumstances are "incapable of explanation upon any other reasonable hypothesis than that of his guilt." 1945 AWR (HC) 298. Government stockist can be convicted for shortage in quantity of grain entrusted. 26 Pat 703. A Government servant cannot be convicted under this section for taking advances from cash in his custody where there is a long standing practice to that effect. 39 PLR 1909.

Where the dispute between the parties is one in the nature of accounting, the proper remedy is to file a civil suit for recovery of the amounts due and not a prosecution under 409, I.P. Code. 154 Ind Cas 258 : 36 Cr LJ 477 : 1935 OWN 126 : 1935 Cr C 442 : AIR 1935 Oudh 241.

A subscriber of respondent was given a mobile phone instrument and connection with an understanding that the subscriber had exclusive right to use the phone. If the accused allegedly induced the subscriber of the second respondent to opt for the service provided by another company, an offence under Section 409, IPC could not be said to have been made out. *Syed Asifuddin* v. *State of AP*, 2005 Cr LJ 4314 (AP) : 2005 CLC 1685 : 2006(1) AIR Jhar R (NOC) 4 (AP).

The accused, a petty" officer, in the Salt Department, was empowered to sell salt at reduced prices to fish curers (ticket- holders). The charge against him was that he really brought salt for himself at reduced rates, entering the sales in the Government books as if made to ticket-holders, thus defrauding Government of the difference in the price of the salt. *Held*, that the officer was guilty of the offence of criminal breach of trust by a public servant. 1 Weir 467. Where a charge is framed against the accused under Section 409, I.P. Code, for the embezzlement of a particular sum, he cannot contend that the prosecution have failed to prove the embezzlement of that sum though they might have succeeded in proving an embezzlement of other sums. 162 Ind Cas 391 : 37 Cr LJ 581 : 38 PLR 1157 : 1936 Cr C 992 : AIR 1936 Lah 907.

Where a branch firm employed purchasing agents who, in their turn, employed the accused as their servant, and where the purchasing agents were charged with criminal breach of trust as agents under Section 409, and servant for criminal breach of trust as servant. *Held*, that the servant could not be convicted of the offence as he was not the servant of the firm, the purchasing agents having taken the whole responsibility, as no specific amount had been proved been embezzled by him and as he has not been proved to have abetted the purchasing agents. 2 PR 1906 Cr : 9 PLR 1902. Where a village Shroff, whose duty it was, among other things, to assist in collecting the revenue received grain from certain *ryots* and in return, granted receipts for the public revenue, as if for money received, held, that the Shroff could not be convicted of criminal breach of trust of the grain so received inasmuch as the accused were not authorised to receive the public revenue in kind, and as the party who so delivered the grain did not thereby discharge himself from liability to revenue. 1 Weir 465 : 4 MHC App. 32 : see also 1

Weir 466. In a case of criminal breach of trust where the accused pleads that he has accounted to the complainant and paid the balance of the money, the burden of proving non-accounts and non-payment is on the prosecution and not on the accused. Rat Un Cr C 869 ; *see* also 1936 OWN 671.

Under the provisions of Section 497 a Magistrate has no power to grant bail in cases falling under Section 409, Penal Code. 1930 Cr C 1151 : AIR 1930 Rang 835. Payment of amount alleged to have been embezzled is no evidence of the offence. AIR 1930 Oudh 324 : 7 OWN 564. An offence under this section cannot be committed in respect of immoveable property. 8 Rang 13 : 1930 Cr C 590 : AIR 1930 Rang 158. In the case of temporary misappropriation of funds of society by its secretary with the knowledge of its members is only a technical offence and benefit of doubt should be given to the accused 12 Lah LJ 165 : 129 Ind Cas 286 : 32 Cr LJ 214 : AIR 1930 Lah 1045. A person who is the manager of the firm cannot be held criminally liable for breach of trust where there is a personal entrustment of goods to him out of the firm in respect of which the offence was alleged to have been committed. AIR 1930 Rang 332 : 1930 Cr C 1168. Entrustment of goods creates trust on sale-proceeds also. AIR 1932 Sind 169 : 34 Cr LJ 51 : 1932 Cr C 733 : 140 Ind Cas 647. Prosecution must prove misappropriation. Onus never shifts. 1933 Cr C 1375 : AIR 1933 Cal 800. Accused is guilty in case of shortage of goods and falsification of accounts by accused. 143 Ind Cas 318 : 1933 ALJ 479 : 1933 Cr C 629 : 34 Cr LJ 574 : AIR 1933 Cal 356. Public servant is responsible for proper expenditure of money not having dominion over it. AIR 1933 Oudh 387 : 10 OWN 897 : 1933 Cr C 1088. Where accused is charged with criminal breach of trust under Section 409 and plea of *bona fide* payment to wrong persons under misapprehension is taken, evidence of other transactions of conversion of money to personal use is not admissible. 142 Ind Cas 274 : 1933 Cr C 197 : 34 Cr LJ 274 : AIR 1933 Cal 136. In case of offence by an agent the agent can be tried at place to which he is bound to make remittance. 136 Ind Cas 159 : 33 Cr LJ 711 : 1932 Cr C 403 : 1932 ALJ 269 ; *see* also AIR 1933 Lah 599 : 34 Cr LJ 902 : 1933 Cr C 817.

Where there is absence of intention to misappropriate money belonging to principal, an agent cannot be prosecution for criminal breach of trust. AIR 1930 Pat 221 : 1930 Cr C 429. Where an agent of a firm refuses to render accounts and to allow one of the partners to have access to the account books when asked to do so, it cannot be presumed without further facts being proved that there is intention to defraud, and the agent cannot be prosecuted in the Criminal Court. The refusal to render accounts may be a good ground for the complainant for a civil action, but it does not amount in any case to a criminal offence much less to an offence under Section 409. AIR 1937 Rang 505. Where money drawn by the Principal of a school for payment of bill due to a particular firm was under his order appropriated towards the payment of another bill due to the same firm, *held*, that it may be a serious irregularity in the eyes of the Audit Officer but that it did not amount to an offence under Section 409, I.P. Code. AIR 1930 Oudh 324 : 7 OWN 564. The law always regards criminal breach of trust by person in charge of public moneys as one of a specially serious nature. 106 Ind Cas 337 : 29 Cr LJ 1. In cases of criminal misappropriation the onus lies on the prosecution to prove not only that money was paid to the accused in trust but also that he did not apply it for the purpose for which it was given. AIR 1928 Lah 382. Section 409 of the Penal Code cannot be construed as involving that any head of an office who is negligent in seeing that the rules about remitting money to the treasury are observed, is *ipso facto* guilty of the offence of criminal breach of trust. 30 Bom LR 624 : 111 Ind Cas 730 : 29 Cr LJ 922. Where the offence of embezzlement was *exhypothesi* complete long before anything done subsequently to help the real offender to conceal the embezzlement it might be punishable under some other section but does not amount to abetment of the offence under Section 409. AIR 1928 Lah 382. A *kabuliyat* provided that a *maujadar* should realise rent and pay the same to the Government and that on failure to do so the Government should realise the same from the *maujadar* or his surety according to the law prescribed for the realisation of arrears of rent. The *maujadar* collected certain amounts but did not remit the same to the treasury with the result that he was prosecuted under Section 409, I. P. Code. *Held*, that the position of the *maujadar* was that of a lessee that the sums should be realised as arrears of rent and that the criminal prosecution was not maintainable. 47 CLJ 442 : 110 Ind Cas 97 : 29 Cr LJ 641 : AIR 1928 Pat 43. A public servant can be convicted under Section 409 without the slightest evidence of any money having been received by him. If property under his control disappears and his connection with the conspiracy is proved conviction will follow. 88 Ind Cas 830 : 20 Cr LJ 1217. Where *lambardar* having collected part of land revenue deposited it with a banker, as *tahsildar* did not accept only a part, after a fixed date, there is no embezzlement and Section 409 does not apply, 131 Ind Cas 910 : 32 Cr LJ 811 : AIR 1931 Lah 468. On a charge under Section 409 prosecution need not prove in what manner the money alleged to have been misappropriated has actually been spent by the accused. 59 Cr LJ 306 : 38 CWN 467 : 35 Cr LJ 1279 : AIR 1934 Cal 532. This section does not include an intention to misappropriate at some future date. AIR 1934 Lah 834 : 1934 Cr C 1183 : ALJ 1934 Lah 419 : 152 Ind Cas 615. A servant acting within the scope of his employment cannot in order of defraud his master set up breach of his master's regulation in his own favour. 35 PLR 649 : 1934 Cr C 1003 : AIR 1934 Lah 677.

The accused was employed as agent for collection of taxes by the Union Committee. He was to take 10 per cent. of the collection as remuneration and to hand over the balance to his master or to pay the money into the treasure, no period being fixed for the latter purpose. He was convicted on a charge under Section 409, I. P. Code, for having failed to account for a certain sum of money collected by him. *Held*, that as the accused was entitled to deduct his remuneration from the collections and as no period was fixed for payment into the treasury, a charge of criminal breach of trust could only be maintained after adjustment of accounts, 56 Ind Cas 669 : 21 Ind Cas 509. The *lambardar is* bound to collect the land revenue by the due date and in case the amount of land revenue for which the *lambardar* is responsible is not paid to the Government by the due date the *lambardar* becomes a defaulter and his person and property can be proceeded against for the purpose of recovering it. 168 Ind Cas 369 : 38 Cr LJ 530 : AIR 1937 Pesh 35. The accused who was a Sub-post-master was asked to make payment for some cash certificate. The value of cash certificate was Rs. 82.2.6 and this amount was paid by the Government for payment to the certificate holders. The accused paid them Rs. 7.3.6 each and himself appropriated the balance. *Held*, that the accused was guilty of criminal breach of trust within Section 409, I.P. Code. 82 All 204 : 11 ALJ 93 : 55 Ind Cas 476 : 21 Cr LJ 316. In a case of criminal breach of trust by Manager of Court of Wards, prosecution does not lie without sanction of Court of Wards. AIR 1931 Pat 86. If accused, is not entrusted with public funds he cannot be convicted. AIR 1931 Mad 439.

Receiving commission by a Vice-Chairman of a Municipality for ordering goods to the Municipality is not an offence under this section. 97 Ind Cas 64 : 27 Cr LJ 1088 : AIR 1926 Rang 171. Non-payment of money collected by an *Amin* for a long time after collection is an offence under this section. 23 LW 718 : 95 Ind Cas 943 : AIR 1926 Mad 727 : *see* also 27 Cr LJ 589 : AIR 1926 Oudh 398. A sentence of imprisonment is obligatory under the law for an offence under Section 409. 94 Ind Cas 130 : 27 Cr LJ 562 : AIR 1926 Lah 350. Endorsement by owners in favour of Bank of a warbond does not pass property in Bond to Bank, so the Bank is guilty under this section if it deals with bond contrary to instructions of endorser. AIR 1926 Lah 385. Where the owner of a sewing machines give it to an agent to be sold for money and the latter pledges it, it is not open to Criminal Court to order the pledgee to deliver possession of the machine to the owner on the ground that the agent had exceeded his authority. 1 Bur LJ 45 : Rang 68. An investigation into whether a transaction was *benami* or not should not ordinarily be undertaken by a Criminal Court and where a person *bona fide* asserts a claim to property which he had transferred but over which he had dominion even if it turns out to be unsustainable in law, there is no offence under Section 409 unless the claim is a mere pretence. 28 CWN 831 : 81 Ind Cas 829 : 25 Cr LJ 1083. It was proved to be as good evidence as could have been produced that accused received the three sums in question and up to the time of the prosecution more than year if he had not paid them over to the persons authorised to receive them, he presumed to have converted them to his own use. 1923 Lah 363. Mere retaining articles of kits for a short time by a person serving in armed constabulary and leaving post without leave does not amount to misappropriation. AIR 1957 Raj 26 : 1957 Cr LJ 103 : ILR (1956) 6 Raj 996 ; *see* also AIR 1958 AP 29 : 1957 MLJ (Cr) 599 : 1958 Cr LJ 15 (for ingredients of offences). Where under an agreement entered into by the accused with the Government the accused are under a duty to sell person the grain stored in the unit established by the Government and to keep the sale proceeds to the Government and that accused sold the grain and misappropriated the sale proceeds thereof, there is an entrustment of property within the meaning of Section 409 and the charge must be deemed to be a charge for misappropriation of the sale proceeds. AIR 1956 Hyd 180 : ILR 1956 Hyd 191 : 1956 Cr LJ 1320. Where a postal clerk does not count postal orders every day but gives a false return, that itself is an indication of conversion. 1963 Jab LJ 142 ; 1965 (2) Cr LJ 325 : AIR 1964 Ori 202 (misappropriation of M.O. amount by some of Extra Department agent of post office).

Mere retention of money entrusted is not a breach of trust. AIR 1970 Pat 311 : 1970 Cr LJ 1247 ; (1965) 31 Cut LT ; 1963 Jab LJ 142 (mere retention gives rise to the inference of misappropriation). The court issued a cheque in favour of an Advocate for refunding the amount to his claim. He got the cheque encashed but did not pay the amount to his client. The advocate was guilty of an offence under Section 409 notwithstanding he give a letter to the client to pay the amount. (1983) 1 Andh LT 153 : (1983) 1 Cr LC 328. Money collected by Tahsil Welfare Officers from different persons for deposit in Land Mortgage Bank, not deposited or returned, brings the offence under this section. (1975) 2 Cr LJ 467 ; (1974) 40 Cut LT 514 (misappropriation by Asstt. Nazir temporarily in charge as Nazir) 1982 Cr LJ (NOC) 134. Failure to pay the purchase money of seeds supplied on credit to the *sarpanch* does not amount to offence under Section 409). For other cases refer to 1980 Cr LJ 484 ; (1978) 1 Kant LJ 482.

Where the conviction was of petitioner—According to cash register amount of Rs. 6.000/- found missing—No satisfactory explanation was given by petitioner—He based his defence on document in respect of which no question was put to him under Section 313. Cr. P.C. conviction was not based solely on this document which was duly considered by Court below. Hence it has not caused any prejudice to accused petitioner. *Autar Singh* v. *State*. (1995) 1 CCR 26 (MP).

Where there was criminal breach of trust by public servant or by banker. or by merchant or by agent—Property. which was subject-matter of the offence must have been entrusted to the accused and trust of some kind is necessary—To make out offence it was held that (i) accused must either be a public servant or a banker. merchant broker. attorney or agent—(ii) Entrusted with property in such capacity (iii) committed criminal breach of trust in respect of such property. *Dhirubhai* v. *Tulsi*. (1995) 8 OCR 22 (Ori).

Where cognizance was taken by trial court—Warrant was issued. Hence direction was made to issue bailable warrant instead of warrant of arrest *Mahesh* v. *State of Rajasthan*. 1995 Cr LR 114 (Raj).

23. Temporary misappropriation.—In appropriate case if the court is satisfied that the accused had made good the loss that at the very highest this may be a ground for leniency but that it can never be a ground for a court to condone the entire act and hold that the offence has not been committed. The law makes a very clear provision for offences of temporary misappropriation and breach of trust and similarly. in cases where property has been removed fradulently and dishonestly and theft or robbery has taken place it is necessary to very clearly lay down that the law envisages that the offence is complete when the ingredients of the section are satisfied. There can be no condonation of completed offences. *State of Karnataka* v. *Mazhar Alam*. 2000 Cri LJ 2534 (Kant).

The defence of the accused was that the amount of Rs. 10.500/- was not taken away by him but that it was being taken to the Head Post Office for deposit and that the bag was lost in the lorry while in transit. There was enough evidence on record to satisfy the court that the defence taken was plausible and at the earliest point of time the accused admitted the liability. made good the amount to the post office. On a combination of these factors. it was held that that was a case where the offence could not be said to have been completed and the facts of the case really constitute an exception to the general rule. *Ibid*.

24. Evidence and proof.—To establish a charge of criminal breach of trust. the prosecution is not obliged to prove the precise mode of conversion. misappropriation or misapplication by the accused of the property entrusted to him over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof. entrustment of property and failure in breach of an obligation to account for the property entrusted. if proved. may in the light of other circumstances. justifiably lead to an inference of dishonest misappropriation or conversion. AIR 1960 SC 889 : (1960) 3 SCR 319 : 1961 SCD 136 : 1961 1 SCJ 42 : 1960 Cr LJ 1250. *State of Sikkim v. Kul Chandra Baral*. 2005 Cr LJ 1027 (Sikkim). Dishonest intention can not be proved directly and must be inferred from circumstances. 26 Cut LJ 210 : ILR (1960) Cut 143 : ILR (1959) 1 Cal 607; 1958 MLJ (Notes) 161.

In case of criminal breach of trust, the prosecution must always prove misappropriation. It is not enough if it merely establishes that the accused received money. AIR 1956 Hyd 180 : 1956 Cr LJ 1320 : ILR 1956 (Hyd) 191 ; AIR 1955 Cal 236 : ILR (1956) 2 Cal 625 : AIR 1954 Cr LJ 1645 ; AIR 1954 Madh B 135 : 1944 Madh BLR (Cr) 47 : 1954 Cr LJ 1178 : Madh BLJ 1954 HCR 558 (circumstantial evidence).

For conviction under Section 409 what the prosecution has to prove is not only entrustment but also dishonest misappropriation. 1953 Ker LJ 33 : 1963 (2) Cr LJ 216 ; ILR 1963 Cut 877 (criminal breach of trust by public servant) when it was held that the prosecution is not to prove the manner in which the money was misappropriated.

It is not necessary nor possible in every case to prove in that precise manner the accused person has dealt with or misappropriated the goods of his master. The question is one of intention and not a matter of direct proof but giving false account of what he has done with the goods received by him may be treated as a strong circumstance against him. 1964 MLJ (Cr) 719. Burden of proof of establishing all the ingredients of the offence under the section is on the prosecution. (1979) 81 Punj LR 247 ; 1981 Cut LR 279 ; 1979 Cr LR (Mad) 331. Only in case of a *prima facie* case being made out the onus shifts on the accused to prove that he is not guilty. 1978 Cr LJ (NOC) 293 ; (1972) 2 Mys LJ 35. When the evidence creates doubt the accused is entitled to benefit of doubt. AIR 1972 SC 521 : 1972 Cr LJ 313 ; AIR 1980 SC 476 : 1980 Cr LJ 311 : AIR 1979 SC 1080 : 1979 Cr LJ 913 (absence of name in school register can not lead to an inference of misappropriation) ; AIR 1973 . SC 488 : 1972 Cr LJ 1202 (no evidence of parting of key of the safe by the accused cashier who was in possession of the safe can not lead to innocence of the accused) ; AIR 1973 SC 82 : 1973 Cr LJ 199 (conviction rightly held).

An insured cause was delivered by the accused to the addressee who found while piece of blank paper with the accused was a Departmental Delivery, agent of the post office. Prosecution did not succeed in establishing that it contained Rs. 1,000 when it was handed over to him. Revision against conviction was allowed for the charge was not found proved. Guilty mind could not be concluded from his negligent act. (1986) 2 Crimes 663 (Ori).

Once the entrustment of the property is admitted by the accused. He must prove that the entrustment has been properly carried out by him. *Jagat Narayan Jha* v. *State of Bihar*, 1995 SCC (Cr) 466 (SC).

There was a case of embezzlement of Panchayat funds which had occurred during a span of 8 months and no audit was conducted during that period. Prosecution witnesses who produced record in Court were not even certain about genuineness of records as cutting and overwriting in records was apparently visible. It was held that case was not proved beyond doubt and the accused was acquitted. *Dilbagh Singh* v. *State*, 2003 Cr LJ 2466 (P&H) : 2003(2) All Cri LR 384 : 2003(1) Rec Cri R 786.

25. Confusing and conflicting type of evidence of accused denied opportunity to defend.—There is no justification to hold that the respondent was deprived of the opportunity to properly detend himself because of the confusing and conflicting types of evidence adduced in the case. If the prosecution has adduced conflicting or confusing type of evidence that goes in favour of the accused because the prosecution is obliged to adduce reliable, cogent and satisfactory evidence in support of the charge. *State of Sikkim* v. *Kul Chandra Baral*, 2005 Cr LJ 1027 (Sikkim) : 2005(1) Crimes 558 (SK).

There is some discrepancy in regard to the withdrawal of the amount as per the evidence of the Chairman and the auditors that the amount was withdrawn by the Chairman etc. The petitioner being the Secretary having domain over the property ought to have taken all the care to see the interest of the society is protected which is meant for the benefit of the members of the Society. Even otherwise also it is not a serious lacuna in the case of the prosecution to hold that the petitioner is not guilty of the offence. After having gone through the evidence and the judgments passed by the Court below. Court rightly held that he is guilty of the offense which also does not call for interference. *M.C. Gangadharappa v. State*, 2002 Cri LJ 2755 (Kant.) : AIR 2002 Kant HCR 1551 : 2002(4) All Cri R 790 : 2002(5) Kant LJ 237 ; *See* also *Badri Lal Gupta v. State of M.P.*, 2006 Cr LJ 1375 (M.P.).

26. Defence.—It cannot be contended that the accused may have been negligent in his duties and may have incured civil liability. But that he could not be held guilty of criminal breach of trust in the absence of a finding that he actually misappropriated goods or connived at such misappropriation. 1965 (1) Cr LJ 539 : AIR 233. If it is shown that money entrusted to the accused for a particular purpose was not returned by him in accordance with his duty, it lies on him to prove his defence. It may well be that the retention may be for a short period and this would be consistent with innocence. AIR 1955 Sau 100 : 1955 Cr LJ 1528. What is a reasonable explanation in for the acquittal of the accused. (1975) 41 Cut LT 311 ; 1983 Mad LJ (Cr) 161 : 1984 Mad LJ (Cr) 78 : 1982 UP (Cr) 33.

27. Whether triable by Second Class Magistrate.—The offence under Section 409 is not triable by the Magistrate of the Second Class and the alteration of conviction to one under Section 409, read with Section 100, is illegal. AIR 1938 Mad 315.

28. Jurisdiction.—The charge under Section 408 is not compoundable. AIR 1943 Cat 41 : 43 Cr LJ 926 : 203 IC 180. Where trust is created at *M* and the complaint by a trustee at *M* that breach of trust has been committed by his co-trustee at *B* by misappropriating trust money, the Court at *M* has no jurisdiction to try the offence. AIR 1942 All 439 : 44 Cr LJ 102 : 103 1C 530 ; *see* also AIR 1941 Mad 181 : 42 Cr LJ 320 (1). The offence under Section 409 is not triable by the Magistrate of the second class and the alteration of the conviction to one under Section 409, read with Section 109 is illegal. AIR 1938 Mad 315 : 39 Cr LJ 465. In case of application by accused charged under this section to commit him to Sessions Judge after prosecution case was over. Sessions Judge has no jurisdiction to order Magistrate to commit the accused. Sessions Judge can make reference to High Court if interference is necessary. AIR 1938 Cal 416 : 39 Cr LJ 569.

29. Sentence.—The offence under this section is a very serious one. when convicted a responsible public servant in the course of his duty. A sentence of one year's imprisonment together with small fine is not adequate. 31 NLR 312 : 156 Ind Cas 184 : 36 Cr LJ 269 : 1959 Cr LJ 1197 ; AIR 1954 SC 715 : 1954 Cr LJ 1997 (Embezzlement and forgery by public servant). AIR 1958 LR 440 : AIR 1963 Bom 21 : 1963 (1) Cr LJ 152. In a case of trial for embezzlement of deposits where the offences charged were those of conspiracy to commit breach of trust and also specific charges with regard to definite sums of money the case at trial was split into four separate charges and separate sentences were passed in two cases. the propriety of the procedure was criticised. AIR 1938 Cal 697 : 40 Cr LJ 90 : 43 CWN 23.

A sentence can be inflicted for a certain offence and his left discretion to adjust the sentence according to the circumstances of each case. AIR 1965 SC 1248 : AIR 1959 Mys 185 : 1959 Cr LJ 831 ; AIR 1959 Ori 159 : 1959 Cr LJ 1197 (shall be adequately published : *see* 1978 Cr LR (SC) 147 ; 1979 Cr LJ 924 : (1980) 1 SCC 610 (sentence reduced) AIR 1974 SC 2336 ; AIR 1979 SC 825 ; AIR 1979 SC 1120 (sentence reduced).

The accused entered into conspiracy to commit criminal breach of trust. With respect to the funds through their company. Main accused is dead. The appellants were mere employees and have spent their entire life under the shadow of criminal prosecution. Hence ends of justice would be met if appellant is sentenced to the imprisonment till rising of the court and fine of Rs. 5,000. *Sushil Kumar Sanghi* v. *State*, 1995 JCC 37 (Del).

Long pendency of matter. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic a view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system. *Ankush Maruti Shinde vs. State of Maharashtra*, AIR 2009 SC 2609 : 2009 (6) SCC 667 : 2009 (6) JT 358 : 2009 (7) SCR 182 : 2009 (6) Scale 388 : 2009 (3) Supreme 760 : 2009 (4) SLT 470;; See also *Bikram Dorjee vs. State of West Bengal*, AIR 2009 SC 2539 : 2009 (2) Crimes 354 (SC) : 2009 (7) JT 325 : 2009 (6) Scale 325 : 2009 (6) SCR 884 : 2009 (3) Supreme 772.

Where there was misappropriation of public fund—Subsequently the misappropriated amount was deposited—Petitioner was of 77 years of age and offence committed in the year 1976-77 when the accused was *Sarpanch of* the *Gram Panchayat*. Finally, it was held that considering the age sentenced reduced to the period already undergone with fine of Rs. 500. *Raghbir Singh* v. *State of Haryana*, (1995) 3 Crimes 417 (P&H).

Where the case was filed for acceptance of recovery by petitioner—Eight copper plates replaced by lead plate—Key was with the accused—Litigation prolonged—Sentence was reduced to period undergone. *Padam Prakash Gupta* v. *U.T. Chandigarh*, (1994) 1 CC Cases 242 (P&H).

Where the convict being a Government servant having no past criminal history and was facing protracted litigation—Sentence was reduced to imprisonment already undergone. Taking into consideration the facts and circumstances of the case that the petitioner is not stated to be a previous convict, that he is employed with the State Government and that he may lose his job in case he remains in jail, petitioner has faced protracted litigation and has undergone sufficient mental harassment. So keeping in view the circumstances of the case, it is a fit case that no useful purpose would be served by sending the petitioner to jail for undergoing the remaining period of imprisonment. *Geeta Rani* v. *State of Haryana*, (1994) 1 CC Cases 397 at P. 401 (P&H).

Where there was conviction order and appeal was filed against the appellant was in jail for more than two months. Sentence was reduced to the period already undergone. *Raj Singh* v. *State of U.P.*, 1994 SCC (Cri) 1785 : 1995 Supp(4) SCC 500.

The counsel for the appellant has only prayed for reduction of sentence so that the appellant was not incarcerated at such distance of time. The offence took place wayback in July 1969. No purpose would be served now in incarcerating the appellant at this stage. Yet the law must have its course. Section 409, I.P.C. leaves no choice with the Court, but to award some imprisonment besides imposition of fine. The Supreme Court was apprised as to whether the appellant had suffered any incarceration during the stage of investigation. If he had then the custody so suffered, which was reckonable, should be taken to be the imprisonment already undergone for the offence committed and the Supreme Court reduced the period of imprisonment to that period while sustaining that of fine. But in case the appellant had not suffered any imprisonment so far. Then the Court reduces his sentence till the rising of the Court while sustaining the fine. To fulfil either purpose, the Special Judge, District Bankantha, Palanipur was directed to summon the appellant and to verify these faces and should it be necessary, to keep him imprisoned till the rising of the Court as ordered as the second alternative. *Jaydev Shrichand Danani* v. *State of Gujarat*, 1992 Cr LJ 3595 at 3596 SC.

In a case, the accused, who was cashier in a Bank on several occasions made entries in the pass books on various loanees accounts and received the cash amounts and did not choose to show the payments in the ledger books. He was convicted for offences under Section 409 and 477A, IPC. As regards sentence, the court held that though the facts that the accused had lost has jab and also he paid back the misappriated amount could be taken into consideration, it could not be forgotten that the accused had committed the act of dishonesty not only towards the Bank but also to the Public. However in view of the fact that the accused had been facing the agony for a long time the sentence of two years was reduced to 1½ years on each count. *Jayaseelan v. State*, 2002 Cri LJ 732 (Mad) : 2002(2) Rec Cri R 484.

The allegation against the accused who was the Branch post Master was that an amount of Rs. 3400/- had not been accounted for in the records of the post office. The accused more than fully reimbursed the entire amount that was found to be short. The trial of the accused dragged on for about 10 years. The moment the offence was detected he was placed under arrest and suspension. In view of the above circumstances, it was held that the accused deserved maximum leniency in grant of sentence and that the award of sentence of simple imprisonment till rising of court along with fine would be proper. *State of Karnataka* v. *Basappa* 2000 Cri LJ 2327 (Kar) : ILR 2000 Kant 2361 : 2000(6) Kant LJ 187 (Karn) (DBI).

Misappropriation of small sum which too is deposited after a long period, merits leniency in award of sentence. *Dasarathi @ Bhalana Nath Madal* v. *State of Bihar*, 1997 (2) East Cr C 435 (Pat).

The offence was detected as early in 1978 and about 20 years have been lapsed, after the offence have been committed and detected for a few months he was in jail. Therefore the interest of justice will be met in the circumstances of the case, that he is sentenced to imprisonment for the period he had already undergone and also to pay a fine of Rs. 10,000/- in default R.I for six months for the aforesaid offences. *Arun Parshuram Sutar* v. *State of Maharashtra* 1999 Cri LJ 438 (Bom).

30. Procedure.—Warrant—Not bailable—Not compoundable—Triable by Magistrate of the first class.

31. Charge.—I (*name and office af Magistrate, etc.*) hereby charge you (*name of th accused*) as follows ;—

That on or about the..........day of...........at.........you being in any manne entrusted with property, to wit.......... (or with any dominion over property, t wit..........) in your capacity of a public servant (or in the way of your business as banker, merchant, factor broker, attorney or agent), committed criminal breach of trus in respect of that property and that you thereby committed an offence punishable unde Section 409 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

A charge under Section I.P. Code framed in accordance with Section 222 (2 Criminal Procedure Code can be combined with charge under Section 477-A, I.P. Cod if the latter offence is committed in the same transaction. AIR Oudh 122 : 45 Cr LJ 538 Joinder of charges of criminal breach of trust in respect of three gross sums, each mad up of separate items alleged to have been committed within 12 months is bad. 44 CWN 175. Where postman is charged under Sections 409, 467 and 471 for misappropriatin amount of money order and forging thumb impression and using such forge document, sanction of the Governor General was held necessary for prosecution unde Section 471, but trial could proceed for other offences. AIR 1941 Mad 38 : 42 Cr L 263. Where the offence is of committing criminal breach of trust by accused as "a clerk or as agent of the company, he may be charged according to Section 408 and may b tried by a 2nd class Magistrate. But where the charge is on the alternative footing tha the breach of trust was committed either as a clerk or as an agent of the company a second class Magistrate has no Jurisdiction to try such an offence. 69 LW 487 : (1947 2 MLJ 163. Criminal breach of trust by a public servant is a very serious offence and i included in the category of these serious offences which cannot be punished wit imprisonment, the Court in this respect having no discretion as in the case o numberous other offences which are punishable with imprisonment define or with both AIR 1950 Lah 199 (FB).

Several defalcations made at different times within one year can be joined togethe as one offence. (1962) 3 Guj LR 701 : 1963 (1) Cr LJ 162 : AIR 1963 Guj 15.

32. Sanction.—It cannot dogmatically be said that no sanction is necessary, unde any circumstances, to prosecute a public servant for offence under Section 409. Th special circumstances of each case are to be examined, and if it is found that th offence mentioned in Section 409 was committed in the discharge of official duty sanction becomes necessary. AIR 1950 Raj 51.

Sanction under Section 197 of the Code is not a condition precedent for an offenc under Section 409, IPC and as such want of sanction would not vitiate conviction of a public servant where entrustment and misappropriation by a public servant have been proved. *N. Bhargavan Pillai by LRs* v. *State of Kerala*, (2004) 2 Crimes 415 (SC).

If the Special Judge has no jurisdiction to try an offence under Section 5(2) of the P.C. Act for want of valid sanction, he lacks jurisdiction to take cognizance of allied offences and to try the same, in view of the specific powers on a Special Judge with limitations specified in Section 7(3) of the Amendment Act. Where there is no valid sanction for prosecution under Section 5(1)(c) read with Section 5(2) the conclusion becomes inevitable that. the orders of conviction recorded against the accused in respect of the charges under Sections 409 and 468 of the IPC and the sentences passed against him thereunder cannot be sustained and thus, are liable to be set aside. *Duryodhan Patra vs. State of Orissa*, 2010 (3) CrLJ 2505 (Orissa).

Sanction is not required for every offence. AIR 1955 SC 309 ; AIR 1956 SC 44 ; AIR 1960 SC 266 ; AIR 1966 SC 220. (if the acts complained are so integrally connected with the duties attaching to the office to be inseparable from them, then only sanction under Section 197 (1) would be necessary) : 1982 Cr LJ 1058 *see* also (1979) 2 Cr LJ 1367 : 1980 Cr LJ 118 ; (1961) 2 Cr LJ 615 (sanction of the Company Court) ; 1979 Cr LJ 537 (criminal acts as alleged are to be taken).

Where there was sanction for prosecution under Section 6 of the Act sufficient for purpose of sanction required for prosecution under Section 409 of Code—Offence under Section 5(l)(c) of the Act and under Section 409 of Code are one and same. Thus joint trial is illegal. *Ganesh Chandra Dilingia.* v. *D.S.P.E. (CBI)*, (1995) 3 Gau LR 186.

Sanction to prosecute a Treasury Jamadar. While the Treasury Officer, was absent a *lambardar* deposited his revenue collections with the *Jamadar* for being deposited in the treasury. *Held*, *Jamadar* was a public servant who defalcated it. 1986 Cr LJ 995.

A sarpanch violated rules of the Gram *Panchayat* by executing works prohibited by them. *Held*, it was not his official duty so to do and as such sanction to prosecute him for drawing funds without executing works and is not necessary. Panchayat Act. Section 139 of Orissa Gram is of no avail to him. 1986 Cr LJ 1025 (Ori).

Where release on probation was held illegal—Misappropriation of amounts was not larger. Conviction was held to be fully confirmed. *State of Gujarat* v. *Mahesh Kumar Ambalal Rana*, (1994) 1 Crimes 535 (Guj) : 1994 Cr LR (Guj) 5.

When accused had admitted the case. Expert had confirmed the signature—Trial Court convicted—Appellate court has affirmed the conviction—Conviction was held to be justified. *Brij Singh* v. *State of Haryana*, (1994) 2 CC Cases 328 (P&H).

When accused was acquitted of offence under Section 468, I.P.C., he cannot be convicted for knowledge or reason to believe about alleged forged document under Sections 420 or 471, I.P.C. in absence of direct or independent evidence. *Arvind Balashankar Goshi* v. *State*, 1991 Cri LJ 2241 (Guj).

33. Conviction.—Where the offence was of criminal breach of trust by public servant accused—Accused has forged cheques—He is held to have misappropriated public funds available with him by making entries in cash book. Accused was held liable for conviction. *State of Punjab* v. *Baj Singh*, 1995 Cr LJ 1311 (P&H).

The accused recorded the debt amount as *Kurk Amin*, and did not deposit in account of the society. He clearly committed criminal misappropriation of property. Hence liable to be convicted under Section 409, I.P.C. *State of U.P.* v. *Nar Singh*, 1995 (32) ACC 355 (All).

Where offence was of criminal breach of trust and falsification of accounts—Appellant accused an Accountant in company made false accounts in respect of amounts received by him from a dealer, hence offence was established—Being Accountant accused cannot be absolved of liability of any transition—Conviction was upheld. *Inder Sain Jain* v. *State of Punjab*, 1994 Cr LJ 1224 (SC) : AIR 1994 SC 1065.

Quantum of sentence. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and *per se* require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic a view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system. *State of Madhya Pradesh vs. Basodi.* AIR 2009 SC 3081 : 2009 CrLJ 4284 : 2009 (2) Crimes 273 (SC) : 2009 (12) SCC 318 : 2009 (6) JT 92 : 2009 (6) SCR 1166 : 2009 (6) Scale 353 : 2009 (3) Supreme 501;: See also *State of Madhya Pradesh vs. Sheikh Shahid*, AIR 2009 SC 2951 : 2009 (12) SCC 715 : 2009 (8) JT 277 : 2009 (5) SCR 1038 : 2009 (5) Scale 679 : 2009 (3) SLT 744.

34. Acquittal.—When entrustment of money not denied by accused but his plea that he had forced money to co-accused cashier not proved. accused can not be acquitted when cashier already acquitted by lower appellate court. *Bagga Singh* v. *State of Punjab*, 1996 Cri LJ 2003 (SC) : AIR 1996 (SC) 3035 : 1996(8) SCC 217 : 1996(2) JT 595 : 1996(2) Scale 462.

Where accused Government servant was receiving Government money on behalf of officer authorised to receive as he was absent in office—Prosecution has alleged non-return of money in Government account by accused—Forgery alleged in cash book showing return of money by accused—Prosecution failed to explain as to why authorised officer left a gap in cash book above his signature—Accused's defence was that he has returned money. Defence of accused was held probable and, therefore, he must get benefit of doubt. *Jagat Narayan Jha* v. *State of Bihar*. 1994 Cr LJ 1100 (SC) : 1995 SCC (Cr) 246 : 1995 Supp(4) SCC 518.

Where the prosecution was under Section 409, I.P.C.—Resulting in the acquittal of the accused—Appeal against the same was filed—no interference warranted unless the order of acquittal happens to be perverse. It is not possible to hold that the view expressed by the Additional Sessions Judge is not the reasonable view to take on the basis of evidence on record. The Additional Sessions Judge after detailed discussion and marshalling of evidence, has rightly come to the conclusion that the prosecution has failed to prove the guilty of the respondent beyond reasonable doubt. The case does not call for any interference. *State (Delhi Administration)* v. *T. Narayanan*, (1994) 53 DLT 738 at pp. 741 742 (Del).

In absence of evidence that if misappropriated amount was lying with accused he misappropriated it for his own use, conviction not sustainable. *N. Kishan Rao* v. *State of A.P.*, 1997(1) Crimes 285 (AP).

It was alleged that the cashier and Accountant of PWD had made fictitious entries on vouchers causing monetary less. Neither vouchers which were alleged to be fictitious nor note/report of Audit Unit was produced. Executive Engineers did not enquire about the said vouchers from the concerned junior Engineers. It was also not shown that any of the two accused were responsible for maintenance and upkeep of vouchers. It was held that the factum of entrustment and factum of misappropriation of entrusted articles was not proved. Acquittal of accused was held proper. *State of UP* v. *Ganga Sahai Saxena*, 2004 Cr JL 2670 : 2004 All LJ 1417 (All.).

In a case the conductor of bus had not deposited amount of sale of tickets with corporation, the records showed that the said conductor was not on duty from the date of offence and he had sent amount through his relations after 11 days. Prosecution could not establish that the retention of amount was wrongful and absence of conductor was not for a valid reason. It was held that the acquittal of the said conductor was proper, as no loss had been caused to corporation. *State of Karnataka* v. *N.R. Anthony Raj*, 2004 Cr LJ 2252 (Kant) : AIR 2004 Kant HCR 1072 : 2004(3) All Cri LR 616 : 2004(3) Cur Cri R 558.

35. Quashing of Proceeding.—If proceedings are quashed on account of delay it would cause his carriage of justice. *Nawal Kishore Sinha* v. *State of Bihar*, 1994 (1) East Cr C (NOC) 4 (Pat).

When non-receipt of goods by Municipal Committee was sent for petitioner relinquished his charge as Section Officer and transferred to another place—Goods as order were sent after his relinquishment of charge—Thus he has no liability for non-receipt of goods after he relinquished charge—Nothing showing any misappropriation of property of Municipal Committee. F.I.R. lodged against petitioner was quashed. *Ishar Singh* v. *State of Punjab*, (1995) XXII Cr LT 322 (P&H).

Where criminal proceedings has initiated—Petitioner entrusted with a buffalo in an execution application—Buffalo had died and F.I.R. against the same was filed—Compensation offered by petitioner—Criminal proceedings quashed. *Gurchant Singh* v. *State of Punjab*, (1994) 3 CC Cases 493 (P&H).

Where there was registration of case after 9 years—Petition was filed for quashing of F.I.R. for offence under Section 409. Finally it was *held* that after lapse of so many years from time the work was carried out, both petitioners shall obviously be handicapped in proving their defence and in this situation the delay in registration of the case and its investigation acquire greater significance. Hence F.I.R. and subsequent proceedings are quashed. *Krishan Kumar* v. *State of Haryana*, (1994) 1 Recent Cr R 274 : (1994) 1 CC Cases 169 : (1994) 1 CC Cases 71 (P&H).

36. Bail.—Grant of anticipatory bail in discretionary relief and it must be based on sound judicial consideration. *S.K. Sarkar* v. *State of W.B.*, (1994) 2 CHN 204.

37. Probation.—Where offence was under Section 409, Indian Penal Code—Benefit of probation may not be given. In such offences benefit was not justified. *State of Gujarat* v. *Mahesh Kumar Ambalal Rana*, 1994 Cr LR 5 (Guj).

38. Expression "direction of law" in context of Secs. 405 and 409.—It must be noted in this respect that Banking norms and established practices and procedures would contain directions of law prescribing the mode in which the trust is to be discharged. The expression direction of law in the context of Secs. 405 and 409 would include not only legislations pure and simple but also directions, instruments and circulars issued by an authority entitled therefore. *Mir Nagvi Askari vs C.B.I.*, AIR 2010 SC 528 : 2009 AIR SCW 7089

39. Meaning of "illegal" and "legally bound to do so"—It carries a very wide meaning. If any ground for civil action can be founded on the basis of any act of omission or commission on the part of a person, has act may be held to be illegal or it may be held that he was legally bound to do an act which he had omitted to do. If a person is guilty of breach of a departmental order, he may be held to be guilty as he was legally bound to act in terms thereof. It does not matter whether the violation was in relation to the circular issued by the Reserve Bank of India or whether it was in violation of the guidelines issued by the Bank itself. *Sudhir Shantilal Mehta vs. C.B.I.*, 2009(8) SCC 1 : 2009(11) Scale 217: 2009(10) JT 554. .

40. Essential ingredients of.—An offence of criminal breach of trust by a public servant attracts the penal provisions of Section 409 of the Indian Penal Code. Indisputably, the Bank entrusted its funds to its officers; they had the dominion over the said property; they were holding the said money in trust which is an comprehensive expression, *inter alia*, to denote a relationship of master and servant. The act of Criminal Breach of Trust *per se* may involve a civil wrong but a breach of trust with an ingredient of *mens rea* would give rise to a criminal prosecution as well. The ingredients of Section 409 are : 1. Accused must be a public servant, merchant, agent, a factor, broker or an attorney. 2. In his such capacity he must be entrusted with some property or must have gained dominion thereover. 3. He must have committed criminal breach of trust. The criminal breach of trust would, *inter alia*, means using or disposing of the property by a person who is entrusted with or has otherwise dominion thereover. Such an act must not only be done dishonestly but also in violation of any direction of law or any contract express or implied relating to carrying out the trust. *Sudhir Shantilal Mehta vs. C.B.I.*, 2009 (8) SCC 1 : 2009 (10) JT 554 : 2009 (12) SCR 682 : 2009 (11) Scale 217 : 2009 (6) SLT 135.

Ingredients of Section 409 of IPC read as under :

(1) The accused must be a public servant;

(2) He must have been entrusted, in such capacity with the property:

(3) He must have committed breach of trust in respect of such property.

No case of criminal misconduct on their part has been made out before the formation of the contract. There is nothing to show that the appellants herein who hold different positions in the appellant-company made any representation in their personal capacities and, thus, they cannot be made vicariously liable only because they are employees of the company.

The First Information Report contains details of the terms of contract entered into by and between the parties as also the mode and manner in which they were implemented. Allegations have been made against the appellants in relation to execution of the contract. *Sharon Michael vs. State of Tamil Nadu*, 2009 (3) SCC 375 : 2008 (17) SCR 1412 : 2008 (13) JT 551 : 2009 (1) Scale 627 : 2009 (1) SLT 593:: See also *R. Kalyani vs. Janak C. Mehta*, 2008 (14) Scale 85.

41. Securities scam—Bank officers dominion over bank funds.—In the present case, the same has been done dishonestly to cause wrongful gain to main accused and in the process wrongful loss has been caused to the Bank. The instruments based on which the funds of Andhra Bank were transferred to the account of main accused were not physically available with Andhra Bank at the time the accused persons authorized the transfer of the funds of Andhra Bank to the account of main accused.

Main accused also utilized the said credit given and accordingly even cheques issued by him were honoured. Had it not been for the credits given on the relevant dates his account would have been overdrawn. Interest was not charged from main accused and was not debited from his account and loss was therefore caused to the bank.

Established banking norms are binding on an officer of the Bank in the matter of discharge of the trust i.e. in dealing with the money entrusted to him. He is required to follow the same and that would be an implied term of his contract of service as an officer of the bank. The accused before us here acted in breach of the same. We are therefore of the opinion that the prosecution has sufficiently been able to prove the involvement of co-accused as regards the offence of criminal breach of trust. *Mir Nagvi Askari vs C.B.I.*, AIR 2010 SC 528 : 2009 AIR SCW 7089

* * * * *

OF THE RECEIVING OF STOLEN PROPERTY

Sec. 410. Stolen Property.—Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which * * * criminal breach of trust has been committed, is designated as "stolen property", [whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without *India]*. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then cases to be stolen property.

Synopsis

1. Amendment.....2635
2. Principle.....2635
3. Stolen property.....2636
4. But if such property, etc.....2636
5. Indentification.....2636
6. Theft.....2637

1. Amendment.—In the asterisks marked place the words "the offence of after the word "which" have been omitted by the Amending Act, 1891 (12 of 1891) and by the Indian Penal Code Amendment Act, 1882 (8 of 1881) respectively. The words within brackets have been inserted by the Indian Penal code (Amendment Act). 1882 (8 of 1882). Section 9. In India read "India" which has been successively substituted for the words "British India" *vide* Indian Adaptation of Laws Order, 1948. 1950 Act 3 of 1951. Section 3 and Sch.

2. Principle.—"The receiver of stolen property though not strictly a participator in the offence by which the property has been acquired, facilitates the commission of that offence or at least renders its detection more difficult, by aiding the thief in the disposal of the property. But the Code does not treat the receiver as an accessory or abettor, or as an offender against public justice. It makes the offence of receiving stolen property a substantive offence, and punishes the receiver, not always as it punishes the principal offender but with a punishment more or less severe according to circumstances".—*Morgan and Macpherson.*

The possession must have been transferred by any of the offences enumerated in the section. AIR 1976 SC 917 : Cr LJ 679 ; 1970 All WR (HC) 368 : 1970 All Cr R 240 ; ILR 1963 Guj 1032.

3. Stolen property.—"An extended signification is given to the words "stolen property" which are used in the four subsequent sections. Not only things which has been stolen, extorted or robbed but also things which have been obtained by criminal misappropriation or criminal breach of trust are within the meaning here assigned to these words."—*Morgan and Macpherson.* 371 ; 15 Cr LJ 675 ; 1952 Cr LJ 744 : AIR 1952 Punj 178 (does not however include the money received by selling stolen property). Property is not stolen property, unless the act by which it has been acquired has been committed either in British India or elsewhere by a person who is liable to be tried in British India for offence committed elsewhere. 5 Bom 338 (FB). In (1963) 2 SCWR 145 : 1964 SCJ 407 : 1963 SCD 1018 : AIR 1964 SC 170 : (1964) 1 Cr LJ 129, it was held on proof of the following facts (1) the goods were recovered within a few days of the disappearance and (2) presence of silk and paper lables of the consignor on most of the woollen goods were recovered and (3) certain manuscripts writings on the bed sheet written by someone connected with consignor, that the above circumstances were sufficient to justify the finding that the property recovered was stolen. *See* also 1965 BLJR 209 : 1965 (2) Cr LJ 570 (possession of a particular person or in a locality before it was stolen need not be proved) ; 1965 (2) Cr LJ 570 (proof of stolen property) ; 1981 Cur LJ (Cr) 206 : 1982 Chand LR (Cr) 228 (in the absence of any proof that the bullock was stolen, it can not be termed stolen property as defined in Section 410) ; AIR 1976 SC 917 : 1976 SCC (Cr) 154 : 1976 Cr LJ 679 (in the instant case it was established that the possession of ornaments and valuable was transferred by theft. But recoveries Were alleged to have taken place more than two years after disappearance of the old widow).

4. But if such property, etc.—'The rules of the civil law applicable to the transfer and acquisition of moveable property, must be consulted to ascertain when 'stolen property' ceases to be so by reason of coming 'into the possession of a person legally entitled to the possession thereof. Suppose goods are found by the owner in the pockets of a thief or on his person and the owner takes the goods again into his possession, but afterwards, for the purpose of detecting the receiver, given them back to the thief desiring him to sell them as he had sold other stolen property. These goods having ceased to be 'stolen property', the person who receives or buys them from the thief, however guilty, is not a receiver of such property".—*Morgan and Macpherson*, 371, see also 11 PLR 1905 ; 113 PLR 1914.

5. Identification.—A conviction under this section is not maintainable, unless the stolen property is undoubtedly identified. 194 PLR 1912 ; 3 MLT 30. The identity of property alleged to be stolen, but recovered and produced and not distinguishable from the property stolen, may be generally established from the surrounding circumstances found to have existed rather than by the evidence of persons able to speak with personal knowledge on the matter. LBR (1893-1900) 199.

6. Theft.—"If stolen property is found soon after the possession of a person who cannot give a reasonable account of the way by which he became possessed of it, it is fair to presume that he himself is the thief. If the evidence leaves it doubtful whether the accused is guilty of theft or receiving stolen property, he may be adjudged guilty and punished under Section 72".—*Morgan and Macpherson*, 473. I LBR 39. The presumption arising from the possession of stolen property is one which is strengthened, weakened or rebutted by concomitant circumstances, such as the length of time elapsing, vicinity to the spot, nature of the property and the behaviours of the accused".—*Morgan and Macpherson* ; 373 ; 23 WR Cr 16. A missing bullock cannot be stolen within the meaning of this section. 30 Cr LJ 1133 : 119 Ind Cas 863 : AIR 1929 All 917.

* * * * *

Sec. 411. Dishonestly receiving property.—Whoever dishonestly receives or retains any stolen property knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

STATE AMENDMENT

Tamil Nadu.—*Amendment by* T.N. Act No. 28 of 1993. Section 2.

Section 411 of the principal Act shall be renumbered as sub-section (1) of that section and after sub-section (1) as so renumbered, the following sub-section shall be added namely

> "(2) Whoever dishonestly receives or retains any idol or incon stolen from any building used as a place of worship knowing or having reason to believe the same to be stolen property shall, notwithstanding anything contained in sub-section (1), be punished with rigorous imprisonment which shall not be less than two years but which may extend to three years and with fine which shall not be less than two thousand rupees :
>
> Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than two years."

Synopsis

1. Scope. 2638
2. Receivers. 2639
3. Dishonestly retains 2639
4. Possession.. 2640
5. Stolen property. 2641
6. Believe. 2642
7. Knowing or having reason to believe the goods to be stolen. 2642
8. Guilty knowledge. 2642
9. Charge to the jury. 2642
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11. Possession satisfactorily accounted for ..2645
12. Cases. .2645
13. Joint trial. .2650
14. Sentence. .2650
15. Procedure .2650
16. Charge .2650
17. Conviction .2651
18. Acquittal .2651
19. Recovery of stolen articles later on—Presumption .2651

1. Scope.—In a charge under this section, the prosecution has got to prove ; (1) that the property was stolen, (2) that it was received or retained by the accused and (3) that the accused knew or had reason to believe the property to be stolen. The prosecution may prove this ingredient either by positive evidence or by certain presumption. AIR 1933 All 893 : 38 Cr LJ 621.

A thief or misappropriator is outside the scope of the section. 1972 Cr LJ 456 : AIR 1972 SC 635 : AIR 1964 SC 110 : 1964 (1) Cr LJ 129, the conviction for theft is not a pre requisite to the conviction of the receiver under the section. The property has to be proved to be stolen. 1969 All WR (HC) 368 : 1970 All Cr R 240 ; 1981 Chand LR (Cr) 540. The accused is to be proved to have knowledge of the property being stolen. AIR 1954 SC 39 : 1954 Cr LJ 335.

Section 411 does not apply to a case where the accused suspects the property to be stolen property. He must have reason to believe when he received the property that it was stolen property. The word 'believe' is much stronger than the word 'suspect'. 52 Cr LJ 646 : AIR 1951 Raj 89.

Where there is a *bona fide* dispute as to the rights of the parties with reference to the land and share of produce to which the parties are entitled, even if then actions are high-handed they could not be convicted of criminal trespass and theft. 1952 Cr LJ 1098 : BLJ 1952 Sau 62 : AIR 1952 Sau 22.

Stolen bar recovered from possession of accused at his house and was convicted—Revision petition was filed for the same. When ingredients of Section 411, I.P.C. are satisfied the accused can be convicted even if offence under Section 379, I.P.C. is not proved against the accused. *Rama Nand Singh* v. *State of Bihar*, (1995) 2 East Cr C 570 (Pat).

When accused cheated the firm by forging letters, Hundi and R. Rs and made use of the same. offence is established. *Satrangi Lal* v. *State of Haryana*, 1995 Cri LJ 969 (P&H).

The accused was convicted under Section 411 on charge of theft of a cow. There are certain ingredients which are to be satisfied to establish offence under the section. Cow which was missing was ultimately found in the cow-shed of the accused. It was observed that mere act of possession would not give rise to the inference that person in possession was the receiver of the stolen property. No inference could also be drawn under Section 411 of Evidence Act in absence of proof that property found in possession of another had earlier been stolen. 1987 Cri LJ 959 (Ori).

The property into or for which the stolen property has been converted or exchanged is not stolen property. 1953 Mad WN 918 : 1954 Cr LJ 583 : AIR 1954 Mad 433.

2. Receivers.—"There must be a taking into his possession of the 'stolen property' by the receiver ; but a manual possession or a touching of the property is not essential to constitute a receipt of it. If the stolen property has come under the control of the receiver, as if it is in the hands of a person whom he can command in respect to it, he has received it."—*Morgan and Macpherson* 131. In the case of dishonest receiving, the offence is complete when the stolen property is received the receiver knowing or having reason to believe at the time that the property was stolen property. 9 CWN 1027. The production of railway receipt of goods establishes possession of the accused. 14 Cr LJ 318 : 19 Ind Cas 1006 : 40 Cal 990. Where the stolen property was found in a room belonging to joint family, the possession of the articles was presumed to be that of the managing member 29 All 598 : AWN 1907 : 6 Cr LJ 23 ; *see* also 22 All 445 ; 5 NWP 120 ; 1 PLT 431 : 58 Ind Cas 341 : 21 Cr LJ 775 ; 22 OC 256 : 54 Ind Cas 248 : 21 Cr LJ 40 ; but *see* 145 Ind Cas 13 : 1933 ALJ 1338 : 34 Cr LJ 939 : AIR 1933 All 437. Criminal possession can be Joint. 1933 Lah 148 : 34 PLR 576 : 34 Cr LJ 604 : 34 PLR 576. The receiving or proceeds from the sale of stolen property is no receipt of stolen property, so as to render the receiver of such proceeds liable to conviction under Section 411 18 NLJ 342.

3. Dishonestly retains.—"If a "stolen property" has been brought without permission to the house of a person who retains it after he becomes aware that it has been stolen, he will be punishable under this section."—*Morgan and Macpherson*, 371 1912 MWN 262 ; 31 PR 1879 Cr ; 21 ALJ 836 ; 44 MLJ 243. Where considerable time elapses between the theft and the discovery of the stolen article possession by itself does not require any explanation 1912 MWN 529 ; *see* also 57 Cr LJ 57 : 1933 Cr C 958 : AIR 1933 Cal 594 ; AIR 1933 All 893 ; AIR1 931 Pat 85 : 32 Cr LJ 614 : 12 PLT 1350. The offences of dishonest retention of property is almost contemporaneous with the offence of dishonestly receiving. A man who dishonestly receives property if he retains it must obviously continue dishonestly to retain it. It would be different, however, if the reception of the property were innocent. Then it would clearly be for the prosecution to show at what stage guilty knowledge of the receiver supervened to make the retention dishonest. 18 Lah 227 : 171 Ind Cas 342 : 38 Cr LJ 1068 : 39 PLR 1 : AIR 1937 Lah 700 : (1960) 1 Guj LR 100.

People do not secrete properties far away from villages in unknown place unless they are not in a position to claim them as their own and unless they have been dishonestly got they will not-hide the traces of the same. AIR 1954 Mad 433 : 1954 Cr LJ 58 : 1953 Mad WR 918. Doubtless there is a real distinction between receipt and retention. In some instances receipt of property may be honest, but subsequently when the offender comes to know that the property is stolen property and yet continues in possession of the same, he may be said to retain the same. But in Section 411 and 412, the word "receives" and "retains" occur side by side and the collection of receipt and retention of stolen property is obviously intended to do away with the necessity of proving the presence of dishonesty at the time of its possession. AIR 1958 Ori 106 : ILR 1958 Cut 131 : 1958 Cr LJ 657 ; ILR (1957) Cut 112 : 22 Cut LT 456. From the bare fact that the accused was residing in the complainant's village the knowledge that the ornaments were stolen cannot be legitimately concluded. AIR 1954 SC 39 ; 1954 Cr LJ

335. The question is a subjective one, was the appellant aware of the theft-or did he believe the goods to be stolen or did he, suspecting the goods to be stolen, deliberately shut his eyes to the circumstances. AIR 1972 SC 1561.

4. Possession.—The word "possession" contemplated by this section and Section 412 is exclusive possession, otherwise the receiver or the possessor of the stolen property would run the risk of losing the stole property, if else could get hold of it. 161 Ind Cas 271 : 37 Cr LJ 454 : 1936 CWN 295. It cannot be laid down that is no circumstances can a man be convicted of being in possession of the property if there are inmates of the house other than himself. All that can be laid down is that no person can be convicted if it is doubtful whether he or some other person had guilty knowledge that the property was in the house occupied by him and others. 162 Ind Cas 964 : 37 Cr LJ 813 : 1036 *A* Cr C 106 : 1936 *A*LJ 511 1936 All 386 : 1936 Cr C 500 ; see also AIR 1936 Pat 534 : 37 Cr LJ 1123. Under Section 114 of the Evidence Act, the Court may, if the circumstances justify it, draw a presumption of guilty against a person who is in possess on of stolen property ; but the section does not lay down that whenever a person is in possession of stolen property, a presumption of his guilt automatically arises. The illustration itself shows that the presumption will not arise unless the accused is in possession of the goods soon after the theft and unless he is unable to account for his possession 1936 *A*LJ 1158 : 1936 *A* Cr C 212 : 1936 *A*WN 973 ; see also CWN 1090 ; AIR 1936 Nag 200 : ILR 1936 Nag 78 : 164 Ind Cas 964 : 37 Cr LJ 1047 ":' AIR 1936 Oudh 380 : 1936 Cr C 989 : 164 Ind Cas 97 : 37 Cr LJ 907 : 1936 OWN 668 : 161 Ind Cas 132 : 37 Cr LJ 752. The mere fact that the accused person points out the place in which the stolen property is concealed does not give rise to any presumption under Section 114, Evidence Act, prejustify his conviction for the offence of receiving stolen property, still loss for the offence of theft. AIR 1938 Bom 463 : 30 Bom LR 1040. In a case under Section 411, even if it be found that the accused was the sole occupant of the room, it does not necessarily follow that he must have been aware of the presence in the room of all the articles that were found therein. AIR 1942 Cal 440 : 43 Cr LJ 561. The mere fact that a thing is found in a house occupied by father and son in common, is no proof that the one is in possession of it. AIR 1941 Pat 383 : 42 Cr LJ 293 ; see also 42 Cr LJ 258 : AIR 1941 Pat 223 ; AIR 1936 Pat 534 : 37 Cr LJ 1123 ; AIR 1936 All 650 : 37 Cr LJ 551 ; AIR 1950 All 180. The mere fact that the accused's wife produced the stolen properties from the house where both were living would not warrant his conviction under this section. AIR 1941 Mad 694 : 42 Cr LJ 738. Where it is proved beyond all doubts, that the property is stolen, the possession of such property or retention of it, knowing it to have been stolen will amount to an offence under this section. AIR 1949 HP 15 : 1949 *A*LJ 45. Considering the language of this section, dishonest retention is contra distinguished in this section from dishonest reception. In the former offence dishonesty supervenes after the act of acquisition of possession, while in the latter dishonestly is contemporaneous with the act of acquisition. The act of dishonest removal within the meaning of Section 379 constitutes dishonest reception with Section 411 and that being so the thief does not commit the offence of retaining stole property merely by continuing to keep the possession of the property he stole. The theft and the taking and retention of stolen goods from one and the same offence and cannot be punished separately. AIR 1950 BP 66 : AIR 1950 Kuteh 88.

Possession that is contemplated under illustration should be voluntary and conscious. 1977 Raj Cr 193 ; 1977 Cr LJ 109 ; 1965 (2) Cr LJ possession that is contemplated under illustration of Section 114, Evidence Act should be exclusive. Conviction on account of ornaments seen to be worn by the deceased was recovered at the instance of the accused just three days after the occurrence and were proved to be stolen property of the accused, on the presumption under Section 114 Evidence Act, under Section 411 for receiving stolen property. AIR 1960 SC 1753 : 1960 Cr LJ 1270 ; 1982 Cr LJ 1579 : AIR 1982 SC 1227. It must be proved that the accused was in possession of the property which he had reason to believe that it was stolen property. (1979) 4 SC 751, for possession. 1978 Cr LJ 379 ; 1977 Cr LR (SC) 130 ; AIR 1979 SC 1718 (possession depends on facts and circumstances of the cases).

Offence held under Section 411, I.P.C.—Stolen articles were recovered the possession was accused—Identification was held to be doubtful offence was made out only under Section 411, I.P.C. not under Section 392, I.P.C. *Shankar Lal Yadav* v. *State of M.P.*, 1994 SCC (Cri) 1409.

Where there was acquittal by trial court. And stolen property was recovered at the instance of accused. Recovery was not connecting the accused with murder. And held liable for conviction only for possession of stolen property. *Gautam Maroti Umale* v. *State of Maharashtra*, 1994 SCC (Cri) 1721.

Where there was recovery of looted property from possession of five accused appellants within short time after commission of five accused appellants conviction under Section 411, I.P.C. was held sustainable. As far as the remaining five accused—Appellants are concerned from whose possession looted property was recovered within short time of the offence that is made out with aid of illustration (a) of Section 114 of Evidence Act will fall under Section 411, IPC. *State of M.P.* v. *Samaylal*; 1994 CrLR 123.

Where rings belonging to the deceased were not duly proved to have been recovered from the accused or the person before whom statement regarding recovery of earring not examined, therefore the accused could not be convicted. If the appellant had stated before Chandra Ram Sharma and also before the Police that Ghuirey had committed the murder and if Ghuirey had not given the Bulaki to the appellant, then the court see no reason why Ghuirey should not have been produced in evidence to show the falsity of the statement made by the appellant. The court finds no credible evidence to hold that the appellate was found in possession of any stolen property. As such, the appellant cannot be convicted under Section 411, IPC also. *Dilip Darjee v. State of Sikkim*, 2002 Cri LJ 1063 (Sikkim) : 2002(2) Crimes 527.

5. Stolen property.—Where there is no evidence to show that a certain property has been actually stolen, a conviction under Section 411 with reference to such property, is not valid. 2 NWP 187 ; SPR 1867 Cr ; 13 PR 1867 ; Rat Un Cr C 416 ; 35 Ind Cas 488 ; 19 NLR 176 : 24 Cr LJ 960 ; 50 Cal 564 : 62 Ind Cas 372 : 97 Ind Cas 664. Bull set at large on the death of a relative is not property. 9 All 384 : AWN 1887 73. It is not correct for conviction under the section that there must be proof of theft. 96 Ind Cas 869 : 27 Cr LJ 1013. The basis of the offence being stolen property, the prosecution must establish that the property was stolen one. AIR 1972 SC 642 : 1972 Cr LJ 458 ; AIR 1964 SC 170 : (1964) 1 Cr LJ 129 ; AIR 1954 SC 39 ; AIR 1958 Ori 51 : ILR (1957) Cut 680 : 1958 Cr LJ 534 ; AIR 1982 SC 1227 ; (1979) 4 SCC 751 : AIR 1982 SC 1227 (circumstances leading to the conclusion of dishonestly receiving stolen property) ; 1976 Cr LJ 842 : AIR 1976 SC 1097 : 1976 SCC (Cr) 204 (doubt about the sustainability of the charge under the section).

6. Believe.—The word "believe" is a very much stronger word than "suspect" and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. 17 Cr LJ 25 : 32 Ind Cas 153 : 33 Cr LJ 169 : AIR 1929 Oudh 213 ; *see* also 134 Ind Cas 401 : 32 Cr LJ 1184 : 8 OWN 517 ; 134 Ind Cas 401 : 8 OWN 517 : 32 Cr LJ 1184 : 6 Luck 658 : 1932 Cr C 592 : AIR 1932 Oudh 25. Where neither receiving nor retaining of stolen property by accused is proved, accused need not prove absence of knowledge or belief that property was stolen one. AIR 1933 Sind 359 : 1933 Cr C 1335. The word "believe" is much stronger than the word "suspect". AIR 1950 Assam 193: (1963) 50 JD 370.

7. Knowing or having reason to believe the goods to be stolen.—The receiver should know or have reason to believe the goods to be stolen, but it is immaterial whether or not he knows who stole them. The offence made punishable is not the receiving stolen property from any particular person, but receiving such property knowing it to be stolen. The receiver must have a dishonest intention, but whether he takes the goods for some purpose of profit or gain to himself, or merely to assist the theft or in order to conceal them, this taking cannot but be intended to cause wrongful gain or wrongful loss, and is therefore dishonest.—*Morgan and Macphersan.* 371. 1913 MWN 969 ; AWN 1898 70. The mere recovery of certain property from the house of the two petitioner was not sufficient by itself to attribute guilty knowledge to either of them unless there were some circumstances connecting them with the possession of the property. (1969) 2 MLJ 435 : AIR 1947 Mad 195 : 48 Cr LJ 720 : 231 1C 248 ; but *see* 49 Cr LJ 147 : AIR 1948 Lah 80 : 2 DLR 725. The existence of knowledge of an accused person can be seldom proved by positive evidence. AIR 1950 All 631.

8. Guilty knowledge.—In order to sustain a charge of dishonest receipt of stolen property "guilty knowledge" at the time of the receipt is necessary. 1 Weir 469 ; 4 MHC App 42 ; 2 Cr LJ 189 ; AWN 1883 17 ; 1937 MWN 327 ; 18 NLJ 237 ; AIR 1935 Pat 451 : 16 Pat LT 568 : 159 Ind Cas 577. There can be no hard and fast" rule as to time, within which the stolen article should be found with accused, to hold him guilty of being in possession of stolen articles but two and a half moths after a dacoity is not a long time. 103 Ind Cas 62 : 28 Cr LJ 638 : AIR 1927 Oudh 277. Mere" suspicion on the accused's part that property was dishonestly acquired is not enough to make person guilty under this section. AIR 1928 Cal 264. In cases of long lapse of time between theft and discovery of stolen property, the onus to prove innocent possession is not on the accused. 1928 Lah 687. Mere suspicion is not sufficient. AIR 1935 Oudh 327 : 36 Cr LJ 602 : 154 Ind Cas 901 : 1935 OWN 408 ; AIR 1972 SC 1561. (If the accused was aware of the theft or did he believe the goods to be stolen, deliberately shut his eyes to the circumstance).

9. Charge to the jury.—It is only a dishonest retention or receipt of stolen property that constitutes an offence under Section 411 I. P. Code ; if therefore, a Sessions Judge fails or omits to tell the jury in his charge that there must be dishonest receipt or retention, it is a serious defect amounting to misdirection. 59 M 995 : 165 Ind Cas 387 : 37 Cr LJ 1150 : 1936 MWN 985 : 44 LW 558 : 71 MLJ 586.

10. Proof.—To support a charge of receiving stolen property the prosecution must prove 1st, that the property is stolen property, that is, that it comes within the definition of Section 410, having been obtained by someone of the offences there mentioned ; 2nd the receiving or retaining of the accused person ; 3rd the guilty knowledge of the accused. His dishonest purpose may be inferred if the above matters, are satisfactorily proved and left unexplained. As to the proof the receiver's guilty knowledge, from the caution necessary in this sort of traffic, it must often happen that no express disclosure is made to him, and yet he knows the property to have been stolen as well as if he had actually witnessed the theft. In this, as in other cases, it is sufficient if circumstances are proved which, to persons of ordinary understanding in the situation of the accused person, must have led to the conclusion that the property was stolen or otherwise dishonestly acquired. Thus, if ornaments, bundles of clothes of various kinds or moveables of any sort from persons destitute of property and without any lawful means of acquiring it, and especially if it is proved that the property was brought at untimely hours and under circumstances of evident concealment it may well be concluded that it was received with a full understanding of the guilty mode by which it has been acquired. And this will be still further confirmed, if it appears that the property was purchased for a sum far below its real value, or was concealed in places not usually employed for keeping such property, or if the marks on it are effaced, or if false or inconsistent stories are told as to the mode of its acquisition. Another circumstances from which such guilty knowledge may be inferred is that the property has been received from a notorious thief or one from whom stolen property has, on previous occasions, been received".—*Morgan and Macpherson*, 373 ; AWN 1883 17. Before a conviction can be had under this section the possibility of the accused having obtained the goods of which he is found in possession by legitimate means must be excluded. 62 Ind Cas 867.

Where the only fact is proved are, that certain stolen property was given to the accused by a third person to raise a loan on the accused and that the accused had similar dealings with such third person. *Held*, that the last matter was irrelevant and that the evidence was sufficient to prove dishonest intention. AWN 1885 27. Where a person is charged with receiving or being in possession of property alleged to have been stolen, an important factor is the value of the property and as to this the Court should insist on having direct evidence as the accused is entitled to have some sworn testimony of value which he can cross-examine. 56 Ind Cas 856 : 21 Cr LJ 552. The finding of the Appellate Court, *viz.*, "the evidence to implicate the accused is that they were all in a house one day discussing as to what was to be done with the booty and a dozen people were seen discussing as to how the booty was to be divided" is sufficient to sustain a conviction under Section 411 and 414 I.P. Code. 7 Pat LT 567 : 27 Cr LJ 657 : 94 Ind Cas 705. It is for the prosecution to prove that the accused received the property dishonestly 29 Cr LJ 594.

The mere fact of possession of stolen property is not in all cases sufficient to warrant the inference that the accused was in possession of it dishonesty and to cast upon him the onus to displace the inference of dishonestly. 122 Ind Cas 586 : 31 Cr LJ 437 : AIR 1930 Pat 353. The possession of the stolen property must be exclusive. AIR 1960 Pat 1551 : 1960 Cr LJ 1647 : 1960 BLR 434 ; (stolen property recovered from the house in occupation of father and son, if father can be convicted) ; AIR 1959 Pat 54 : 1959 Cr LJ 219 (stolen property found in well or from verandah in joint possession) : 1959 All WR (HC) 180 : 1959 All Cr R 1959 All LJ 161 (joint residence where from stolen property was recovered) ; AIR 1958 Punj 194 : ILR 1958 Punj 1747 : 1958 Cr LJ

1084 ; AIR 1955 *A*jm 10 : 1955 Cr LJ 595 ; (recovery from). The recovery of stolen property at accuseds instance from a place not in his exclusive possession is not sufficient to justify his conviction under Section 411. AIR 1952 Raj 20 : 1951 RLW 74 ; 25 Cut LT 454 : 1959 (1) On JD 430. From the bare fact that the accused was residing in the complainant's village his knowledge that the ornaments were stolen property cannot legitimately be concluded. AIR 1954 SC 39 : 1954 Cr LJ 355. The conviction on the mere production of currency notes where there is no evidence that they had any mark of Identification is illegal. AIR 1958 Ori 51 : ILR 1957 Cut 680 : 24 Cut LT 1 : 1958 Cr LJ 534. Possession of stolen things nine months after loss does not amount to possession soon after theft. AIR 1931 Pat 85 ; see also AIR 1937 Pat 112 : 17 Pat LT 754 ; 38 Cr LJ 359 : 167 Ind Cas 31 ; 1961 MPLJ (Notes) 88. *A* man who is in possession of stolen goods soon after the theft may be presumed to be either the thief or has received the goods knowing them to be stolen unless he can account for his possession. 149 Ind Cas 31 : 35 Cr LJ 994 : 1934 Cr C 512 : AIR 1934 Rang 80 ; *see* also AIR 1934 Oudh 399 : 11 OWN 905 : 1934 Cr C 1324 : 35 Cr LJ 1130 : 150 Ind Cas 845 ; 157 Ind Cas 652 : 36 Cr LJ 1206 : 1935 OWN 911 : 1915 Cr C 1149 : AIR 1935 Oudh 475. Court may draw presumption if accused is not able to account for his possession. But onus of proving ingredient of offence under Section 411 is on prosecution and does not shift to accused. AIR 1933 All 843 ; see also AIR 1933 All 461 : 1933 Cr C 761 : 34 Cr LJ 1018 : 145 Ind Cas 609 : 17 Cut LT 93 ; 1952 *A*W (HC) 555 : 1952 *A*LJ 61. Presumption of guilt is made from the fact that the accused hands over the stolen article dug out from his field. 1952 *A*LJ 61 : 1951 *A*WR (HC) 555 ; (1960) 2 Ori JD 317 : 27 Cut LT 159 : ILR 1962 Cut 542.

It is not necessary in every case from the prosecution in order to secure a conviction under Section 411, I.P. Code to prove by positive evidence in addition to the *factum of* theft and the recent recovery of property from the possession of the accused that the property was in possession of some one else before it came into possession of the accused. AIR 1959 All 718 : ILR (1959) 1 All 213 All LJ 403 : 1959 Cr LJ 1271 ; AIR 1959 Pat 54 : 38 Pat 151 : 1959 Cr LJ 219 (presumption from exclusive possession of stolen property (utensils) taken out of public stream). AIR 1958 Ori 51 : ILR 1957 Cut 680 : Cut LT 1 : 1958 Cr LJ 534 (proof of receipt from another is not necessary).

For conviction under Section 411, the prosecution must prove that the property said to have been recovered from the possession of the accused was a stolen one. AIR 1951 *A*jm 59 ; Madh BLR 1955 Cr 110 : 1955 1 Madh BLJ HCR 1026. To succeed in a prosecution under Section 411, the prosecution must not only prove that the property had been stolen but they must also establish facts from which the Court can properly infer that the person charged with, being in possession of the stolen property either knowing the property to be stolen or had reasonable grounds for believing the same to have been stolen. 1952 Cr LJ 1298 : AIR 1952 Cal 616 : 1958 Jab LJ 264. It is not open to the accused to prove how he came to possess the property which is said to be stolen property. 1953 Cr LJ 1125 : AIR 1953 All 493 : 1953 All LJ 173 ; AIR 1957 Assam 35 : 1957 Cr LJ 349, where it was laid down relying on AIR, 1954 SC 39 : 1954 Cr LJ 335, that the prosecution must prove in prosecution under Section 411 (1) that the stolen property was in the possession of the accused (2) that some person other than the accused had possession of the property before the accused had got possession of it and (3) that the accused had knowledge that the property was stolen property. *See* also 22

Cut LT 456 : ILR 1957 Cut 112 ; 1956 All LJ 764 : 1956 All WR (HC) 596 : AIR 1954 Mani 13 : 1954 Cr LJ 1713 ; 1957 Raj LW 167 : ILR (1956) 6 Raj 1007.

The prosecution must prove that accused received articles knowing them to be stolen. When there is no material on record to prove this there can be no charge under Section 411, I.P.C. *Mahendranath Panda* v. *State.* (1995) 1 CCR 777 (Ori).

The accused was charged for committing the offence of murder and robbery but stolen articles were lying in open accessible to all and evidence of recovery was not reliable. It was held that charge of murder could not be proved from said evidence of recovery. However, it could attract provisions of Section 411 Penal Code. *State* v. *Ishwar Shambhaji Babar*, 2004 Cr LJ 438 (Bom) : 2003 All MR (Cri) 1878 : 2004(1) Bom CR (Cri) 58.

11. Possession satisfactorily accounted for.—In a case under Sections 411 and 414, I.P. Code, if the accused satisfactorily accounts for his possession, the question of the application of the presumption permitted by Section 114 of the Evidence Act no longer arises. It is then for the prosecution to show by evidence direct or circumstantial that there was some collusion between the thief and the receiver or that the receiver had real reason to believe that the property which he had purchased was stolen. 166 Ind Cas 91 : 38 Cr LJ 129 : 18 Pat LT 210 : AIR 1937 Pat 191 ; 1950 ALJ 738. In a case where the Court is to convict a person for his failure to offer an explanation for the possession of the goods. It is incumbent upon the Court to ask the accused for an explanation and when the accused fails to offer an explanation the Court is permitted to draw any presumption. AIR 1958 Cal 414 : 1958 Cr LJ 1012 ; see also 1954 Cr LJ 1713 : AIR 1954 Mani 13 ; ILR 1953 Punj 313 ; AIR 1974 SC 1830 (presumption under Section 114 of the Evidence Act); AIR 1974 SC 1 334 ; 1982 (2) Bom CR 176 (question whether the accused was found in possession of the stolen property can not arise when the discovery was not proved).

12. Cases.—The only evidence against an accused person that in the presence of several persons, he pointed out a part of the stolen property buried in a grave yard, is insufficient to establish his guilt under Section 411. 32 PWR 1913 Cr : 315 PLR 1913 : 21 Ind Cas 474 ; see also AWN 1895, 229 ; 13 Ind Cas 220 ; 17 All 576 : AWN 1881, 94 : 15 Cal 511 : 9 Cr LJ 52 : 19 MLJ 301 ; 92 PLR 1902 ; 3 Bom LR 187 : 24 OC 294 : 73 Ind Cas 331 : 11 Lah LJ 439 ; AIR 1935 Sind 159 : 28 SLR 41 : 1934 Cr C 1261 ; AIR 1933 Sind 352 : 1933 Cr C 1180. Whether the fact of the accused pointing out stolen property is or is not evidence of possession is a question of fact. 126 Ind Cas 53 : AIR 1930 Sind 168. Where all that is proved against the accused person is that he is receiver of stolen property knowing it to be stolen, and the evidence falls short of showing that the offence of receiving was a repeated offence, *Held*, that the conviction of the accused as having received the property of a particular person is bad in law. 9 ALJ 370 : Cr LJ 254 : 14 Ind Cas 606. In the absence of conclusive evidence of guilt an accused cannot be convicted under this section where the circumstances are gravely suspicious. 10 CWN 219 : 3 Cr LJ 195. It is enough for the prosecution to prove facts which justify the inference that the accused either dishonestly received the property, or having received it honestly, dishonestly retained it. 15 PR 1889 Cr. Where stolen goods apparently of two thefts are found on an accused person at one and the same search and there is no proof of two distinct acts of receiving, he cannot be convicted of two offences under Section 411, I.P. Code. 4 PWR 1907 : 5 Cr LJ 122 ; SC 167 Oudh : 15 All

317 ; see also 142 Ind Cas 884 : 34 Cr LJ PLR 433 : 1932 Cr C 921 : AIR 1922 Lah 612. Failure to disclose names of thieves is not sufficient ground for conviction under Section 411. 145 Ind Cas 284 : 1933 Cr C 881 : 34 Cr LJ 957 : AIR Lah 596. Sale of ornaments more than a month after theft does not in itself lead to inference that they were proceeds of theft. AIR 1933 Lah 987. Where accused is found with stolen article within twenty four hours of the theft and the accused refuses to disclose the name of the person from whom he received it without assigning any reason, guilty knowledge can be presumed. 9 OWN 1169 ; see also AIR 1933 Oudh 53 : 1933 Cr C 93 : OWN 977 : 34 Cr LJ 101. For conviction under this section. the prosecution has to establish not only possession of property but also that such possession was with knowledge, that it was stolen. 1937 MWN 327; AIR 1939 Mad 178 : 40 Cr LJ 448 ; AIR 1944 Cal 39. The evidence that the accused pointed out the place from where property was recovered is not sufficient to convict him under this section. AIR 1943 Oudh 298 : 44 Cr LJ 473. Mere intention and preparation to misappropriate the property was not sufficient to constitute offence under this section. AIR 1938 Mad 172 : 39 Cr LJ 312. Where the only evidence against the accused is that he was with the other accused before and after the theft is not sufficient for his conviction under this section. AIR 1939 Mad 765 : 41 Cr LJ 96 : 184 1C 609. As regards whether taking pledge of stolen property is an offence under this section. *Vide* AIR 1939 Mad 582 : 40 Cr LJ 828. An accused can properly be convicted under this section for the offence of dishonestly retaining within British India of property which he had himself stolen in an India State. ILR 1943 Lah 62 : 44 Cr LJ 706 : AIR 1943 Lah 162. The act of a person in handing over stolen property to the police of his own accord in order to assist them in investigation cannot give rise to a presumption that he is the receiver of stolen property. 44 Cr LJ 186 : AIR 1943 Lah 4 ; but see AIR 1943 Lah 5 : 44 Cr LJ 62. Before a conviction can be sustained under this section, the exclusive and conscious possession of the stolen property must be brought home to the accused. AIR 1941 Pat 614 : 42 Cr LJ 810 ; AIR 1944 Sind 237 : 46 Cr LJ 243 ; AIR 1945 All 230. Where an accused pleads guilty and admits himself to be thief and not merely the receiver, the conviction should obviously be under Section 414 and not under Section 411. AIR 1940 Lah 319 : 41 Cr LJ 823 : 190 Ind Cas 116. Section 411 does not require that the person receiving the article which is found later on to be a stolen article must make enquiries at the time of receiving it whether it is obtained by theft or otherwise. AIR 1950 All 497. In conviction under this section it must be shown that the accused knew or had reason to believe that the property had been stolen. AIR 1950 Ass 87.

The cash in the denominations, as stated by the witness, who had handed over the same to the deceased was found in possession of the accused. The bag in which the said cash was kept by the deceased was seized from the accused and the same was also identified. The seized cash containing slips of SBI corroborated the statements of the witness that he handed over the cash to the deceased after withdrawing the same from the bank on the date of offence : and the accused did not claim that the cash belonged to him nor did he satisfactorily explain for the possession of the same. Therefore, a presumption under Section 114 of the Evidence Act can be drawn against the accused and as such the accused persons were the receivers of the stolen property. *Vempati Kanuka Rao* v. *State*, 2004 Cr LJ 877 (AP) : 2004(2) ALD (CRL) 227.

In a case of theft of fresh Sheesham wood, eight logs of wood were recovered from court yard of house of accused which was situated in fields. Recovery was made in pursuance of statement of accused under Section 27, Evidence Act. The recovery memo was duly attested and the logs had been duly identified by the forest guards. It was held that as the recovery was made in pursuance to the statement of accused under Section 27 of the Evidence Act which it was not required by law to be conducted in the presence of any independent witnesses. *Surjit Singh* v. *State of Punjab*, 2005 Cr LJ 1176 (P&H) : 2005(1) Rec Cri R 683 (P&H).

Where the stolen article is of an ordinary make and there is nothing peculiar in it, the uncorroborated evidence of the complainant of an ordinary position alone as to its identification is not sufficient for finding that it does not belong to the accused, specially where it has been equally contradicted by a witness on the other side. 22 PWR 1912 Cr : 15 Ind Cas 971 : 13 Cr LJ 555 ; see also 1 Pat LT 727 : 21 Cr LJ 673 : 57 Ind Cas 913. The mere fact that a person was in possession of a stolen animal and he sold it to another is not in itself sufficient for his conviction under this section, and his denial of having any connection with the animal does not prove his guilty knowledge, especially when there is some enmity between the alleged vendor and the vendee. 34 WR 1914 Cr 229 PLR 1914 : 15 Cr LJ 654 : 25 Ind Cas 982. *A* person who has obtained possession of property by criminal breach of trust is liable to be punished for the breach of trust only, but not for an offence under Section 411, 2 NWP 312. The fact that a person is in possession of stolen property and does not account for it is, although suspicions, not sufficient to convict him of an offence under Section 411. 6 All 224 : AWN 1884 ; 55. Possession of Currency Notes of not large value a year and a half after their theft, is not in itself evidence of any guilty knowledge on the part of the possessor so as to support of conviction for dishonest retention of stolen property. In such a case, the fact that the accused gave a false explanation of his possession is not sufficient to warrant his conviction. 1912 MWN 362 : 11 MLT 186 Ind Cas 315 : 13 Cr LJ 475. It is not sufficient to show that the accused person was careless or had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired. 29 Bom 449 : 7 Bom LR 527 : 2 Cr LJ 480.

The offence of receiving or retaining stolen property is not one of those offences mentioned in Section 562 of Cr PC, as it is punishable under Section 411 or Section 414, I.P. Code, with more than two years' punishment. 2 Bom LR 343. The accused purchased a shopkeeper's weight from a beggar boy without making any enquiry of the boy. *Held*, that these circumstances did not justify the inference that the accused either knew or had reason to believe that it was stolen property. 5 Bom LR 87. *A* person receiving property which is not stolen, but erroneously believing it to be stolen, is not guilty of an offence under Section 411. Rat Un Cr C 389. The mere facts of possession of stolen articles not of an unusual character and such as easily pass from hand to hand, does not justify a conviction under Section 411 of the Penal Code. Rat Un Cr C 594. But the possession of stolen property, immediately after it has been stolen, affords strong presumption, that the person in whose possession it is, is either the actual thief or a receiver with guilty knowledge ; and the presumption is strengthened, if the person, in whose possession the stolen property is, fails to give a satisfactory account of the manner in which he acquired such possession or gives false accounts which are contradictory, or if property is secreted. 11 Cal 160 ; 13 MLT 30 : 7 Cr LJ 30 : 1 Weir 477 ; 12 CPLR Cr 51 : 17 Cr LJ 179 ; 1922 Lah 80. Where the disappearance of a document from records of an office and substitute of a forged one in its place were proved and the genuine document was found in the possession of the accused, the servant of the person, to further whose civil suit the substitution was made, *held*, that it would raise a presumption that the accused was retaining stolen property with a dishonest intention. 21 328. In order to convict a person of an offence under Section 411, I.P. Code, on the presumption of guilt arising from the possession of stolen property, the possession must be exclusive as well as recent. 15 PR 1889 Cr. Retention of property criminally misappropriated is not dishonest retaining stolen property. Where a person takes possession of property not in the possession of another person he does not, by that act alone, commit an offence. 15 PR 1889 Cr Act or omission under Section 411 and Arms Act, Section 19, is not the same. 145 Ind Cas 609 : 34 Cr LJ 1018 : 1933 ALJ 523 : 1933 Cr C 761 : AIR 1933 All 461. Where three accused were in possession of stolen revolver at various times, conviction under Section 411 is no bar to conviction under Arms Act, Section 9 (F). AIR 1933 Oudh 470 : 1933 Cr C 1393 : 146 Ind Cas 354. Where accused was charged under Section 302, I.P. Code, alone, conviction cannot be altered into any under Section 411. 100 WR 466 : 1933 Cr C 693 : Luch 518 : AIR 1933 Oudh 315. Where a village Magistrate is charged with offence under Section 411, sentence under Section 197, Cr PC, is not necessary. 143 Ind Cas 102 : 1932 MWN 1075 : 1933 Cr C 373 : 34 Cr LJ 426 : AIR 1933 Mad 270.

To constitute dishonest retention, there must have been a change in the mental element of possession (possession always subsisting *animo et fact.* from an honest to a dishonest condition of the mind in relation to the thing possessed. 18 PR 1884 Cr. Being in possession of stolen property with the knowledge that it is stolen is not an offence under Section 411, I.P. Code, though it may be evidence of such an offence or of theft. 46 PR 1887. What amounts to a "reason to believe" the certain property is stolen property explained. 37 PR 1888 Cr. *A* pawnee, in the possession of stolen property was ordered to restore the property to the owner thereof, notwithstanding that he received it without guilty knowledge. 37 PR 1870 Cr. In a case in which the accused is charged with receiving stolen property, it must be clearly proved that he retained the property with guilty knowledge. *Held*, the proof that an accused person retained a certain property, alleged to be stolen, with guilty knowledge must be clearly given where the accused is charged with receiving stolen property. 13 WR Cr 70. Where the accused rescued from police custody property alleged to have been stolen, *held*, that they could not be convicted of an offence under Section 411 without strict proof that the property was stolen property. Rat Un Cr C 98. Where in a case under this section the stolen property was found in the possession of the accused more than three months after the theft, *held*, that having regard to the length of time there was no presumption that the accused knew or had reason to believe that the property was stolen. 22 CWN 596 : 46 Ind Cas 158 : 29 Cr LJ 325 : 51 Ind Cas 685 : 20 Cr LJ 525. In a case under this section, in charging a jury it should be pointed out that the stolen goods referred to must be in possession soon after the theft or that the stolen goods must have been recently stolen. 24 CWN 619 : 31 Cr LJ 310 : 56 Ind Cas 849 : 21 Cr LJ 545. Before a conviction can be had under Section 411 of the Penal Code the possibility of the accused having obtained the goods in possession by a legitimate means must be excluded. 62 Ind Cas 867 : 22 Cr LJ 595. Where properties stolen at a burglary are recovered from the possession of two person on different dates and on different places they cannot be tried together for an offence under Section 411 of the Penal Code. 63 Ind

Cas 620 : 22 Cr LJ 684. Where certain stolen articles were found in a *nohera* of which the accused was joint owner and which was at that time in the charge of a disreputable person the accused cannot be convicted under Section 411, I.P. Code. 4 Lah LJ 484. In the absence of anything to convict the husband with the possession of stolen property he cannot be convicted of an offence under Section 411, I.P. Code, in respect of stolen property found in the possession of his wife. 20 *ALJ* 162 : 67 Ind Cas 338 : 27 Cr LJ 386 ; *see* also 74 Ind Cas 271 : 24 Cr LJ 667. Where the fact of burglary was not reported until after four months had elapsed and goods of common pattern were found in the house of the accused which the accused and the complainant each claimed as his own. *Held*, that there was no satisfactory evidence to prove that the article belonged to the complainant and the accused must be acquitted. 1923 Lah 36. Where there is no proof of separate receipt of two properties found with the accused at one and the same time, he cannot be convicted separately for each, unless there was distinct evidence of receipt of articles under different circumstances at different time. 9 0 & AIR 779 : AIR 1928 Lah 637. The mere finding of stolen property with the accused three years after the theft does not indicate dishonest intention within the meaning of Section 411, 1923 Lah 460. Where the evidence in a case of receiving stolen properties does not show whether the properties were all received on one day or on different dates, no presumption can be drawn as to the date of receipt either way. 2 Pat LT 131 : 5 Pat LT 319 : 25 Cr LJ 738 : 81 Ind Cas 226 ; 26 Cr LJ 1 : 83 Ind Cas 481. Though the facts may raise a certain amount of suspicion, as to a person being in possession of stolen property any offence under Section 411, I. P. Code, can be established on the mere suspicious conduct of the accused. 25 PLR 165. Where the prosecution produced absolutely no evidence to show that the stolen property was ever in possession of the accused and he was, in fact, found guilty of the offence under Section 411, I. P. Code, upon the evidence given by certain witness called by the co-accused in support of his statement that he had purchased the property in good faith from the accused and the accused was not giving opportunity to cross-examine. *Held*, that the conviction of the co-accused should be set aside. *Held*, further, that as the stolen property was actually recovered from the co-accused, it would be quite reasonable to draw a presumption of guilty knowledge against him but not against the accused whose name transpired in the exculpatory statement made by the co-accused. 41 CWN 286. A person lost his currency notes. They were found by a child in street from whom they came into possession of accused, to whom those notes were traced after a short time and were ultimately recovered after a certain amount of denial ; *Held*, that the facts did not constitute any offence under Section 411. AIR 1938 Mad 172 : (1937) 2 MLJ 734 : 46 MLW 812 : 1937 M Cr C 332 : 1937 MWN 321. Where the accused are proved to have stolen more goods than had been established to the joint family a conviction cannot be held under Section 411, I.P. Code. 47 All 511 : 23 *ALJ* 421 : 87 Ind Cas 846. In a charge under this section, the person from whom the property was originally stolen must be stated if known. 91 Ind Cas 64 : 27 Cr LJ 32. Where an accused person's property known to have been at different places, he can be convicted separately of receiving stolen property. 96 Ind Cas 120 : 27 Cr LJ 872 ; 1953 All LJ 368 : 1953 Cr LJ 1699 : AIR 1953 All 752 (property recovered from the accused). Where in the absence of the petitioner in his house, his wife produced the key of a box in the house, which box was found to contain stolen articles the petitioner cannot in the absence of any evidence to show that the incriminating articles were held by the wife on account of the petitioner, be convicted under Section 411. AIR 1961 Punj 30 : 1961 All Cr R 8 : 1961 (1) Cr LJ 152. It is not necessary for a conviction under Section 44 that the stolen property should have been physically produced from the actual possession of the accused. 1957 Raj LW 167 : ILR (1956) 6 Raj 1007.

Where recovery was after 8 days of murder—Arrest was after a week—*Pyajama* and bag recovered on the instance of accused who was last seen with the deceased, there was no direct evidence benefit of doubt was given. *Gulab Singh* v. *State of H.P*, 1994 SCC (Cri) 1783.

Where a wrist watch and gold ring belonging to deceased were found with A-4 and A-5 it was not sufficient to hold them guilty. This was sufficient to hold them guilty of being participant in the crime of murder. However, they can be held guilty under Section 411 of the Code. *Anshad and others etc.* v. *State of Karnataka.* (1994) 2 Crimes 192 (SC) : (1994) 4 SCC 381 : 1994(3) JT 324 : 1994 SCC (Cr) 1204.

13. Joint trial.—Separate trial is the rule. Joint-trial is an exception. Where more than one offence of theft is committed persons in possession of such property cannot be jointly tried. AIR 1935 Oudh 327 ; 3 Cr LJ 391 (joint-trial of offence under this section in respect of articles stolen is one theft in view of Section 239 (f), Cr. P. Code. In a case covering offence under Sections 307, 411 and 414 of I.P. Code, where the accused was on bail as regularly attending the Court, the detention of the accused under COFEPOSA on the basis of the aforesaid offence after more than a year and half was illegal. 1982 Cr LJ 420 : AIR 1982 SC 482 ; *see* also 1980 Cr LJ (NOC) 91 (limitation for taking cognizance did not apply to offence committed prior to the commencement of new CrPC.

14. Sentence.—Light sentence under this section is not proper as that would form a direct encouragement to other persons. 157 Ind Cas 169 : PR Pesh 9 : 36 Cr LJ 1338 : AIR 1935 Pesh 100 ; 1953 Cr LJ : AIR 1953 All 492. That the accused is a member of the criminal tribe is no ground for differentiation of sentence for an offence under Section 411. AIR 1941 Mad 708 : 42 Cr LJ 824. When the accused is below 21 years he is entitled to the benefit of Section 360 Cr. P. Code. AIR 1979 Cr LJ 907 ; 1980 Cr LJ 444 : AIR 1980 SC 636 ; 1983 Cr LJ 683 : AIR 1983 SC 349 (sentence not interfered with under Article 136 of the Constitution).

It is found that since petitioner is suffering from acute cancer and is at very stage of death. Hence sentence is minimised to period already undergone. *Rama Nand Singh* v. *State of Bihar*, (1995) 2 East Cr C 570 (Pat).

Where there was delayed identification parade—Prior to identification parade accused were shown at the police station there was delayed recovery of stolen articles and long pendencey of criminal proceedings. Hence sentence was reduced to period already undergone. *Bhagona* v. *State of M.P.*, 1995 Cr LR 84 (MP).

15. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable—Triable by any Magistrate or Magistrate summarily if the value of the article does not exceed Rs. 200/-

16. Charge.—I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows ;

That on or about the......... day of........ at.........you dishonestly received (*or* retained) stolen property, to wit........(*specify if*) belonging to *A,B*, knowing or having reason to believe the same to be stolen property, and that you thereby committed an offence punishable under Section 411 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

It is to be noted that person may be charged with and tried for his offence and also in the alternative under Section 414.

17. Conviction.—Where accused was found in possession of stolen articles—Conviction was under Section 412. Prosecution must prove that accused had knowledge that articles were stolen in dacoity there was no material to prove that accused had such knowledge—It can be merely presumed that accused knew that articles were stolen thus accused was convicted under Section 411 and not under Section 412. *Achyut Das* v. *State of Assam*. 1994 SCC (Cri) 326 ; (1994) 1 SCC 387 : (1994) 1 East Cr C 449 (SC) : AIR 1994 SC 968 : 1994 JIC 489 : 1994 Cr LJ 1119.

Accused purchased 9 kgs. silver for a paltry sum knowing it to be stolen property. Recoveries were also made from different persons of silver ingots at the instance of accused. He cannot be said to be a *bonafide* purchaser. Hence conviction sustainable. *Bhanwarlal* v. *State of Rajasthan*, 1995 Cr LJ 625 (Raj).

Accused was found in possession of stolen articles. The conviction under Section 412, when was passed appeal was filed on the question whether offence under Section 411 or 412 I.P.C. under Section 412 prosecution must prove that accused had knowledge that articles were stolen in dacoity—No material evidence is present on the record to prove that accused had such knowledge—It can be merely presumed that accused knew that articles were stolen. *Held*, thus accused can be convicted under Section 411 and not under Section 412. *Achyut Das* v. *State of Assam*, 1994 SCC (Cri) 526 : AIR 1994 (SC) 968 : 1994(1) SCC 387 : 1993(4) Scale 308 : 1993(3) Crimes 1107.

The accused was alleged to have received the stolen property dishonestly and concurrent finding of fact proved the guilt of the accused based on appreciation of substantive evidence. It was held that conviction of accused under Section 411 was proper but sentence was reduced to the period already undergone as accused had already been in jail for a period of 10 months and long period of 12 years had elapsed since institution of the case. *Kanik Lal Thakur* v. *State of Bihar*, 2003 Cr LJ 375 (Pat) : 2001(3) East Cri C 43.

18. Acquittal.—When articles and cash were recovered from the hutment belonging to the accused. Identity of the property not established. Conviction was held liable to be set aside—Conviction was set aside. *Manik Devrao Shinde* v. *State of Maharashtra*, 1994 SCC (Cri) 1761.

The accused was charged of receiving stolen property *i.e.* question paper of State Service Commission Examination. After getting it Zeroxed it was sold for huge amount. It was found that there was no scope of leakage of question paper and no question paper was recovered from the accused. It was held that conviction was liable to be set aside. *S. Narasimha Kumar* v. *State*, 2003 Cr LJ 3188 (AP) : 2003(1) ALD (CRL) 651 : 2003 (2) Andh LT (Cri) AP 441.

19. Recovery of stolen articles later on—Presumption.—When the prosecution successfully proves that the offences of robbery and murder were committed in one and the same transaction and soon thereafter the stolen properties were recovered from some person the Court may legitimately draw a presumption not only of the fact that the person in whose possession the stolen articles were found committed the robbery but also that he committed the murder. Merely because the recovery has been made after four months it cannot be concluded that the recovery has not been made soon after the incident of robbery and murder and therefore at the most the accused can be convicted under Sec. 411 for having been found in possession of stolen articles in view of the nature and quantity of stolen articles (Jewellery) recovered especially when the presence of the accused at the place of occurrence is substantiated by evidence of finger print expert. *Shashi Shekhar alias Neeraj alias Raju v. State*, 2007 CriLJ 4193 (Delhi).

* * * * *

Sec. 412. Dishonestly receiving property stolen in the commission of a dacoity.—Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with *imprisonment for life* or with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine.

Synopsis

1. Amendemnt 2652
2. Scope 2652
3. Procedure 2655
4. Charge 2655
5. Acquittal 2656
6. Sentence 2656
7. Exclusive possession 2656
8. Identification 2656
9. Dacoity and receiving stolen property—Simultaneous conviction for both offences not possible 2656
10. Conviction 2656

1. Amendment.—*Imprisonment for life* was substituted by Act 26 of 1955.

2. Scope.—"For one description of cases of receiving stolen property, namely, the cases in which property is known by the receiver to have been acquired by the offence of dacoity or is received from a dacoit, it was thought fit specially to provide a heavier punishment. The receiver, in these cases, may be punished as severely as those who commit dacoity".—*Morgan and Macpherson*, 374. The bare discovery on the part of each of its members as would form a sufficient basis for conviction. 22 All 445. To establish an offence under this section, the prosecution must let in some evidence to show that the accused knew or had reason to believe that the property was stolen in the course of dacoity. 41 CWN 639. But the fact of stolen property being found concealed in a man's house would ordinarily be sufficient to raise a presumption that he knew the property to be stolen property, but not to prove that he knew that it had been acquired by dacoity. Rat Un Cr C 184 ; *see* also 7 WR Cr 199 ; WR Cr 16.

To support a conviction under Section 412, it is not sufficient to show that the accused knew the property to be stolen property, it must be proved that they knew or had reason to believe that its possession had been transferred by the commission of dacoity or that being stolen property, they received it from a person whom they knew or had reason to believe belongs or belonged to a gang of dacoits. Rat Un Cr C 756 ; *see* also UBR (1897-1901) Vol. I, 72 ; 6 Bom 711. The fact of stolen property being found concealed in a man's house would ordinarily be sufficient to raise a presumption that he knew the property to be stolen property, but not to prove that he knew that it had been acquired by dacoity. Rat Un Cr C 184 : Cr Reg 10.10.1882. The mere knowledge of place of concealment does not necessarily lead to the conclusion that the person having such knowledge actually received the articles stolen or participated in the act of concealment. 1 PR 1917 Cr. In a case of identification of ornaments of small value, the opinion of the assessors is of considerable value. They are well acquainted with the ways and habits of men of ordinary standing. 25 Cr LJ 1291 : AIR 1925 Oudh 452.

Where in a case of dacoity the Judge charges the jury saying that if the articles were stolen properties and were found in possession of the accused it is sufficiently proved that they were thieves or dacoits and the rebuttable presumption that arises in law is that the accused are either thieves or dacoits and they succeed by adducing sufficient proof in establishing their innocence. 42 Cr LJ 212 : 90 Ind Cas 542. A receiver of the articles of petty value stolen at a dacoity should not be treated in practically the same manner as though he were accused of the actual dacoity. 103 Ind Cas 62. Where a person received at one and the same time several stolen articles belonging to different owners, the receipt constitute one single offence. AIR 1923 All 547 : 21 ALJ 389 : 24 Cr LJ 632 : 73 Ind Cas 520. Mere possession of property taken away by dacoits at the time of commission of dacoity will not be sufficient to bring home the charge under Section 412. It must be proved that the accused had knowledge or had reason to believe that the possession of the property was transferred by the commission of the dacoity. AIR 1942 Pat 439 (1) : 43 Cr LJ 911 ; *see* also AIR 1942 Pat 145 : 43 Cr LJ 234 ; AIR 1945 Bom 292 ; 46 Cr LJ 600 ; AIR 1942 All 291 : 41 Cr LJ 647 ; AIR 1942 Pat 304 : 43 Cr LJ 648 ; 41 CWN 639 ; AIR 1937 Sind 11 : 168 IC 330.

In a prosecution of the accused for an offence of receiving the stolen property knowing the same to have been stolen, upon the prosecution establishing that the accused is in possession of goods recently stolen, the jury may in the absence of any explanation by the accused of the way in which the goods came into their possession which might reasonably be true, find them guilty, but if an explanation were given which the jury think might reasonably be true, and which is consistent with innocence, although they were not convinced of its truth, the prisoners are entitled to be acquitted inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused. AIR 1943 PC 211 : 45 Cr LJ 241 ; *see* also AIR 1933 Bom 458 : 45 Cr LJ 221 : AIR 1943 Lah 4 : 44 Cr LJ 186. Before any body can be convicted under this section, it must be shown that the property in the accused's possession is stolen property. AIR 1942 Pat 304 : 43 Cr LJ 648 : AIR 1944 Mad 26 : AIR 1942 Pat 250 : 43 Cr LJ 358 : AIR 1942 Pat 145 : 43 Cr LJ

234 : AIR 1941 Pat 223 : 42 Cr LJ 258 ; AIR 1941 Pat 175 : 42 Cr LJ 215. Possession of the stolen buffalo 5 or 6 or every 4 or 5 months after the offence is not in possession as will constitute proof of an offence under this section. AIR 1942 Sind 85 : 43 Cr LJ 711. In order to justify his conviction on the more serious charge under this section, there must be evidence to show that he knew or had reason to believe that a dacoity, had been committed and the property had been taken in it or that the person from whom he obtained it belonging to a gang of dacoits and the property was stolen property. 1946 Nag Rul 206 : 47 Cr LJ 822 : 226 1C 78 ; 47 Cr LJ 511 ; ILR (1946) 2 Cal 619 ; AIR 1949 All 245 : 50 Cr LJ 379 ; AIR 1950 All 398.

The mere circumstances that certain persons were co-owners of premises from which stolen property is recovered is not, by itself, wholly sufficient to establish any criminal liability to sustain a conviction under Section 412, I.P. Code, unless there are other circumstances showing that they (or any of them) were well aware of the existence of such property and were in control thereof. 6 DLR (Pat) 1 : 52 Cr LJ 104 : 5 AI Cr D 44 : AIR 1951 Pat 296.

The recovery from the possession of the accused of certain ornaments identified to be forming part of the proceeds of the dacoity within 3 weeks, was sufficient to establish a case against him under Section 412. ILR 1956 Punj 140 : 1957 Cr LJ 678 ; 1958 Raj LW 527.

Where recovery of the ornaments from the possession of the accused persons has not been proved by reliable evidence and similarly evidence regarding identification of the ornaments in the test identification is not trustworthy and convincing since only members were called upon to identify the ornaments, the conviction of the accused under Section 412, IPC cannot be sustained. *Baij Nath* v. *State*, (2004) 3 Crimes 160 (All).

Where the recovery of the stolen ornaments from the possession of the accused persons has not been proved by reliable evidence and the evidence regarding identification of the ornaments is not trustworthy and convincing, the conviction of the accused persons under Section 412, IPC cannot be sustained. *Baij Nath* v. *State*, 2004 Cr LJ 3526 : 2004 All LJ 1971 : 2004(49) All Cri C 303 : 2004(3) Crimes 160.

In the case there was no evidence to show that the accused persons had full knowledge that the ornaments purchased by them were the subject of dacoity. The ornaments were received from them and one of the accused persons had claimed the property as purchased from some person under receipt but that person was not examined as a defence witness. It was held that all the accused could at best be charged under Section 411, IPC and not under Section 412, IPC. *Narayan Prasad* v. *State of MP*, 2006 Cr LJ 123 (SC).

The wife being a passive partner in life has merely to acquiesce in the property being kept in the house even if he knows that the property was obtained in the course of a dacoity and for this he cannot be convicted under Section 412. 1963 (1) Cr LJ 344.

It is necessary for the prosecution in a conviction under Section 412 to prove that the property transferred was stolen property and that possession of such property was by commission of a dacoity and that the accused received or retained such property. 1977 Raj Cr C 289 ; 1982 Cr LJ 610. The articles were recovered very soon after the dacoity and has been proved to have been stolen in the course of dacoity, the case falls within the ambit of Section 412, IPC. AIR 1982 SC 129 : AIR 1978 SC 1390 : 1978 Cr LR 147 ; 1976 Cr LJ 378 (proof of knowledge or belief that the possession of articles was transferred by commission of dacoity) ; *see* also AIR 1972 SC 645 : 1972 Cr LJ 456 ; 1980 All Cr R 421 : 1980 UPLT (NOC) 200. For presumption under section 114. Illustration, Evidence Act, *see* AIR 1970 SC 955.

None of the fool-proof procedures attaching to the seizure was followed in order to lend authenticity to the alleged siezure. The recovery should have been made in presence of two independent and respectable persons of the locality and, moreover, after seizure the money should have been kept in a seal of the raiding party and it should have been produced in Court under the sealed cover. The manner in which the concerned amount of money was brought the Court and the manner in which it was kept would clearly reveal that no reliance can be placed in order to substantiate that of course, there was no any recovery from the house of the accused. The non-examination of the head of the raiding party also took away much of the authenticity of the alleged recovery from the house of the accused. *Munna Mahto* v. *State of Bihar*, CriLJ 3526 (SC).

In *Munna Mahto's case (Supra)* the prosecution failed to establish that the recovered money was the same which was looted from possession of complainant. The court on this point observed as under:

"Now even if it is assumed for a moment of course, there was any recovery of any money from the house of the accused, it is to be established that the recovered money was the same that was looted from the possession of the informant. In this connection, the evidence of the Manager of the Bank who had handed over the money to the informant should have been adduced and the entry register should have been produced in Court in order to prove that particular numbers of currency notes were made over to the informant and recovered money tallied in their numbers with the some of the currency notes made over to the informant. This was not done by the prosecution. So, on the record there was no sufficient, unimpeachable and reliable evidence to establish that from the house of the accused part of the looted money was recovered. The accused was acquitted for the charge under Section 120 (B) of the Indian Penal Code. Upon the aforesaid evidence on record, it was also not established that the accused was, of course, found in possession of the looted money and that he was connected in any manner with the alleged occurrence of looting from the alleged place and alleged time."

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

4. Charge.—I *(name and office of Sessions Judge, etc.)* hereby charge you *(name of the accused) as* follows :—

That on or about the.............day of.............at.............you dishonestly received (or retained) stolen property, to wit belonging to one *A, B* knowing (or having reason to believe) the same to have been transferred by the commission of dacoity (or dishonestly received from one *C, D.*, a person whom you knew (or had reason to believe to belong or to have belonged) to a gang of dacoits) property which you knew (or had reason to believe to have been stolen, and that you thereby committed an offence punishable under Section 412 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

5. Acquittal.—There was no sufficient, light available on the spot. Hence it is difficult to convict accused appellants who have committed the offence under Section 395, I.P.C. Even the theory of recovery and arrest on the spot soon after dacoity is not proved beyond doubt. Hence, acquittal ordered. *Gopal* v. *State of U.P.*, 1955 (32) ACC 359 (All).

In a charge of dacoity certain articles were recovered from the possession of accused but there was nothing on record to show that accused had made a statement before the police as regards the gold chain which was recovered from the shop of goldsmith. Neither it was established that recovery of gold chain was at the instance of the accused. It was held that conviction of accused under Section 412 was not proper. *Raghunath Day* v. *The State*, 2003 Cr LJ 4592 (Cal).

6. Sentence.—Where accused was held to be charged of possession of articles stolen during dacoity—Revision petition was filed against conviction and sentence, the recovery of stolen articles were proved. The prosecution-witnesses established their ownership. The accused persons aged within 17 to 30 years. The accused have undergone custody for more than 6 years. Hence, conviction is maintained and the sentence is reduced to period already undergone. *Rabindra Singh* v. *State of Bihar*, (1994) 2 East Cr C 372 (Pat).

7. Exclusive possession.—Exclusive possession of a gun in premises occupied jointly must be proved by prosecution for a conviction in a dacoity case. 1986 Cr LJ 484 (Pat).

8. Identification.—Chart of an identification parade held by a Magistrate remained unproved. *Held*, it is inadmissible in evidence. 1986 Cr LJ 684 (Pat).

9. Dacoity and receiving stolen property—Simultaneous conviction for both offences not possible.—In Section 114 Illustration (a) of the Evidence Act the words "either the thief or has received goods" and more particularly, the word "or" postulates that both the presumptions cannot be drawn simultaneously. This appears to be a pointer to the proposition that one cannot be convicted with both theft and for receiving or retaining stolen property. Section 411 nor Section 414 of the IPC can be applied to the original theft of the property concerned. No person can receive for himself nor does a person assist himself in concealing. Thus, it appears that simultaneous conviction for dacoity and receiving or retaining stolen property by commission of dacoity is not permissible. Moreover, the act of dishonest removal constitutes dishonest reception and so the thief does not commit the offence of retaining stolen property merely by continuing to keep possession of the property he stole. The theft and taking and retention of stolen goods form one and the same offence and cannot be punished separately. *Rafikul Alam and Ors. v. The State of W. B.*, 2008 CriLJ 2005 (Cal).

10. Conviction.—*Appeal against conviction.* Person who snatched bag from dacoits and allegedly handed over to accused, even though material witness, has not been examined by the prosecution for the reasons best known to it. It seems, prosecution has not come with a clean hand and has tried to suppress the material facts. It is onus on the prosecution to prove that the properties were stolen properties and were misappropriated by the present appellants. In absence of such proof, the conviction of the appellants is not proper. Mere possession is not sufficient to convict the accused under Section 412, IPC. Non-production of the material object and non-mentioning the serial number of the currency notes are also fatal to the prosecution. Therefore, conviction of accused is liable to be set aside. *Bhaskar Chandra Nayak and Another v. State of Orissa*, 2009 CriLJ 3875 (Ori).

* * * * *

Sec. 413. Habitually dealing in stolen property.—Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with *imprisonment for life*, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Amendment....................2657
2. Scope....................2657
3. Procedure....................2657
4. Charge....................2657
5. Conviction....................2658

1. Amendment.—The words in italics were substituted for the words "Transportation for Life" by Act 26 of 1955, Section 117 and Sch (with effect from 1.1.1956).

2. Scope.—"The common receiver or professional dealer in stolen property, is hereby made punishable".—*Morgan and Macpherson*, 374. The essence of the offence under this section is the habitual, that is to say, constant receipt or dealing in goods which the prisoner knew or had reason to believe, were stolen. A man cannot be said to be habitually receiving stolen goods who may receive the proceeds of a number of different robberies from a number of different persons, there must be a receipt on different occasions and on different days. 19 Cal 190 ; 13 PR 1914 Cr ; ILR 1955 TC 772 : 1955 Ker LT 830. Where the charge of an offence under Section 401, I.P. Code, rested on the approver's statement about the accused having been present at a meeting held for the purpose of forming the gang, and where it was because that statement was disbelieved that the prosecution failed and where the approver's statement was in fact part of the material on which the prosecution for the offence under Section 413, I.P. Code, had been instituted but that prosecution would be based entirely on the evidence as to the discovery of the stolen property in the accused's house, which, it was held in the former trial, did not prove his membership of the gang. *Held*, that the two trials were not based on the same facts and Section 403 did not apply. 26 PLR 470 : 88 Ind Cas 185 : 26 Cr LJ 1077.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable—Triable by Court of Session.

4. Charge.—I (*name and office of the Sessions Judge, etc.*) hereby charge you *name of the accused* as follows :

That on or about the........day of........at........you were a habitual receiver of (or dealer in) property which you knew (or had reason to believe) to be stolen property and that you hereby committed an offence punishable under Section 413 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

5. Conviction.—Accused charged for dealing in stolen property under Section 413 and not under Section 124 of Bombay Police Act, but convicted under Section 124, Bombay Police Act. As ingredients of both provisions are practically common, Conviction under Section 124 not illegal. *Ramesh Singh* v. *State of Maharashtra*, 1993 Cr LJ 2743 (Bom).

* * * * *

Sec. 414. Assisting in concealment of stolen property.—Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Synopsis

1. Scope 2658
2. Procedure 2660
3. Charge 2660
4. Scope of the offence of cheating 2660
5. Necessary ingredients 2661

1. Scope.—"Those whose dealing with stolen property is not of such a kind as to make the guilty of dishonestly receiving or retaining it, may be punished under this section. Assistance given by aiding the concealment or destruction, or by promoting the sale, of the stolen property, if it is given, voluntarily, by a person who knows or who has reason to believe that the property is stolen, constitute the offence".—*Morgan and Macpherson*, 375, 29 Bom 449 : 7 Bom LR 527 ; Rat Un Cr C 553 ; 1 Weir 469 ; 39 PR 1881 Cr ; 1 Agra Cr 9 ; AWN 1887, 96 ; 14 Bom LR 893 ; 28 All 313 ; 15 PR 1896 Cr ; 1 All 379 ; 45 MLJ 728 the intention of the section is to punish persons who, subsequent to the commission of the offence, either conceal it or make away with it by destroying or otherwise disposing of it. The section is clearly intended to penalties persons who deal with stolen property in such a way that it becomes impossible to identify it or use it as evidence. It cannot apply to the case of a man spending money stolen by another 158 Ind Cas 835 : 36 Cr LJ 1459 : 1935 Cr C 968 : AIR 1935 Lah 587. Where an accused misappropriates property from the body of a dead person voluntarily helped in disposing of it, an offence under this section has been committed, the property being stolen property. AIR 1938 Rang 109. The word "believe" in Section 114, I.P. Code, is a very much stronger word than "suspect" and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. It is not sufficient to show that the accused was careless or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired. 6 Bom 402 : 6 Ind Jour 538 ; *see* also 139 Ind Cas 442 :

33 Cr LJ 764 : 33 PLR 572 : 1932 Cr C 580 : AIR 1932 Lah 434. The finding of the property in question was stolen property is necessary for a conviction under Section 414. Where the accused assisted the robbers in making away with the money so robbed, he committed an offence under this section. ILR (1940) 2 Cal 9. Where ornaments were entrusted to accused No. 1 for sale, but he pledged the ornaments with the help of accused No. 2, the accused No. 2 cannot be convicted under this section, but should be charged for abetment of breach of trust. 1936 MWN 493. The accused, a driver of a taxi, was carrying persons who had hired it. On the way, the taxi stopped and two persons got down from it and within a distance of about three and a half yards, they, without premeditation, attacked injured and robbed a man of his purse and then again boarded the taxi and the accused in spite of the cries of the victim, drove away as fast as he could ; *Held*, the accused having assisted the robbers in making away with the money so robbed was rightly convicted under this section. ILR (1940) 2 Cal 9. Such a finding may be based on strong circumstantial evidence. An accused, who conceals property in the belief that it is stolen while really it is not, is not guilty. AIR 1924 Mad 350 : 45 MLJ 728 : 25 Cr LJ 790 : 81 Ind Cas 310. Under this section, it is not necessary to trace the ownership of property. Proof that the property is stolen is sufficient. The accused should have helped another in the disposal of the stolen property. AIR 1926 Bom 71 : 49 Bom 878 : 27 Bom LR 1373 Cr LJ 114 : 91 Ind Cas 690. This section applies where there is no actual receipt of stolen property. Where there is such evidence, Section 414 applies. Rat Un Cr C 533 ; 4 MHC App 13 : 1 Weir 469 : 2 Weir 35. Neither Section 411 nor Section 414 can be applied to the original thief of the property concerned, 4 NLR 71 : 8 Cr LJ 11. The words "disposing of " in Section 414, I.P. Code, must be interpreted by the light of the words they are associated with, *viz.*, "concealing", and "making away with", and they cannot be taken to include "restoring to the owners". UBR 1910 1st Qr 8 : 7 Ind Cas 465 : 11 Cr LJ 493. Where the accused voluntarily assisted in concealing, or disposing of or making away with stolen property, and was also found to have concealed it in the field of an enemy of his, with a view that it might be found there and that he might be apprehended and charged with theft. *Held*, that the Magistrate acted properly, in convicting and punishing the prisoner under Sections 192 and 414, IPC. 1 All 397. This section is not applicable to original thief. 4 NLR 71. A bull dedicated to idol is neither *ferae bestiae* and, therefore, *res nullus*. The property remains in the temple for the benefit of the public. It can, therefore, be the subject-matter of Sec. 414, 1951 CrLJ 1141 : AIR 1952 Assam 123.

Section 414 aims at those persons who are not in possession of stolen property themselves and helps others in possession to dispose of the same. Neither the thief nor the receiver of stolen property can come under Section414. The accused disposed of the misappropriated property himself. He is not guilty of the offence under Section 414. BLR 1952 A 146 : 1952 Cr LJ 904 : AIR 1952 A 481. The accused not taking part nor receiving any articles but throwing a bundle into well if commit an offence under Section 414. AIR 1957 AP 482 : 1957 Cr LJ 939. It is not necessary for a person to be convicted under Section 414 that another person must be traced out and convicted of an offence committing theft. The prosecution has simply to establish that the property recovered is stolen property and that the accused provided help in concealment and disposal. AIR 1964 SC 170 : (1963) 2 SCWR 15 : 1964 All Cr R 57 : 1964 SCJ 407 : 1963 SCD 1018 : 1964 (1) Cr LJ 129. Accused must be *held* to be have reasons to believe that it was a stolen cheque. (1974) 2 Malyan LJ 21.

2. Procedure.—Cognizable—Warrant—Not compoundable—Triable by any Magistrate summarily if the value of the property does not exceed Rs. 200/-

3. Charge.—I *(name and office of Magistrate, etc.,)* hereby charge you *name of the accused* as follows :—

That on or about the.............day of..............you voluntarily assisted, in concealing (or disposing of or making away with) property, to wit.......which you knew (or had reason to believe) to be stolen property, and that you thereby committed an offence punishable under Section 414 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

4. Scope of the offence of cheating.—"The provisions for the proper punishment of some of the aggravated forms of cheating are contained in other Chapters of the Code than the present one (of offence against property) wherein cheating is defined, *viz.*, in the Chapter of offence relating to the coin, to weights and measures, to documents and to trade or property marks. The practice of intentional deceit for purposes of gain or to induce a person to acting such a way as to cause damage or harm to himself is an offence made punishable by the Code under this head. It is important that the law should, in no case, encourage deceit or falsehood, and that it should impose restraints on those who practise deception. But the Legislature cannot go so far as to establish the rule of morality as a part of the rule of law. Many false presences and many representations calculated and intended to mislead are morally wrong and deserving of punishment ; but a Penal Code cannot adopt so severe a standard as the moral law whereby to measure the conduct of men. It is by public opinion, the opinion of the general body of the people, that restraints and punishments must to such cases be imposed. It would be highly inexpedient to punish as a criminal every dependent who obtains pecuniary favour by false profession of attachment to a patron, every legacy-holder who obtains a request by cajoling a rich testator, every debtor who moves the compassion of his creditors by overcharged pictures of his misery, every petitioner who, in his appeals to the charitable represents his distresses as wholly unmerited, when he knows that he has brought them on himself be intemperance and profusion.

"In dealing between buyers and sellers, frequently even in tolerably honest transactions, there happens an exaggeration on the one side and a depreciation on the other of the value of the thing sold which may be morally reprehensible, but with which the penal law cannot deal. If all the misrepresentations and exaggerations, in which men indulge for the purpose of gaining at the expense of others, were made crimes, not one day would pass in which many thousands of buyers and sellers would not incur the penalties of law—A very large part of the ordinary business is conducted all over the world, and no where more than in India, by means of conflict of skill, in the course of which deception to a certain extent perpetually takes place. The moralist may regret this but the Legislature sees that the result of the attempt of the buyer and seller to gain an unfair advantage over each other is that in the vast majority of cases, articles are sold for the prices which it is desirable that they should fetch ; and therefore he does not think it necessary to interfere. It is enough for him to know that all this great was of falsehood practically produces the same effect which would be produced by truth; and that any law direct against such falsehood would, in all probability, be a dead letter, and would, if carried into rigorous execution, do more mischief in a month than all the lies which are told in the making of bargains throughout all the *bazars* of India produced in a century".—*Morgan and Macpherson.*

5. Necessary ingredients.—Section 414 is intended to penalise the person, who deal with stolen property in such a way that it becomes difficult to identify it or use it as evidence. It is not necessary to establish that the property was the subject matter of any particular theft. It would suffice if the prosecution can establish that the accused had knowledge or "had reason to believe" that the property is stolen one. It is not necessary to establish, from whom the theft was committed, when it was committed, how it was committed and who committed it. It is further not necessary to establish to whom accused assisted while disposing of the properties. All that the prosecution is required to establish is that the accused rendered help in either concealment or disposal of the property, which he had reason to believe to be stolen property or had knowledge to believe that it was such. So far as the five accused in the instant case are concerned, there is satisfactory evidence on record to show that they had reason to believe that the autorickshaws in question were stolen properties. They alienated the autorickshaws by making misrepresentation that necessary documents would be made available afterwards because the vehicles were purchased in auction sales held by the Banks. Obviously, the necessary ingredients of S. 414 of the Indian Penal Code are duly established against them. *Sayyed Issaq and Ors. v. State of Maharashtra*. 2008 CriLJ 2950 (Bom).

* * * * *

OF CHEATING

Sec. 415. Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act of omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Illustration

(a) *A*, by falsely pretending to be in the Civil Service, intentionally deceives *Z*, and thus dishonestly induces *Z* to let him have on credit goods for which he does not mean to pay. *A* cheats.

(b) *A*, by putting a counterfeit mark on a article, intentionally deceives *Z* Into a belief that article was made by a certain celebrated manufacturer, and thus dishonestly induces *Z to* buy and pay for the article. *A* cheats.

(c) *A*, by exhibiting to *Z* a false sample of an article, intentionally deceives *Z* into believing that the article corresponds with the sample, and thereby dishonestly induces *Z* to buy and pay for the article. *A* cheats.

(d) *A*, by tendering in payment for an article a bill on a house with which *A* keeps on money, and by which *A* expects that the bill will be dishonoured, intentionally deceives *Z*, and thereby dishonestly Induces *Z* to deliver the article, intending not to pay for it. *A* cheats.

(e) *A*, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives *Z*, and thereby dishonestly induces *Z* to lend money. *A* cheats.

(f) *A* intentionally deceives *Z* into a belief that *A* means to repay any money that *Z* may lend to him and thereby dishonestly induces *Z* to lend him money. *A* not intending to repay it. *A* cheats.

(g) *A* intentionally deceives *Z* into a belief that *A* means to deliver to *Z* a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces *Z* to advance money upon the faith of such delivery. *A* cheats : but if *A*, at the time of obtaining the money. Intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) *A* intentionally deceives *Z* into a belief that *A* has performed *A*'s part of a contract made with *Z* which he has not performed, and thereby dishonestly induces *Z* to pay money. *A* cheats.

(i) *A* sells and conveys an estate to *B*. *A*, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to *Z*. without disclosing the fact of the previous sale and conveyance to *B*, and receives the purchase or mortgage money from *Z*, *A* cheats.

Synopsis

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1. Suggested amendment.—The definition of cheating in this section requires modification in order to cover cases where one person deceives and another person suffers, or is likely to suffer damage or harm in body, mind, reputation or property. AIR 1941 Lah 460 : ILR 1941 Lah 718 : 43 Cr LJ 254.

2. Object of the section.—In order to bring a case within the 1st part of the section, it is essential in the first place, that the person who delivers the property should have been deceived before he makes the delivery and in the second place, that he should have been induced to do fraudulently or dishonestly. The object of this section is to make it, cheating to obtain property by deception in all cases where the property is fraudulently or dishonestly obtained. However, immoral a deception may be, it does not constitute the offence of cheating, its object is only to cause a distribution of property which the law recognises as rightful ; there must be an intention to acquire or retain wrongful possession of that to which some other person has a better claim, and that other person is entitled to recover by law ; in all such cases, the object is wrongful gain attended with wrongful loss. 2 CLJ 524. The damage or harm referred to in this section must be the necessary consequence of the act done by reason of the deceit practised, or must necessarily be likely to follow from them. *Ibid.* ; 17 Cal 606. Mere silence on the part of the accused would not amount to deception. UBR (1892-1896) Vol I, 255. In order to find whether a person is guilty of cheating, the Court has to take into consideration the cumulative force and effect all the surrounding circumstances. 1 Weir 476 ; *see* also 23 Cr LJ 443 ; 31 Ind Cas 353 ; 34 PR Cr 1919.

Each part of the section is independent of the other. The common factor is that there must be deceit practised by the accused upon the complainant. There must be dishonesty or fraud in obtaining delivery of property and an intentional inducement of the complainant to do or omit to do some act or omission which must cause or be likely to cause damage or harm to that person in body, mind, reputation or property. 1978 All Cr C 147 : 1979 Cr LJ (NOC) 122. A false pretence, unlike English law, must not as a matter of a fact that has existed or exists but may be of a future conduct, will amount to cheating. AIR 1966 All 594 : 1966 Cr LJ 1367 (from a reading of illustration (f) and (g) of the section).

3. Ingredient of offence.—In the offence of cheating under this section there are two elements—Deception and dishonest intention to do or omit to do something. Neither mere deception nor mere dishonesty is a criminal offence. To establish the offence of cheating, the complainant must show not only that he was induced to do or not to do something, but that this induced act or omission or his part caused or was likely to cause him some harm or damage in body, mind, reputation or property—Which are presumed to be the four cardinal assets of humanity. A complaint in respect of such act under Section 415, IP. Code, more than three months afterwards, on the ground that the complaint was induced not to file a suit against the accused immediately on dishonour, is not sustainable, when there is no assertion in the complaint that any harm or damage was caused or likely to be caused. 1937 MWN 999 : 46 LW 629 : (1937)

2 MLJ 878 : AIR 1938 Mad 129 ; AIR 1949 All 15 : 50 Cr LJ 31 ; AIR 1949 Cal 586. The definition of cheating in the section consists of two parts both of which the words "by deceiving any person" apply. The first part is applicable if there is deception and the accused has attempted fraudulently or dishonestly to induce the complainant to deliver the property to him. But the second part does not require the inducement to be fraudulent or dishonest. ILR 1950 Nag 908 : 5 AI Cr D 149 : AIR 1951 Nag 315 : 6 DLR (Nag) 32. The words "which act or omission causes is likely to cause damage or harm to that person in body, mind, reputation or property" occuring in the second part of Section 415 have no application to the first part of that section. They have reference only to the offence of cheating committed by inducing the deceived person to do or to omit to do something which he would not do or omit to do if he were not so deceived, 39 Mys LJ 1070 : 1962 (2) Cr LJ 559 ; 1962 (2) Cr LJ 595 : 1963 MLJ (Cr) 146. As far as the offence of cheating is concerned, the most essential ingredient that has to be proved by the prosecution is that one was cheated and thereby he was dishonestly induced to deliver the money to the accused. Merely parting with money will not amount to cheating. 1961 MLJ (Cr) 350 : 1960 (2) Ker LR 287 : 1962 (1) Cr LJ 654.

Where there is fraudulent misrepresentation by the accused to select him by mentioning false details in his application to the Public Service Commission, the ingredients of Section 415 as contained in the latter part of the section must be *held* to exist. AIR 1960 Andh Pra 441 : 1960 Cr LJ 1181 ; *see* also 1965 All Cr R 71 : 1965 All LJ 272.

Cheating can be committed in either of the two ways described in Section 415. Deceiving a person is common in both the ways of cheating. A person deceived may be fraudulently or dishonestly induced to deliver any property or to consent to the retention of any property by any person. The person deceived may also be intentionally induced to do or to omit to do anything which he would not have done if not deceived and when act of his caused or was likely to cause damage as harm in body, mind, reputation or property. (1965) 1 SCWR 16 : 1965 (1) Cr LJ 355 : AIR 1965 SC 333.

Whatever legal effect it might have on the civil rights of the parties under the document (interpolation in document made in January, 1944 but contract made on 2.3.1944 to come into effect on 11.11.1943), it was impossible to invoke the said date to impute a criminal liability to the accused for an act done by them before the contract was executed. AIR 1960 SC 391 : 1960 Cr LJ 532 ; 1976 MLJ (Cr) 548. 1977 LW (Cr) 114 ; 1977 LW (Cr) 26 (when even any one of their results follows on account of the deception practised by a person the offence of cheating would be completed). 1977 Kant LJ 111 ; 1977 Cr LJ 2050 ; 1980 All LJ 1067 (the main ingredient is offence under Section 415 is that there should be fraudulent or intentional ingredient to the person so deceived to do or omit to do anything which would not do or omit if he were not so deceived); 1977 Cr LJ 899 ; 1977 Cr LJ 2048 ; 1975 Cr LJ 879 ; AIR 1960 All 103.

It must be proved that representation was false to the knowledge of accused and was made to deceive complainant. *Moni Gogoi* v. *Sarumani Hazarika*, (1992) 2 Gau LR 113.

To constitute such offence dishonest intention of accused is inducing person deceived to deliver property must be proved. *Smt. Uma Dutta* v. *G. Mahadevan*, 1993 Cri LJ 3231 (Ori).

In absence of ingredients of criminal offence especially *mens rea* there can be no criminal prosecution. *Dhruvdeo Mishra* v. *State of Bihar*, 1991 (1) PLJR 121.

Mere acts of cheating is not sufficient—It must have caused damage or harm the person deceived. *(M/s.) Sonbhadra Coke Products* v. *State of U.P.*, 1994 Cr LJ 657 : 1994 LJ 302 (All).

Before the offence of cheating can be made out it has to be shown that damage or harm has been caused to the person so deceived. *(M/s.) Sonbhadra Coke Products* v. *State of U.P.*, 1994 Cr LJ 657 : 1994 LJ 302 (All).

Where the accused company did not keep its investors in dark about the tridium system and gave them all necessary information in respect of various aspects of the system thereby not only forwarding them about the risk factors invited in the project and advising them to consider them before investing, if despite the caution the investors ignore them and invest their money in the project it cannot be said that they were misled, misrepresented or deceived nor it can be said that there was intention inducement by the accused-company. *Motorola Incorporated* v. *Union of India*, 2004 Cr LJ 1576 (Bom) : 2003 All MR (Cri) 1903 : 2004(1) Bom Cri (Cri) 26.

It was contended by the accused that at the time of auction in *mandi samiti*, the accused was not present and taking advantage of his absence the deceased dishonestly persuaded the commission Agent to deliver him the money and then he quickly disappeared. It was pointed out that the deceased did not return to his own house and went to another village which act was itself sufficient to suggest that it was the accused who was deceived and cheated. The record of *mandi samiti* showed that the name of accused was entered as owner and at the municipal outpost the deceased himself had gone to the offence and returned with the tax receipt which was in the name of accused. The accused continued to sit in the tractor. The Court held that it was more than clear that no case of cheating was made out. *Shiv Dan Ram* v. *State of Rajasthan*, 2005 Cr LJ 36 (Raj).

4. Delivery of property.—A man can give delivery through another of property within the meaning of Section 415, I.P. Code, which is not in his possession but which is at his order. If, for instance, *A* had an agreement with *B* will give delivery of certain goods in his possession on account of *A* on the receipt of delivery note from *A* and *C* by deception obtains a delivery note from *A* on *B* and thereby gets possession of goods from *B*, it cannot be said that he has not got delivery of the property from or through *A* directly as a result of his deception of *A*. AIR 1937 Sind 293.

The words "to deliver any property", in Sections 415 and 420 imply that the word "property" means movable property. 6 Sau LR 466 ; AIR 1961 SC 1698 : 1961 (2) Cr LJ 822 (an admission card to sit for an university examination is a property) ; AIR 1977 SC 1174 (passport is a property).

5. Fraudulently or dishonestly.—The word "fraudulently" used in this section together with the word "dishonestly" means something different from "dishonestly". The word is not confined to transactions in which there is wrongful gain on the one hand, or wrongful loss on the other, either actual or intended. The word "defraud" may or may not imply deprivation, either actual or intended. ILR 32 Cal 75 : 9 CWN 897 : 1 Cr LJ 469 ; *see* also 61 ; Ind Cas 33. The words "fraudulently" and "dishonestly" do not govern the whole of the definition. They do not apply to the second part of the definition.

20 PR 1889. Illustrations (f) and (g) leave no doubt that an intention as to future, expresses falsely or dishonestly for the purpose of deceiving a person, could amount to deception as a constituent element. AWN 1886, 262. Where the charge does not contain any allegation that the accused acted dishonestly or that he deceived the complaint the charge should be set aside and the proceeding quashed. AIR 1933 Sind 169 : 34 Cr LJ 1049 : 145 Ind Cas 617. It is not necessary to constitute cheating that wrongful gain should accrue from the party deceived. 16 Cr LJ 753 : 31 Ind Cas 353. "Fraudulently" and "dishonestly" imply some idea of wrongful gain. 49 Cr LJ 419 : AIR 1948 Mad 268 : ILR 1948 Mad 578 ; 49 Cr LJ 443 : AIR 1948 All 433 ; 1961 Ker LT 318 : 1962 (1) Cr LJ 649 ; *see* also 1959 MPC 40 : 1959 Jab LJ 212 (dishonest inducement by accused as to his title to land sold) ; AIR 1980 SC 366.

6. Deception.—This section does not, in any manner, limit the mode in which the deception may take place, nor is it necessary that the deception should be by express words, but it may be by conduct or implied in the nature of the transaction itself. 32 Cal 941 : 9 CWN 1006 ; 18 ALJ 408. Where the person who granted the permits as well as the persons who obtained the permits are alleged to be in the conspiracy there is the question of one deceiving the other. 1933 Cr LJ 1289 : AIR 1933 Pat 225.

There can be dishonest concealment even in absence of statutory duty to speak. The explanation to Section 415 makes it clear that the dishonest concealment of fact is a deception within the meaning of the section. AIR 1956 All 334 : 1956 Cr LJ 664.

7. Sale.—To constitute the offence of cheating by taking delivery of property, there should be deceit at the time when delivery is taken and the seller should be fraudulently and dishonestly induced to deliver the property in consequence of such deceit. 9 Ind Cas 458 ; Rat Un Cr C 546.

8. What constitutes offence.—The essence of the charge of cheating is that the complainant should have been deceived. AIR 1941 Sind 398 : 1941 Ker 345 : 43 Cr LJ 73. Deception is only one element of the offence of cheating and not the only element. There can be no cheating unless by reason of the deception, the person deceived is induced to part with any property or omit to do anything that he would not do or omit to do but for the deception. AIR 1940 Lah 93 : 41 Cr LJ 394 ; *see* also AIR 1938 Sind 153 : 40 Cr LJ 61 ; AIR 1938 Lah 828 : 40 Cr LJ 371 ; AIR 1938 Mad 129 : 39 Cr LJ 261. Where in a proceeding for issue of a certificate of marriageable age of a certain girl, the applicant by producing another girl misrepresents to the Magistrate that the girl produced is the girl whose age is required to be certified, the offence committed is not cheating, since the Magistrate, would not suffer any harm in mind, body or reputation. AIR 1951 Sau 8. Under Section 415 unless and until damage or harm is proved the offence of cheating is not completed. 148 Ind Cas 690 : 35 Cr LJ 872 : AIR 1934 Pesh 5. The burden is on the prosecution to prove fraud or dishonestly on the part of the accused. Every ingredient which is included in the definition of the offence must be established by the prosecution. AIR 1933 Pat 598 ; 1933 Cr C 1360 : 146 Ind Cas 580. There must be active deception by which a person is fraudulently induced to deliver property or there must be dishonest concealment of facts causing damage. 60 Cal 262 : 1933 Cr C 502 : AIR 1933 Cal 366 ; *see* also 51 Cal 250 : 28 CWN 160 : 26 Cr LJ 330 : 84 Ind Cas 554 ; 2 PLT 211 : 50 Ind Cas 921. Valuable security does not include a decree. 39 Cr LJ 1288 : 28 CWN 414. To constitute the offence of cheating, it is enough to allege that the property obtained was in the possession of the person defrauded and it is not necessary to allege that such property belonged to him. 1 Weir 471 : 1 MHC 31. It must be proved that the person who was made to deliver property, *etc*., or to do or omit to do anything, which causes or is likely to cause him danger in body, mind, reputation or property, and which he could not have otherwise done. The offence is not committed if a third party on whom no deception has been practised, sustains pecuniary loss in consequence of the accused's act. 25 PR 1904 Cr : 10 PLR 1905. Certain retail-dealer induced their creditors to give time and soon after vacation intervened and they removed the goods. *Held*, that they are guilty of cheating. 23 ALJ 433 : 87 Ind Cas 426. Negotiations between the cheat and the persons cheated does not create a new contract between the parties and such negotiations make no difference to his criminal liability for an offence which is not compoundable. 26 Cr LJ 1602. To convict a person for cheating, it is necessary to show that there is a proximate connection between deception practised on the complainant and his being induced to part with some property. If the connection is too remote or very indirect the offence of cheating would not be complete. 26 Cr LJ 213 : 83 Ind Cas 997 : AIR 1924, 209. Sending an insured letter containing. *Khilafat* notes does not amount to cheating. 26 Cr LJ 209 : 83 Ind Cas 993 : AIR 1924 All 205. Under this section, proximate and natural result and not a vague and contingent one is to be taken into account. 52 Cal 188 : 85 Ind Cas 641. The delivery contemplated by this section is "delivery to any person" a phrase which will include even an agent for that purpose. 1927 MWN 221 : 101 Ind Cas 484 : 28 Cr LJ 452 : AIR 1927 Mad 544 : 52 MLJ 511. In the absence of dishonest intention, a Judgment debtor is not guilty by mere dishonour of a cheque. AIR 1928 Oudh 292. The essence of an offence under this section is, (1) that there must be deception practised upon- a person, (2) that by that deception the person must be induced to do or omit to do something which he would not have done or omitted to do if he had not been so deceived. (3) that such act or omission must cause or be likely to cause, the person deceived damage or harm in body, mind, reputation or property. To constitute the offence of cheating under Section 415 of the Penal Code the damage or harm caused or likely to be caused to one person deceived in mind, body, reputation or property must be the necessary consequence of the act done by the person of the deceit practised, or must be necessarily likely to follow therefrom. The mere possibility of harm or damage however remote is sufficient, 34 PR Cr 1919 : 48 Ind Cas 877 : 20 Cr LJ 77 ; 18 NLR 52 : 67 Ind Cas 619 : 23 Cr LJ 443 ; 26 Bom LR 211 : 81 Ind Cas 926. In the absence of dishonest inducement the charge could not be entertained. 21 ALJ 321 : 1923 All 431. No offence under Section 415 is committed by untrue praise of goods offered for sale. AIR 1925 Cal 605 : 26 Cr LJ 921 : 29 CWN 362 : 86 Ind Cas 985.

To constitute cheating within clause (ii) of this section, it is necessary (1) that the person deceived must have acted under the influence of the deceipt, (2) that the facts must establish damage, or (3) that the damage must not be too remote. 51 Cal 250. The act or omission under Section 415 must be such as to cause or is likely to cause damage or harm to the person deceived. AIR 1954 Mys 9 : ILR 1953 Mys 382 : 1954 Cr LJ 136 ; 1954 BLJR 77. In addition to the element that there, should be a direct connection between the false representation and the delivery of the property for the doing of something of the person deceived, the act omission should cause or is likely to cause danger to the person. 1956 Andh LJ 678. Loss or damage must be the proximate result of the act complained of. 1952 ALJ 232. No offence of cheating can be said to have been committed if one person is induced by deception to do or omit to do something and the act or omission caused or is likely to cause damage or harm to another person. ILR 1953 Mys 382 : 1954 Cr LJ 136 : AIR 1954 Mys 9 ; *see* also AIR 1961 All 639 : 1962 All Cr C 25 : 1961 (2) Cr LJ 759 ; 1961 (2) Cr LJ 98. In order to bring a case within the second part of Section 415, I.P. Code, damage or harm caused or likely to be caused, must be the necessary consequence of the act done by reason of the deceipt practised or must be necessarily likely to follow therefrom, and the law does not take into account remote possibilities that may follow the act. 35 PLR 666 : AIR 1934 Lah 833 ; AIR 1933 Cal 366 : 60 Cal 262 ; AIR 1936 Rang 471 : 38 Cr LJ 48 ; AIR 1934 Cal 457 : 35 Cr LJ 446 ; 1955 All LJ 308. Mere criminal breach of trust does not constitute an offence under this section. AIR 1930 Pat 404. In case of payment by cheque, an offence of cheating is made out if the accused knew that the cheque would not be met. 32 LR 562 : AIR 1930 Bom 179.

If the person making the representation honestly believed the representation to be true, there can be no question of cheating. AIR 1951 Assam 82. When the complainant knew the truth, the accused cannot be convicted of cheating him, but will be guilty only of an attempt to cheat. AIR 1960 SC 979 : 1960 Cr LJ 1283.

The act of omission should be one which causes or likely to cause damage harm to the person induced in body mind, reputation or property. 1978 Cr LJ 2048 ; 1977 All Cr C 23 : 1971 Cr LJ 1797 ; AIR 1974 SC 1511. No loss or damage is caused to the person misled and hence, no offence is committed. AIR 1963 SC 1572 : 1963 (2) Cr LJ 43.

An offence of issuing cheque without sufficient funds need not necessarily take within is wings offence of cheating under Section 415, I.P.C. *C.S. Nair* v. *G.M. State Bank of Travancore*, 1996 Cri LJ 4289 (Ker).

9. Intentionally.—The word "intentionally" in the second breach of the definition, only applies to the act of omission which the person deceived is induced to do, or omit to do, and it is not necessary in order to sustain a charge under that branch of the definition, that the accused person should also have intended to cause harm or damage, as the result of such act or omission. 36 PR 1888 Cr. There being in the instant case no direct relation of cause and effect between the representation alleged to be made and the harm or damage to the complainant as a result of the breach of contract offence under Section 415 had not been committed in consequence of the accused persuading the complainant to enter into a shipping contract. AIR 1960 Bom 268 : ILR 1960 Bom 64 : 1960 Cr LJ 812 ; *see* also 78 Mad LW 164 : 1965 (2) Cr LJ 514 : AIR 1965 Mad 452 (when it was *held* that because the conduct of a debtor has been highly unethical, the criminal process can not be used against him in order to compel him to discharge a civil liability). The person so declared should be intentionally induced to do or omit to do anything which he would not do or omit if he were not deceived. AIR 1974 SC 1811 : 1974 Cr LJ 1261 ; *see* also AIR 1965 SC 333 : 1966 (1) Cr LJ 355 ; AIR 1956 SC 575 : 1956 Cr LJ 1116 (*mens rea* on the part of the accused).

10. Sale—False representation.—It is true that there is no duty on a seller to disclose defects in title in immovable property which the buyer with ordinary care could discover and the mere concealment of defect in title in such case is no fraud. But where the advance of money is made upon certain property burdened with a charge on the representation that the property was free of any charge and the questions regarding property was falsely answered, and further that the charge was not registered, it cannot be said that the person making advance could have discovered the charge by reference to registers. The representation therefore, is not mere concealment or non-disclosure of facts, but is false representation amounting to the offence of cheating. 167 Ind Cas 873 : 38 Cr LJ 510 : AIR 1937 Sind 56 ; AIR 1934 Nag 149 : 35 Cr LJ 1063 ; AIR 1960 All 103 : 1960 All Cr R 84 : 1960 Cr LJ 188 (Bogus schemes-persons induced on false representation and suppression of martial facts to deposit money) ; 6 Sau LR 466 (woman fraudulently induced to believe that she was executing the conveyance deed for Rs 13,000/- which in fact was for Rs. 7,500).

11. Prosecution against company for cheating and criminal conspiracy.—Word "whoever" occurring at the beginning of Sections 415 and 120B of IPC cannot include in its sweep juridical person like 'company' and since a 'company' is incapable of having *mens rea*, it cannot be prosecuted for offences under Sections 420 read with 120B of IPC. *Motorola Incorporated* v. *Union of India*, 2004 Cr LJ 1576 (Bom) : 2003 All MR (Cri) 1903 : 2004(1) Bom CR (Cri) 26.

12. Scope of this section whether excluded by Section 32 of the Sea Customs Act—The fact that the Sea Customs Act refers to delivery of goods detained by the Collector does not exclude the application of Section 415. I.P. Code, in appropriate cases, when it is clear that the acts necessary to constitute an offence under the section and to attract its application in fact exists. AIR 1937 Sind 293.

Civil proceedings are no bar to criminal proceedings and both are co-extensive. *Smt. Godavaribai Saigal* v. *I.D. Chandani*, 1995 (2) Bom CR 470.

13. Cases.—A person employed as a clerk in charge of the renewal of licence for hand carts received Rs. 2 for each such renewal, whereas he ought to have taken Rs. 1-1400. He was charged with cheating and evidence was produced showing that he had taken two annas in excess from persons other than those named in the charge, *held*, that such evidence was inadmissible either under Section 24 or under Section 15 of the Evidence Act. 8 ALJ 1269 : 12 Ind Cas 987 : 12 Cr LJ 611. An attempt to deceive by a false representation of facts, involves that the person charged should have taken some steps towards the communication of the representation to the person whom it was intended to deceive. 8 CWN 278 : 1 Cr LJ 124. Where the accused hired certain property from the complainant for use at a wedding, and advanced a portion of the hire, promising in writing to pay the balance and to restore the goods when the wedding was over, being fully aware that there was to be no wedding, and intending, when he got the property, to apply for its attachment before judgment as belonging to another person against whom he had brought a suit, *held*, that the accused was guilty of cheating. 3 NWP 16 ; *see* also 3 MWP 17. Inducing a *Karkun* to deliver a warrant of attachment by false representation is an offence under this section. 6 Bom LR 375. But to induce a son to pay his father's debt, by acting on his fear of consequences to his father, does not seem to come within the definition of the crime of cheating. 1864 WR Cr 25. The mere taking of money one day and dishonestly running away without paying it the next day is not necessarily cheating. 5 WR Cr 5. Where reward was taken from father of abducted girl for making search for girl and restoring her to her father, but person taking the reward does not keep his promise, conviction of the person under Section 415 is not justified in the absence of proof that he had practised any deception on the father of the girl, AIR 1932 Lah 516. Where the accused sent a letter to his creditor and insured it for a sum of money but when the addressee opened it he found blank sheet of paper within the envelope, *held*, that the accused was liable to be convicted under Section 415. 145 Ind Cas 671 : 34 Cr LJ 1020 : 14 PLT 48 : AIR 1933 Cal 514 : AIR 1933 Pat 183. Deceiving a woman by false representation as to status and receiving money is cheating. 61 PLR 1918 : 44 Ind Cas 351. An accused obtaining health certificate by false persuasion is guilty of cheating- 21 Cr LJ 478 : 56 Ind Cas 510. Where the accused promised to elevate a certain community to the position of *Kshatriyas* by investing its members with the sacred thread, *held*. that he was not guilty of cheating unless it was impossible for the members of the community to be classed as *Kshatriyas*. AIR 1925 Cal 603 : 26 Cr LJ 849 : 29 CWN 408 : 41 Cr LJ 172 : 86 Ind Cas 750. Where grant of loans and disbursement of money are directly dependent on the correctness or certificateness of certificates and recommendations of the accused, any false statement therein to the knowledge of the accused would amount to 'deception' within the meaning of Section 415. (1972) 38 Cut LT 879 : (1972) 1 Cut LR (Cri) 396 (408).

A contractor in the Public Works Department, who was charged cheating in respect of a sum of money which he received on account of work which he had not then finished, was acquitted on the ground that there was no proof, (1) that there was a false pretence made use by the accused, (2) that he knew he was making use of a false pretence or that he intended to defraud, (3) that the Public Works Department were deceived by the pretence as they believed in its truth, and (4) that the accused received the money with the intention of causing wrongful loss to the Government. 23 WR Cr 43. Purchasing of waste paper by Government servant under an assumed name is not an offence under this section, in the absence of any rules forbidding employees in the office from bidding an auction sales *held* by the Government. AWN 1892, 151 ; AWN 1903, 231. The selling of milk and water in about equal proportions as pure milk will support a finding of cheating under Section 415 of the I.P. Code. Rat Un Cr C 145.

Where there is no deception or dishonesty an offence under this section has not been committed simply because the accused made a false representation. 33 Cal 50 : 3 Cr LJ 244 ; 4 Bom LR 442. Cheating unaccompanied by delivery of property may be punished under Section 415 or Section 420 of the Penal Code, but if of a serious nature, the case should be sent to the Sessions Court. Rat Un Cr C 2. Where there is a concealment of fact, there is neither fraud nor dishonesty, unless there is duty imposed by law, as between the accused and the person with whom he is dealing, to make the fact known. 27 All 561 : AWN 1905, 18 : 2 ALJ 268 : 2 Cr LJ 218. A person making a false statement in respect of his place of residence, in order to facilitate his recruitment in a certain district, has not committed the offence contemplated by Section 177 or Section 182, I.P. Code, nor has he committed the offence of cheating under Section 415. 6 All 97 : AWN 1883, 224. If a vendor at the time of selling his immovable property, either makes a positive statement that the property is encumbered or dishonestly conceals the facts within his knowledge thinking that if he stated those facts the vendee would not buy, he can be convicted of cheating as defined in Section 415, I.P. Code. 3 PWR 1908 Cr : 101 PLR 1908 : 7 Cr LJ 273. Where a person instigates another to enter into a contract by a false statement of his own intention to fulfil its terms, he commits the offence of cheating, but mere non-fulfilment of the contract is no *prima facie* evidence even of an original intent to defraud. 15 CPLR 97 ; *see* also 10 CWN 1005 : 4

Cr LJ 154. The essence of the offence of cheating is a fraudulent or dishonest intention, and the act done towards the commission of the offence, which is requisite to establish the attempt to cheat, must be done within a fraudulent or dishonest intent. 19 Cal 380 : *see* also 1 ALJ 728 : 2 Cr LJ 788 ; Rat Un Cr C 470 ; 7 CLJ 375 : 12 CWN 750 : 38 PLR 1900, Cr ; 128 PLR 1903 : 25 PR 1903 Cr ; 9 PR 1884. Where a person purchased a stamp from a licenced vendor, representing himself to be another, the vendor entering the latter's name in the register, *held*, that he was not liable to be convicted of cheating. 16 PR 1876 ; AWN 1884, 87 ; 1 Weir 480. The ordering of goods on credit would amount to an offence of cheating under Section 415 only where there was an implied promise to pay and it is proved that the person so ordering had no reasonable expectation of being able to pay within a reasonable time. 56 Bom 204. The mere fact that at the time when the goods were ordered the accused was in embarrassed circumstances is not enough to justify the inference that the accused did not intend to pay for those goods; and that the statement that he would pay for them on a particular day was a deception. *Ibid.* Mere taking thumb impression on a blank piece of paper is not enough to prove an intention to use the paper dishonestly. AIR 1926 Pat 267 : 7 PLT 72 : 27 Cr LJ 609.

The petitioner proposed to the father of a girl for the hand of his daughter and obtained his consent and was admitted into his house. Subsequently information was received by the father that the petitioner was a married man ; this the petitioner admitted to be true. Shortly after the daughter who was major left the parent's protection of her own accord and went to the petitioner. On the complaint of the parents the petitioner was convicted of cheating under Section 417, I.P. Code. *Held*, that the facts did not bring the case within Section 417 read with Section 415, I.P. Code. 22 CWN 1001 : 28 CLJ 485 : 46 Ind Cas 701 : 19 Cr LJ 781. In a case of promise of marriage, subsequent cohabitation and pregnancy of the girl and the accused thereafter refusing to marry, the intention not to marry should be proved at the time when the promise was made. 1955 BLJR 17. Where a shop-keeper to whom currency notes are tendered in payment retain a small amount in depreciation of notes, no deceit is practised. 43 Bom LR 842 : 21 Bom LR 763 : 52 Ind Cas 604 : 20 Cr LJ 684. Sale of property without disclosing that the vendor had no right is an offence under this section. 17 ALJ 500 : 50 Ind Cas 667 : 20 Cr LJ 331. Where a minor borrowed money representing himself as a major during the continuance of his guardianship by his mother and after attaining the age of eighteen years and without the intention of repayment, he can be convicted under this section. 18 ALJ 407 : 59 Ind Cas 253 : 21 Cr LJ 749. To convict a person for cheating, it is necessary to show that there is a proximate connection decedition practised on the complainant and his being induced to part with some property. 21 ALJ 873 : 52 Cal 188 : 85 Ind Cas 641 : 26 Cr LJ 213. By means of wrong entries more wagons were sent to a colliery siding then it was entitled to *held*. this does not amount to "a delivery of property, so as to constitute offence of cheating." 28 CWN 160. Certain retail-dealer induced their creditors to give time and soon after vacation intervened and they removed the goods, *held*, they were guilty of cheating. 23 ALJ 433 : 26 Cr LJ 970. Where the judgment-debtor gave to the decree-holder as an accommodation a crossed cheque which was dishonoured, *held*. that the judgment-debtor was not guilty as he had no dishonest intention to cheat. AIR 1928 Oudh 292 : 29 Cr LJ 657. Where an applicant obtained an advance for the purchase of a motor car on its security but had already mortgaged it to another. the failure to disclose the mortgage a dishonest concealment of facts. AIR 1927 Rang 239 : 5 Rang

274 : 28 Cr LJ 765 : 103 Ind Cas 845. Where an accused advertised "*Gupta-Mantra*" by reading of which people would achieve their objects without doing any efforts whatsoever and offered a cash prize in case of the failure of the '*Mantra*", but on replying to the advertisement, the accused while sending the "*Mantra*" also sent instructions that were very difficult to be observed without great efforts and preparations. *Held*, that the accused was guilty of the offence of cheating. AIR 1938 Pat 18.

When a person is cheated by another, no new contract is substituted between the parties by the temporary fresh accommodation given to the offender as the result of negotiations to save his reputation in business and by the attempt to obtain sufficient security from him for the payment of money due from him. Such negotiations make no difference to his criminal liability for an offence which is not compoundable. 26 Cr LJ 1602 : 90 Ind Cas 706. Sending an insured letter containing *khilafat* bonds does not amount to cheating. 26 Cr LJ 209 : 83 Ind Cas 993 : AIR 1924 All 205.

Where the prosecutor himself knows the falsehood of the pretence of the accused, namely, that he could double currency notes given to him, but not withstanding that, he parts with the money, the accused cannot be convicted of the offence of cheating. But he would be guilty of attempting to cheat, 6 DLR (MB) 4 : 5 AI Cr D 51 : AIR 1951 MB 100 : 52 Cr LJ 644. Mere preparation is an indifferent act possessing no definite indication of criminality. (1952) 2 MLJ 771 : 1952 MWN Cr 259 : 1953 Cr LJ 1152 : AIR 1953 Mad 609. Halsbury's statement of law that 'the false pretence must be of a fact that exists or has existed does not apply to India. For false pretence in English law is narrower in its application that what is contemplated by 'cheating' in Section 415. A promise as to future conduct not intended to be kept is not by itself cheating under English law, but under the Penal Code this will amount to cheating, as is clear from a reading of illustrations (f) and (g) to Section 415. AIR 1960 All 103 : 1960 All Cr R 84 : 1960 Cr LJ 188.

The evidence of the prosecutrix that accused had sexual intercourse with her on promise to marry her and persistently making representation that he could not live without her company and when she became pregnant the accused made attempts to abort the child and thereafter refused to marry her is fully corroborated by other PWs in all material particulars. From this evidence it can be concluded that the accused never intended to marry the prosecutrix and as such the accused was rightly convicted under Section 417, IPC. *Badi Chinna Rao* v. *State*, 2004 Cr LJ 807 (AP) : 2003 (2) ALD (CRL) 622 : 2004 (1) Andh LT (Cri) AP 138.

Charge against manager of transport company for procuring petrol coupons by fraud was not proved in AIR 1957 SC 466 : 1957 Cr LJ 593. Accused forged the school certificate to get promotion was rightly convicted under Sections 417, 471. 1980 WLN 83 : 1980 Raj LW 96 : 1982 Cr LR (Mah) 467 (T. V. sold on one year guarantee, subsequently found defective—not a criminal offence but a civil liability). AIR 1970 SC 843 : 1970 Cr LJ 849 (in case of wagons with letter L/U endorsed, the railway did not incur further liability). There is difference between breach of contract and cheating. 1974 Cr LJ 352 : AIR 1974 SC 301. When a cheque issued to meet an antecedent liability the dishonouring of the cheque will not give ground for a prosecution of cheating. (1977) 4 Cr LJ 254. The accused represented to the complainant that he would had duplicate currency notes, complainant gave some currency notes feigning belief in the above false representation. The accused was found guilty of an offence to attempt to cheat. AIR 1960 SC 979 : 1960 Cr LJ 1383.

Damage or harms to be shown to have been caused to person deceived in order to constitute offence of cheating. *M/s. Sonbhadra Coke Products* v. State *of U.P.*, 1994 Cri LJ 657 (All).

14. Illustration (f).—Deceiving in Section 415 does not necessarily require that there should be any representation in words. A dishonest concealment of facts is a deception within the meaning of the section, where the concealment is of something while there is a duty to disclose. The deceit referred to in the section and the illustration may clearly be by conduct. The nature of the transaction itself may imply an assertion. 56 Bom 204 : A1R 1931 Bom 243. Proof of absolute impossibility of payment is not necessary. A conduct may know that except for a miracle he will not be able to pay. In such a case it can reasonably be said that he has no intention of paying, since he cannot be said to intend to do what he has no expection of being able to do. 56 Bom 204 : AIR 1932 Bom 273 : 33 Cr LJ 401.

15. Illustration (g).—At the time when agreement for sale was executed, it could have, in no event, been termed dishonest so as to hold that the complainants were cheated of the earnest money which they passed to the appellant as part consideration, when possession of the total land involved in the bargain was passed over to the complainant respondents, and which remains in their possession. Now, it is left to imagine who would be interested in delaying the matter in completing the bargain when admittedly the complainants have not performed their part in making full payment. The matter is, therefore, before the Civil Court in this respect. The liability, if any, arising by the breach thereof is civil in nature and not criminal. *Nageshwar Prasad Singh* v. *Narayan Singh*, 1999 Cri LJ 598 (SC) : AIR 1999 (SC) 1480 : 1998(5) SCC 694 : 1998(6) JT 414 : 1998(9) SLT 296.

16. Illustration (i)—The object of Explanation (1) to Section 3, T.P. Act, is to safeguard the interests of a third party who has acquired a good title under a previous registered instrument but it does not, in any way, alter or modify the criminal liability of a person who deliberately suppresses certain facts or mis-states certain forces. AIR 1954 Punj 31 : 1954 Cr LJ 299.

17. False representation.—When accused made false representation by promising respondent lady to marry and consequently she shared had together and become pregnant and subsequently accused petitioner refused to marry her, *prima facie* offence under Section 417, I.P.C., is made out. *Ravichandra* v. *Mariyammal*, 1992 Cri LJ 1675 (Mad).

These can be inferred from circumstances including conduct of accused. *Dhruwdeo Mishra* v. *State of Bihar*, 1991 (1) PLJR 121.

18. Bail.—When accused successfully acquired title over property through process of Civil Court by using forged document, he can not be granted bail. *Jagdish Prashad Sharma* v. *C.B.I.*, 1996 Cri LJ 946 (Del).

19. Quashing of proceedings.—Where there 'was advertisement of *Yoga* Training and false statement as to institution recognised. Charge of training Rs. 1,000/- offence of cheating was made out. Hence, proceedings cannot be quashed. *Swami Dhirendra*

Brahamachari v. *Shailendra Bhushan*, 1994 (2) Recent CR 473 : (1994) 1 Crimes 981 : (1994) 53 DLT 696 (Del).

There was dispute between landlord and tenant relating to breach of tenancy agreement. The landlord disconnected water and electricity supply of tenant. No case was made out by tenant that land lord had fraudulent intention of deceiving tenant at the time of entering into the transaction of lease. The withdrawal of facilities was in pursuant to failure of tenant to pay the rent. The facilities were withdrawn from June 95 but complaint was filed in September 96 *i.e.* after lapse of more than one year. It was held that cognizance taken was hit by Section 468 Cr PC and proceeding were quashed. *T.P. Amina* v. *Dr. P. Nalla Thampy Thera*, 2003 Cr JL 2945 (Ker) : 2003(4) All Cri LR 212.

20. Complainant not required to produce verbatim all ingredients of offence.—It is not necessary that a complainant should produce *verbatim* in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the complaint, is not the need at this stage. If factual foundation for the offence has been laid in the complaint, the Court should not hasten to quash criminal proceedings during investigation stages merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence. In *State of Haryana* v. *Bhajan Lal*, 1992 AIR SCW 237 : AIR 1992 (SC) 604 : 1990 Supp(3) SCR 259 : 1990(4) JT 650 : 1992 Cr LJ 527, the apex Court laid down the premise on which the FIR can be quashed in rare cases. The following observations made in the aforesaid decision are a sound reminder (Para 109 of AIR) :

"We also a give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice. *Rajesh Bajaj* v. *State of NCT of Delhi*, 1999 Cr LJ 1833 (SC) : AIR 1999 (SC) 1216 : 1999(3) SCC 259 : 1999(2) JT 112 : 1999(1) Scale 697 : 1999(2) Supreme 442.

21. Ingredients of offence.—Criminal breach of trust is defined in Section 405 of IPC. The ingredients of an offence of the criminal breach of trust are :

"1. Entrusting any person with property or with any dominion over property.

2. That person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or willfully suffering any other person so to do in violation—

    (i) of any direction of law prescribing the mode in which such trust is to be discharged, or

    (ii) of any legal contract made touching the discharge of such trust.

An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied :

"(i) deception of a person either by making a false or misleading representation or by other action or omission;

(ii) fraudulently or dishonestly inducing any person to deliver any property; or

(iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit."

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out.

We may reiterate that one of the ingredients of cheating as defined in Section 415 of the Indian Penal Code is existence of an intention of making initial promise or existence thereof from the very beginning of formation of contract. *S.V.L. Murthy vs. State*, AIR 2009 SC 2717 : 2009 (6) SCC 77 : 2009 CrLJ 3930 : 2009 (7) JT 385 : 2009 (7) SCR 784 : 2009 (6) Scale 758 : 2009 (4) Supreme 399.

22. Sections 415 and 420—Ingredients of offence of.—An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied : (i) deception of a person either by making a false or misleading representation or by other action or omission; (ii) fraudulently or dishonestly inducing any person to deliver any property; or (iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit."

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out. *Harmanpreet Singh Ahluwalia vs. State of Punjab*, 2009 (7) SCC 712 : 2009 CrLJ 3462 : 2009 (7) SCR 563 : 2009 (6) JT 375 : 2009 (7) Scale 85 : 2009 (4) SLT 341.

23. Cheques—Post dated.—The cheques were post dated ones. Admittedly they were issued in the year 1996. They were presented before the bank on a much later date. They were in fact presented only on 10.01.2001. When the cheques were issued, the accounts were operative. Even assuming that the account was closed subsequently the same would not mean that the appellant had an intention to cheat when the post-dated cheques were issued. Even otherwise the allegations made in the complaint petition, even if given face value and taken to be correct in its entirety do not disclose commission of an offence under Sec. 420 of the Indian Penal Code. They do not satisfy the ingredients of the suit provision. It is, therefore, in the fact situation obtaining in the instant case, difficult to hold that the provisions of Sec. 420 of the Indian Penal Code were attracted. *Subodh S. Salaskar v. Jayprakash M. Shah & Anr.*, AIR 2008 SC 3086 : 2008 (8) JT 637 (SC) : 2008 (11) Scale 42 (SC) : 2008 (7) SLT 127 : 2008 (8) SRJ 292 (SC) : 2008 CrLJ 3953 (SC) : 2008 (3) JCC 330 (NI) : 2008 (3) RecentCR 875 (SC).

24. Civil dispute—Quashing of complaint.—Indisputably, the parties entered into a contract in terms whereof the firm was to manufacture a machine to purify and desalt the dyes of a particular quality and quantity. The specifications for the machine were changed.

We may reiterate that one of the ingredients of cheating as defined in Section 415 of the Indian Penal Code is existence of an intention of making initial promise or existence thereof from the very beginning of formation of contract.

An offence of cheating may consist of two classes of cases :

(1) Where the complainant has been induced fraudulently or dishonestly. Such is not the case here;

(2) When by reason of such deception, the complainant has not done or omitted to do anything which he would not do or omit to do if he was not deceived or induced by the accused.

It is in that sense, a distinction between a mere breach of contract and the offence of cheating should be borne in mind. We, having regard to the facts and circumstances of the case, are of the opinion that no case has been made out and against the appellant so as to hold that he should face the criminal trial.

No exception can be taken to the aforementioned principles of law, as therein also it has categorically been held that exercise of inherent power under Section 482 is permissible where allegations set out in the complaint do not constitute the offence for which cognizance has been taken by the Magistrate. It is evidently a case of that nature.

For the reasons aforementioned, the judgment of the High Court cannot be sustained. It is set aside accordingly. Criminal proceedings against the appellants are quashed. The appeal is allowed. *V.Y. Jose vs. State of Gujarat*, 2009 (3) SCC 78 : 2008 (16) Scale 167 : 2008 (17) SCR 588 : 2009 (1) SLT 535.

* * * * *

Sec. 416. Cheating by personation.—A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

Illustrations

(a) *A* cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(b) A cheats by pretending to *B*. a person who is deceased. A cheats by personation.

Comments

Scope.—"Where there is cheating and it is effected by any of the following deceptions, the offence will, it seems, amount to cheating by personation. *First* by pretending to be some other person :—as if *A* pretends to be a certain rich banker of the same name. *Secondly*, by taking a name not his own ;—as if *A* pretends to be *B*. *a* person who is deceased. *Thirdly*, by taking a title or addition to which he has no right :—as if *A* takes the title of *Raja* having no right to the title. *Fourthly*, by pretending to be of a country of which he is not;—as if *A*, an East Indian pretends to be an African. *Fifthly*, by pretending to be of a calling of which he is not ;—as if *A* falsely pretends to be a elegyman. *Sixthly*, by pretending to be of a family of which he is not ;—as if *A* pretends *S* to be a member of one of the Sovereign Houses of India. *Seventhly*, by falsely pretending to hold or to have *held* any office, real or imaginary. *Eighthly*, by falsely pretending to be related by blood or marriage to any person real or imaginary ;—as if *A* falsely pretends to be married to *B*, *an* hiress. *Ninthly*, by falsely pretending to be in the employ of any person, real or imaginary ;—as If *A* falsely pretends to be the agent of a great commercial house in Europe, or to be the *vakil* of a native prince, *etc*. There may be personation without any false pretence made in word".—*Morgan and Macpherson*, 385. Where an accused, pretending to be certain candidate for an examination, forges answers papers purporting to be answered by such candidate, he is guilty of both cheating and forgery, and the fact that such candidate has failed miserably in other papers answered by himself does not affect the guilt of the accused. 40 CWN 956 : AJR 1936 Cal 403.

A person represented a girl to be the daughter of one woman, when she was, within his knowledge the daughter of another woman, *held*, that he was guilty of cheating by personation. 7 WR Cr 51 ; *see* also 16 WR Cr 42 ; AWN 1832, 236 ; 7 WR C 55. Where accused, falsely representing himself as a bachelor, was admitted into the house of complainant as a prospective husband of complainant's daughter, but before marriage, he was discovered a married man and nevertheless the girl went away with him, *held*, that the accused could not be convicted under the Section 417 IPC 19 Cr LJ 781 : 22 CWN 1001 : 28 Cr LJ 485 : 46 Ind Cas 70l.

Four students, who were entitled to travel at a reduced rate, were mentioned in a certificate which was properly signed by the proper authority and endorsed by the Railway Company. The accused, who was not one of the four was also entitled to travel at the reduced rate, as a student, and there is no rule prohibiting the transfer of a student's ticket. On the presentation by the accused; of the endorsed certificate containing the names of 4 persons eligible for concession tickets, the Railway Company issued a pass for passenger tickets and arrested the accused who was convicted. *Held*, that the conviction was bad, as it cannot be assumed that the accused intended to use the pass for persons who were not entitled to travel at the reduced rates. 7 MLT 201 : 5 Ind Cas 793 : 11 Cr LJ 339 : 1910 MWN 510 ; *see* also 1957 All LJ 491 : 1957 All WR (HC) 456.

As Section 416 itself mentions, it is not necessary for the prosecution to make out when the accused has been personating, for the one personated may be imaginary or non-existing or unknown. AIR 1960 AP 441 : 1960 Cr LJ 1181 : AIR 1961 All 639 : 1961 (2) Cr LJ 759.

Mere personation is not an offence. 1973 MPLJ 129 : 1973 Cr LJ 877. In order to come within the scope of this section, all the ingredients of Section 415 must be present. AIR 1974 SC 1811 : 1974 Cr LJ 1261 ; AIR 1967 All 123 ; 1978 Cal HCN 1039 ; 1979 Cr LJ (NOC) 228 (the person deceived was induced by such deception to deliver property or otherwise to act his own detriment) ; 1981 Cr LJ 1179 (message by phonogram to boycott election).

The accused was charged with the offence of cheating by impersonation. The accused had induced engineers concerned to give appointments to certain candidates by representing to them that he was brother of Minister and also by producing forged letters purporting to have been written by the Minister. *Held*, that evidence on record clearly made out a case of cheating by impersonation defined under Section 416 and punishable under Section 419. 1987 Cri LJ 933 (All).

Offences such as cheating by personation *etc.* under Section 416, 420, 471 and 464, IPC are incapable of being committed by body corporate one of the ingredients of these offences is either fraudulent or dishonest intention. Same cannot be attributed to body corporate. *State Bank of Hyderabad* v. *Smt. T. Meenakshi*, 2004 Cr LJ (NOC) 245 (AP) : 2004(1) ALD (CRI) 206 : 2004 (3) All Cri LR 174.

* * * * *

Sec. 417. Punishment for cheating.—Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Synopsis

1. Scope and applicability 2678
2. Illega; Contract 2684
3. Procedure 2684
4. Charge 2684
5. Sentence 2684
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1. Scope and applicability—An offence under Section 420 is more serious than that under this section. 25 Cr LJ 1193 : AIR 1925 Mad 367. Where a person advertising goods praised them unduly and as a person who purchased them found they were of inferior stuff no prosecution for cheating is maintainable. 29 CWN 362 : 86 Ind Cas 985 : 27 Cr LJ 921. Where all that ist had is a blank piece of paper with thumb-impression upon it and there is no writing in the paper it is hardly sufficient to show a dishonest intention and there is no cheating. 27 Cr LJ 609 : 7 Pat LT 772. To satisfy the definition of cheating there must be immediate caution and the act itself must involve the probability. 51 MLJ 800. Person inducing another to give on credit certain articles but not intending to pay for them is guilty under Section 420 and not under section. AIR 1928 Lah 935. Where in pursuance of the deception, no property passes, the offence is one of cheating punishable under Section 417, but where in pursuance of deception, property is delivered, the offence is punishable under Section 420. *Anitesh* v. *State*, AIR 1951 Assam 122 : 52 Cr LJ 1222.

A mere breach of contract cannot give rise to criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement. Where there is no clear and conclusive evidence of criminal intention of the accused at the time the offence is said to be committed and the aggrieved has an alternative remedy in a civil Court the matter should not be allowed to be fought in a Criminal Court. AIR 1959 Trip 40 : 1959 Cr LJ 1216.

An offence under Section 417 can be said to be committed both where the accused delivered some one and induced him to deliver a certain property to him by fraudulent or dishonest representation as also where the person deceived is proved to have done something which he was not bound to do, on a fraudulent or dishonest inducement by the accused as such an act caused or was likely to cause damage or harm in body, mind reputation or property of the person on whom the deception was practised. ILR (1963) 13 Raj 928 : 1963 Raj LW 416.

Where the accused made an offer to mortgage his property in order to pay off his creditors and thus averted institution of a suit against him, but subsequently would not complete the transaction unless a certain amount not originally stipulated were paid, *held*, that as the accused had no intention, under the circumstances of the case, to cheat at the time when the promise was made he was not guilty of the offence of cheating. 9 BHC 448. If the creditor by a trick induces his debtor to pay him money less than what is actually due to him in full settlement of the account, and then refuses to abide by the agreement, it is doubtful whether his act would amount to cheating. 25 PWR 1913 Cr : 14 Cr LJ 524 : 20 Ind Cas 1004 : 327 PLR 1913. Where a *key dangyi*, who had no authority to collect capitation tax, collected the tax, from three separate tax payers, leading them to believe that he had authority from the *thugyi* to collect, and whereafter collection he paid over to the *thugyi* only a portion of his collection from each tax payer and dishonestly misappropriated the remainder. *Held*, that he was guilty under Section 417. I.P. Code. LBR (1872-1892), 492.

Where a person, who has been previously convicted is charged and convicted subsequently, under Section 417, *held*, that he is not liable to enhanced sentence under Section 75 as the offence under Section 417 is not punishable with three years' imprisonment or upwards. 19 PR 1889 Cr. A person can be convicted for the sale of a girl for marriage on mis-representation as to her caste. Book Cir 25 of 1865 (Oudh). In order to convict a person under this section, mere illegal demand is not sufficient, but fradulent intention must be proved. 15 Cr LJ 512 : 13 Cr LJ 512 : 15 Ind Cas 656. Mere sending bogus insured letter is not cheating. AIR 1938 Sind 193. In the above case *Davis, J.C.*, observed "Indeed, even if reliance be placed upon cases decided by the Patna High Court, which is the only Court, which it can be said, takes the view that a conviction such as this can be sustained, reference to the latest judgment of that Court. AIR 1933 Pat 183, will show that in the judgment of the Judges in that case previous judgment of that Court in 1 Pat LJ 391 : 34 Ind Cas 992 : 17 Cr LJ 272 was wrong and misled other Court. But it appears to me, with all respect to the learned Judge's of the Patna High Court, who decided the case in AIR 1933 Pat 183 : 14 PLT 48 : 145 Ind Cas 671 that the view taken by the Allahabad High Court in AIR 1924 All 205 : 83 Ind Cas 993 : 21 ALJ 865 : 26 Cr LJ 209, by Calcutta High Court in 50 Cal 849 : 73 Ind Cas 780 : 24 Cr LJ 684 : 28 CWN 252 and by the Madras High Court in 28 Cr LJ 70 : AIR 1927 Mad 199 : 99 Ind Cas 102 : 59 MLJ 800 is the better view and that whatever offence may be committed when a bogus insured cover is sent through the post, the offence of cheating the addresses within the provisions of Section 417, I.P. Code, is not committed and I think this is clear from the words of Section 415, I.P. Code, itself.

It is clear from the words of Section 415 that mere deceit of a person is not sufficient. The mere doing something fraudulently or dishonestly is not sufficient. The deceit of the fraudulent or dishonest person must induce the person deceived to deliver some property, or to consent that some property shall be retained, or intentionall induce the person deceived to do or omit to do something which he would not otherwis do or omit to do, and these words are important, and which act or omission causes o likely to cause damages or harm to that person in body, mind, reputation or property But when the section says which act or omission causes or likely to cause damage o harm to that person in body, mind, reputation or property' it appears to me, it clearl means—Which act or omission in itself cause or is likely to cause damage or harm t that person in body mind, reputation or property and that if that damage or harm i dependent upon the future act of some other person, then such damage or harm is to remote to be within the provisions of the section, which contemplates that the act don is in itself likely to cause damage or harm and which is not dependent for damage o harm upon the entirely problematical action of some other person. To use a trite phras the act done or omitted to be done must be the *causa causaus* of the harm caused o likely to be cause. This interpretation of the section is strongly supported and clearl put in the Calcutta and Madras cases and also in the Allahabad case to which I sha refer".

In a suit for pre-emption, a consent decree was passed on plaintiffs agreeing to pa a certain sum in cash and to discharge a prior incumbrance. The plaintiff subsequentl discovered that the defendant, the vendor, had, after the purchase but before the suit mortgaged the property. But there was no evidence to show that the plaintiff would no have consented to pay the consideration, he had been aware of the charge created b the vendee. *Held*, that there was no obligation on the vendee to disclose the existence o the mortgages, and that consequently, his omission to do so would not constitute th offence of cheating. 27 All 302 : AWN 1904, 205 :1 CLJ 1044. Using false name wit intent to defraud postal authorities is an offence under this section. 13 M 27 : 1 Wei 545. If an accused person writes a letter to the Registrar of the University for duplicate Matriculation certificate, falsely signing the name of another person wh really passed the examination, he cannot be convicted under this section, inasmuch a there is nothing to show that the deception practised on the Registrar caused harm o damage, to the Registrar of the University which he represents. 25 M 726 : 1 Weir 481 12 MLJ 68.

Where a person is convicted of cheating by inducing the persons deceived to do an of the acts described in Section 415, but not specified in Section 420, the offence i punishable under Section 417. 4 Bom LR 76. Cheating unaccompanied by delivery o property is an offence under Section 417. Where accompanied by delivery of property the offence is punishable under Section 420. Rat Un Cr C 96. The accused, a prostitute was charged under Section 269, I.P. Code with communicating syphillis to a perso who had sexual intercourse with her. *Held*, that she was not punishable under th section. *Held*, also that if there was an offence in the case, it was one of cheatin punishable under Section 417 or Section 420, if there was evidence that the intercours was induced by misrepresentation on the part of the deceased person. 11 Bom 59. licensed opium-vendor commits the offence of cheating, if he sells opium at rates highe than those fixed by the Government. 4 Bom LR 823. Selling liquor by fraudulen measure is also an offence under this section. Rat Un Cr C 336. But selling rice at higher rate than that agreed upon with the seller vendor is not an offence under this section. 22 WR Cr 82. Whatever offence of cheating may be committed when a bogu insured cover is sent through the post, the offence of cheating the addressee within the provisions of this section is not committed. AIR 1938 Sind 193 : 40 Cr LJ 61.

Where a person purports to send Rs. 400 under an insured cover but the cover, when opened before postal authorities delivering it, is found to contain currency notes of only Rs. 130 and it is established that he had actually sent Rs. 130 instead of Rs. 400 as shown by the cover. *Held*, that he was guilty of an offence of cheating and not of an attempt to cheat as the act of signing the acknowledgment and the consequent misuse of the acknowledgment by the person was likely to cause embarrassment and even actual danger or harm to the complainant in mind and property. AIR 1950 All 609 ; AIR 1948 All 433. Where a person gives a false name and address to a Sanitary Inspector in order to shield himself from protection for an offence, he cannot be convicted of cheating. Rat Un Cr C 635 : Cr Reg. 10 of 1893. A coolie recruiter induced the complainant to come to the depot promising him domestic service, and entered his name in the books of the depot. He wrote a letter to a coolie contractor in Calcutta offering the complainant as a coolie. *Held*, that the acts of the accused amounted to an attempt to cheat. 9 CWN 764 : 2 Cr LJ 422. But including another by false representation to withdraw a criminal charge is not an offence under this section. 1 Weir 437. In a proceeding under Section 107, Cr. Pro. Code, the opposite party undertook not to go to the property, the subject-matter in dispute, or to do any act which was likely to involve a breach of the peace, on the pleader for the complainant agreeing to persuade complainant's master to file an undertaking that he would protect the property from sale. The undertaking which the latter offered to file not having been proved by the opposite party was not filed, whereupon the opposite party started proceedings against the pleader under Section 417 of the Penal Code. *Held*, that the proceedings should be quashed as no *prima facie* case of cheating had been made out. 20 CWN 1112. The accused in this case was sued by the complainants for Rs. 650. In order to create evidence that he paid Rs. 650, the accused filled a registered envelope with blank sheets of paper and posted it to the complainants after insuring it for Rs. 650. The complainant gave an acknowledgment receipt to the post office.

Held, that the above facts did not amount to a complete offence of cheating but that they amounted to an attempt to cheat. 1 Pat LJ 391 : 17 Cr LJ 272 : 34 Ind Cas 992 ; 50 Cal 849 : 28 CWN 252 : 73 Ind Cas 780 : 21 ALJ 865. An offence to cheat is to be framed where the accused sending packet containing newspaper cuttings insured for amount due from him to complainant wants to use it as evidence for discharge of his debts. (1961) 30 JD 354 : 27 Cut LJ 446. But in a case where in sending the insured covers by post the accused declare that covers contained certain amount but was found to contain blank pieces of paper, *held* that though there was preparation to cheat some body there was no attempt to cheat any one and as such no offence under Section 477/511 was established. 59 CWN (7 DR) 1. Accused lent a sum of money to the complainant who executed a bond. He also gave the Complainant a *kamaiti poroha* in respect of his homestead land. After some years, the complainant paid the money back to accused, but the latter refused to return the bond until the *kamaiti poroha* was returned to him. 2 Pat LT 211 : 59 Ind Cas 921 : 22 Cr LJ 164. Taking complainant to another village on pretence of buying a buffalo and obtaining deed of divorce in intoxication does not constitute an offence under this section. 3 LLJ 283. A cheque issued at Gaya was dishonoured by the Bank of Calcutta and the fact of such dishonouring reached the complainant at *Butani, held*, a prosecution could be initiated at *Gaya, Butani* or *Calcutta*. 25 Cr LJ 81 : 76 Ind Cas 17. Giving a cheque in payment of debt amounts to a representation that the drawer has authority to draw that amount, that the cheque is a valid order for payment and that it will be paid, but does not amount to representation that he has money at the Bank to that amount at that time. Prosecution has to prove that the failure to meet the cheque was not accidental but was a consequence expected and intended by the accused. AIR 1930 Bom 179 : 32 Bom LR 562 : 126 Ind Cas 868. Giving a post-dated cheque by a person having no funds in bank does not amount to an offence of cheating when there is no evidence to show that the person to whom the cheque was given parted with any property or that he did or omitted to do anything which he would not have done or omitted to do if he had known that the cheque would be dishonoured. The dispute in such a case is of a civil nature. AIR 1940 Lah 93 : 41 Cr LJ 594. But in a Madras case, it has been *held* that a post-dated cheque in payment of goods already received is a mere promise to pay on a future date, as such a broken promise is not a criminal offence, though it may amount in certain business relations discreditable behaviour. AIR 1938 Mad 129 : 39 Cr LJ 261. The charge under Section 408 is not compoundable and even where the accused makes some promise and the case is dropped, the promise would not be enforceable and it would always be open to the complainant to have the case revived if the Magistrate is so disposed. Hence, in such a case, the accused cannot be prosecuted for cheating under Section 417 for having induced the complainant to compromise the case. AIR 1943 Cal 41 : 43 Cr LJ 926. The accused advertised *"Gupta Mantra"* by reading which people would achieve desired object without any hardship or effort on their part. The accused advertised a cash prize in case it was proved fallible. A person replied the advertisement, got in return the alleged *Mantra* along with certain instructions for example, looking at the moon for fifteen minutes without winking, a beat which, if not impossible, at any rate is beyond the powers of ordinary human being except by long training and preparation. Thus the instructions were contrary to the claim made in the advertisement and could not be observed without great effort and preparation. *Held*, that the accused was guilty of cheating. AIR 1938 Pat 185 : 39 Cr LJ 442 : 174 IC 635. Where a person obtains by deception from his creditor a document which is likely to facilitate the evasion of payment by the debtor, he commits an offence under this section. AIR 1933 Pat 183 : 34 Cr LJ 1020 : 145 Ind Cas 67 : 14 Pat LT 48. Where the mortgagor assured the mortgagee that the property was free from encumbrance and that there was no defect or dispute as regards title but it subsequently transpired that the mortgagor had previously executed *a farzi* deed of sale but he continued to remain in possession: *Held*, that on those facts the mortgagor was not liable to be convicted for the offence of cheating as the prior sale was merely *a farzi* deed. 9 Pat LT 303 : 110 Ind Cas 332 : 29 Cr LJ 700 : AIR 1929 Pat 337. Where dishonest intention of accused persons is not proved, the conviction under Section 417 is bad. 1964 (1) Cr LJ 186 : AIR 1964 Cal 64.

In view of the relationship between a customer and a banker, where a banker refused to cash a cheque on the ground that the funds drawn against had not been received it is not possible in such circumstances to make out a case under Section 417, I.P. Code, against the banker. 1951 AWR (HC) 85 : 6 DLR (A) 24 : 5 AI Cr D 53 : 1950 ALJ 808.

A sentence of one year's rigorous imprisonment and fine with further rigorous imprisonment for 4 months in default of payment of it is perfectly legal under Section 402, I.P. Code. But where the finding of the offence is altered in the Appellate Court into one of attempting to cheat, punishable under Sections 417 and 511, read together, the same sentence is illegal because the longest them of imprisonment that could be imposed substantially under the two sections is six months and the largest that could be imposed in default of payment of fine is a month and a half. 106 Ind Cas 678 : 29 Cr LJ 86 : AIR 1928 Nag 113. An attempt to commit an offence is punishable under Section 511 though the final act short of actual commission of that offence has not been accomplished. 29 Cr LJ 780 : A1R 1928 Lah 551; *see* also 11 Lah LJ 95. Where there is no allegation of misrepresentation, an accused cannot be convicted under this section. 10 Lah LJ 301.

In cases where there is delivery of property on account of cheating, the section that specifically provides for it *viz.*, Section 420 ought to be made use of Section 417 with provides for punishment for cheating *simpliciter* ought to be used for those cases of cheating as defined in Section 415 in which the victim has not be induced to deliver any property. 1977 Cr LJ (NOC) 259 : 1977 Mad LW (Cr) 26. *A* submitted false claims to Government and obtained payment in respect of works not carried out by him. It was *held* that he was guilty under Section 420 and not under this section. AIR 1967 SC 752 : 1967 Cr LJ 656.

When accused by producing forged school certificate procured his appointment as peon, he is guilty of offence under Section 417. I.P.C. only. *Tej Singh* v. *State (Delhi Admn.)*, 1991 JCC 205 (Del).

When accused had stated before marriage that girl was hale and hearty, then merely because sometime after marriage girl's eye-sight was found slightly weak or she had urinary infection, no offence is made out. *Anil Chandra Pitambardas Sagar* v. *Rajesh Harjivandas Jhaveri*, 1991 Cri LJ 487 (Bom).

When accused abandoned the lady after four days of alleged marriage with her, it is only breach of promise which can be challenged under matrimonial laws or for damages for breach of agreement. No offence under Section 417. I.P.C. is made out. *Durga* v. *Viswanathan*, 1994 MLJ (Cri) 617.

Where accused promised to marry petitioner and he married her but after four days left her. No evidence of offence under Section 417 as according to promise the acccused married her though not maintained her after four days. There was nothing to show inention of cheating by accused. Evidence of petitioner did establish the offence as charged. Examination of investigating will not improve prosecution case. Finally, it was *held* that lower Court rightly exercised jurisdiction under Section 258, Cr. P.C., in acquitting accused. *Durga* v. *Viswanathan*, 1994 MLJ (Cri) 617.

Complainant a stockist of goods of a firm declined to continue as such. Hence, he asked accused persons to take-back unsold goods and make payment thereof. Criminal liability was not *held*. It is pure and simple civil liability and thus complaint under Section 417, I.P.C., not maintainable. *Suresh Chand Bansal* v. *Vishwa Ranjan*, 1994 ACC 232 (All).

The accused on false promise of marriage committed sexual intercourse with prosecutrix and persistently told the prosecutrix that he could not live without her company. When she became pregnant accused tried to abort the child. It showed that he never intended to marry her and his conviction under Section 417 was held proper. *Bada China Rao* v. *State*, 2004 Cr LJ 807 : 2003(2) ALD (CRI) 622 : 2004(1) Rec Cri R 1018.

2. Illegal Contract.—When a person enters into an illegal contract, he cannot complain of cheating against the other party for not fulfilling the obligation. The penal provision is not meant for such person. In the instant case, the offence alleged against the petitioners, were cheating and entering into conspiracy to cheat. The basic allegation was that the accused promised to pay or deposit a some of Rs. 40,000/- to the complainant for his withdrawal of candidature from the election and thereafter resiled from the same by not paying it in spite of the complainant fulfilling his part of agreement, *viz*, withdrawal from the contest. The Hon'ble Court observed that "As such, on the very allegation found in the complaint and speaking to the same in the sworn statement and as the complainant has admitted in clear terms that he withdrew his candidature from contest only after he entered into an agreement with the petitioner who had promised him to pay a certain amount for such withdrawal. This agreement, in my view, is not only an illegal agreement or contract, but also opposed to public policy, such agreement is illegal and unenforceable under the law. Even if the part of the agreement is realised by the other side, the complainant cannot allege the offence of cheating by the other side" – 2000 Cri LJ 4216 (Kant).

3. Procedure.—Not cognizable—Warrant—Bailable—Compoundable with permission of the Court—Triable by any Magistrate.

4. Charge.—I (*name and office of the Sessions Judge, etc.*) hereby charge you (*name of the accused*) as follows :

That on or about the .... day of .... at ....you cheated *A.B.* by deceiving him fraudulently (or dishonestly induced him) for deliver some property, to wit............. [or induced him to consent to the retention of some property, or wit .... by you (or C.D.)] [or by intentionally inducing the said *A.B.* to do (or omit to do) something, to wit ....which the said *A.B.* would not do (or omit to do) if he were not so deceived, which caused him (or was likely to cause him) damage (or harm in body, mind, reputation or property)] : and that you thereby committed the offence punishable under Section 417 (or Section 420) of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

In case of cheating, the charge must set out the manner in which the offence was committed. AIR 1977 SC 2433 : 1978 Cr LJ 189. Accused cannot be charged for more than three items of cheating and for a period beyond one year unless it can be shown that the deception alleged are so connected as to form the same transaction. 1969 Cr LJ 1203 : AIR 1969 All 487.

5. Sentence.—Where an accused's connection with specific offence of cheating is only through conspiracy and he was sentenced for conspiracy, an additional sentence for cheating should not be passed. AIR 1939 Cal 376 : 41 Cr LJ 255.

Where there was second marriage and accused was falsely showed himself a C.B.I. Officer. Conviction order passed, benefit of probation was not to be given. He was fully mature and knowing the consequences and nature of the act. *Krishan Kumar* v. *State of Punjab*, (1994) 1 Recent CR 148 (P&H).

When agency terminated by complainant, liability in regard to goods unsold is civil liability and no complaint under Section 417 IPC, is maintainable. *Suresh Chand Bansal* v. *Vishwa Ranjan*, 1994 ACC 232 (All).

6. False promise to marry.—Where the prosecution can establish the essential ingredients of cheating u/S. 415, IPC and where the accused dishonestly inducing woman to have sexual intercourse with him on the basis of false promise to marry her, case of simple cheating under S. 417 of Penal Code could be said to be made out.

Per I.A. Ansari, J. The ingredients of the offence of cheating require (i) deception of a person, (ii) whereby, fraudulently or dishonestly, inducing the person, so deceived, to deliver any property to any person or to consent that any person shall retain any property, or (iii) intentionally inducing that person to do or omit to do anything, which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. Deception of a person is common to the second and third requirements of the provisions of S. 415. The ingredients, as pointed out under (i) and (ii) herein before, are alternative to each other and this is made significantly clear by use of disjunctive conjunction 'or'. The definition of the offence of cheating embraces cases in which no transfer of property is occasioned by the deception and also cases in which such a transfer occurs. Deception is the quintessence of the offence. When an accused makes a false promise to marry, which he never intends to carry out, and induces thereby the victim, so deceived, to have with him sexual act, which the victim would not have indulged in or permitted, had she not been induced by such deception and, when such act of having sexual intercourse by her with the accused causes, or is likely to cause, damage or harm to her body, mind or reputation, the act of the accused would amount to cheating. Thus, when a woman is induced to part with her chastity or virginity, which is the most valued possession of hers, the person, who so induces the woman by making false representation, would be liable for punishment under S. 417, IPC if the victim's having sexual intercourse, with such a person, causes or is likely to cause harm to her body, mind or reputation, for, in such a case, unless so deceived, the victim would not have permitted sexual act by the accused. *Bipul Medhi and etc. v. State of Assam*, 2008 CriLJ 1099 (Gau).

* * * * *

Sec. 418. Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.—Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person who interest in the transaction to which the cheating relates, he was found either by law or by legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Synopsis

1. Scope 2686
2. Procedure 2686
3. Charge 2686

1. Scope.—"The aggravated form of cheating which is punished by this section is committed when the person who cheats stands in some relation of trust or confidence to the person cheated either as a clerk, servant or agent generally, or as a person employed on a particular occasion only, as a broker employed to buy or sell certain goods, as auctioner employed to sell property, *etc.* Whoever undertakes to act as the agent of another person, whatever may be the nature of the agency, bound by law to protect within the scope of such agency his employer's interests. Cheats by persons like diose who are punished when their offence amounts to the breach of trust by Sections 407, 408 and 409 appear to be within this section. The deception must not be only intentional, but also with the knowledge that it is likely to cause wrongful loss."—*Morgan and Macpherson*, 386. Where the directors, the manager and the accountant of a Bank, intending to defraud the share-holders, knowingly put forward false balance sheets, so that depositors were induced to allow their money to remain in deposit, *held*, that they were guilty of cheating under Section 418, I.P. Code. 16 All 88 : AWN 1894, 23. Where general effect of statements, which are literally true is to create a false impression. *Held*, that the statement were nonetheless fraudulent. 5 SLR 95. Representation by Mahommedan that he is a Hindu with an object of securing service is an offence under this section. 18 SLR 59 : 28 Cr LJ 312 : AIR 1925 Sind 57 : 81 Ind Cas 309.

Taking sugar from the co-operative society on misrepresentation for distribution to persons within the circle of *Nyaya Panchayat*. The society was not itself cheated and so no prosecution under Section 418, I.P. Code. 1973 AWR 577 ; 1983 All Cr LR 333 (no misappropriation by the Bank in the facts and circumstances of the case).

2. Procedure.—Not cognizable—Warrant—Bailable—Compoundable with permission of the Court—Triable by any Magistrate.

3. Charge.—I (*name and office of the Magistrate, etc.)* hereby charge you (*name of the accused) as* follows :

That on or about the ....day of ....at ....you cheated *A.B.* by .... *(specify the act constituting the offence)* with the knowledge that you were thereby likely to cause wrongful loss to the said *A.B.* whose interest in the transaction to which the cheating related you were bound either by law (or a legal contract, and that you thereby committed an offence punishable under Section 418 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 419. Punishment for cheating by personation.—Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.

Synopsis

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1. Cases.—Where a person falsely personally caused a Registrar to register a fictitious divorce, whereby he personated person purported to divorce his wife, *held*, that the registering the deed did not or was not likely to cause damage or harm to the Registrar, in body, mind, reputation or property, and therefore, the accused was not guilty of an offence under Section 419 of the Code. 17 Cal 606. A person cannot be convicted of an offence under this section, for disposing of a girl representing her to be of a caste different from that to which she belongs. 149 PLR 1903 ; 13 PR Cr : 1 Cr LJ 949 ; 17 PR 1903. Where it was not proved that the accused, who was travelling with a forged pass, showed the pass at any time to a Ticket Examiner or any other Railway Official before the completion of the journey, and where the charge was laid under Section 419, I.P. Code, and Section 112, Railways Act, *held*, that she could not be convicted of cheating by personation under Section 419, I.P. Code. 12 Cr LJ 406 : 11 Ind Cas 590 : 12 MLJ 748. Attempt to get reinstated in *Kurnam's* post by the production of a false certificate does not cause "harm" or "damage" within the meaning of Section 415, to the officer before whom the certificate is produced ; and so conviction under Sections 419 and 511, *held*, illegal. 4 MLT 324 : 19 MLJ 271 : 8 Cr LJ 421. Where the accused was found to have knowingly represented one *J.*, to be *B*, the mother of a *sepoy* named *K* who had been killed, and thereby induced the military authorities to grant a person to *J*, to which she was not entitled, it was *held* that the accused had committed the offence of cheating, punishable under this section. AWN 1907, 291 : 3 MLT 61 : 6 Cr LJ 426. An offence under this section is committed where a low class *Brahmin* representing himself as a high class *Brahmin* induces complainant to give her daughter in marriage to him. ILR (1937) 2 Cal 221 : 168 Ind Cas 708 : 38 Cr LJ 577 : 41 CWN 540 : AIR 1937 Cal 214 (FB). Accused pretended to be one S.C., a candidate for the B.A. examination of the Calcutta University, in the examination hall and wrote answer papers purporting to be answers by S.C. intending that they shall be treated as those written by S.C. *Held*, that he has committed an offence under this section. 165 Ind Cas 505 : 37 Cr LJ 1156 : 40 CWN 956 : AIR 1936 Cal 403 ; 1962 Raj LW 263 (fact that the accused knew that person encashing the certificates was personating the real holder of the certificate) ; AIR 1957 Andh Pra 4 : 1956 Cr LJ 44 (accused using Railway Season ticket of another person pretending to be another person). Where long after an alleged offence of cheating by personation has been committed, a person marks false statement in order to support the false personation, he cannot be convicted under Section 419 and Section 109, I.P. Code. 156 Ind Cas 914 : 36 Cr LJ 1031 : 1935 A Cr C 115 : 1935 Cr C 592 : AIR 1935 All 566. But where there is no intention to defraud, no offence under this section has been committed. 32 Cal 775 : 9 CWN 807 : 2 Cr LJ 368 : 1 Cr LJ 469. The accused wished to pass a stolen note and, in order to escape detection, gave his name falsely, when he was asked by the shop-keeper, after he has cashed the note, to give his name. The shop-keeper did not know either of the men and admitted that the men made no offence. *Held*, that the accused was either guilty of cheating by personation or of cheating. 1 Weir 479. Where a person belonging to a certain caste, whose enlistment in the police force was prohibited, representing himself to be a member of another caste, got a Government appointment in the Police Department, *held*. that the accused was not guilty of the offence of cheating by personation, but might be guilty of an offence under Section 182, I.P. Code. 14 PR 1880 Cr. A Mahommedan who pretends to be a Hindu in order to get a job under a Hindu who would not employ a Mahommedan is guilty under this section. 25 Cr LJ 789 : 81 Ind Cas 309. Taking into account of previous convictions for theft and burglary to increase sentence for an offence under Section 419 seems anomalous. AIR 1927 Lah 220 : 28 Cr LJ 312 : 100 Ind Cas 536.

Injury is not a necessary element of fraud in the Penal Code so that in order to sustain a conviction for forgery, no injury need be established. ILR (1960) 2 Punj 424.

American national, pretended to be a British natural and gained entry by case of a forged passport was *held* to be guilty under this section. AIR 1968 Mad 348 : 1968 Cr LJ 1282 ; the individual personated need not be a real person. AIR 1960 AP 441 : 1960 Cr LJ 1181 ; 1969 Mad LW (Cr) 252. (representing to be other than what he really is).

When loan was secured from Bank on joint land and re-paid, no charge on joint land subsisted for complaint. *Om Prakash* v. *State of Haryana*, 1992 (2) CC Cases 385 (P&H).

When Magistrate was charged petitioners for offence under Secs. 420, 467, 468 & 120-B, IPC, Petition under Section 482, CrPC for quashing the F.I.R. and summoning order. In the instant case, although petitioner No. 1 to 3 filed a civil suit regarding some property against their father petitioner No. 4 and father's sister Smt. Phoola but that suit was withdrawn and no decree was passed in favour of petitioner Nos. 1 to 3 as is evident from Annexure P-4, Petitioner Nos. 1 to 3 are nephews and petitioner No. 4 is the brother of respondent No. 2. They have amicably settled the dispute regarding the property and Phoola does not want to pursue the case against the petitioners. Although the offence with which the petitioners have been charged are not compoundable yet considering the fact that the parties had buried the hatchet by settling all disputes amicably, the continuation of proceedings in the courts specially when Smt. Phoola is not likely to support the averments made by her, will not be in the interest of justice and will rather amount to abuse of the process of the Court. *Ishwar and others* v. *State of Haryana*, (1994) 2 SLJ 1606 at p. 1607 : (1994) 1 Recent Cr R 161 (P&H).

When delay was not caused due to Court or prosecution, there is no fault with proceedings pending for six years. *Gouri Shanker Saraf* v. *State of M.P.*, 1991 Cr LR 171 (MP).

2. Procedure.—Cognizable–Warrant–Bailable–Compoundable with the permission of the Court—Triable by any Magistrate.

3. Charge.—I *(name and office of the Magistrate, etc.)* hereby charge you *(name of the accused)* as follows :—

That or about the...............day of..............at.......you cheated *A*, *B* by pretending to be *C*, *D* (or representing yourself to be C, D.....) (or knowingly substituting *C*. *D* for *E*, *F or* representing that *C, D.* was *E, F)* and thereby fraudulently (or dishonestly, *etc.*) induced deliver of property by *A, B,* to wit, ... (*mention the property cheated (of* intentionally induced the said *A, B, to do (or* omit to do) some act, to wit.........) which caused (or was likely to cause) damage (or harm) to the said *A, B in* body (mind, reputation or property) and that you thereby committed an offence punishable under Section 419 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

For charge under this section along with charge under other section, *see* (1975) 2 Cr LJ 538 ; 1976 Cr LJ 392 ; AIR 1977 SC 2433.

4. Jurisdiction.—When civil suit was pending acquittal was fully justified—Civil Court has jurisdiction for recovery. *George Zancharia alias Raju Karuvampakka* v. *T.K. Varghese*, (1994) 3 Crimes 758 (SC) : 1995(1) JT 225 : 1994(4) Scale 694 : 1995(1) CCR 33 (SC).

5. Ingredients.—When petitioner substituted some other person as complainant before assistant collector, his conduct amounted to cheating by personation. *Jagdish Singh* v. *State of Punjab*, 1991 (1) CC Cases 112 (P&H).

It is necessary for prosecution to carry out test identification parade of petitioner before he could be sent up for trial. *Sulekh Chand Jain* v. *State*, (1991) 43 DLT 136.

In absence of essential ingredient as dishonest intention for proof of offence, accused was rightly acquitted. *State* v. *Abdul Sattar*, 1992 RCC 135.

Where acquittal was given by trial court and conviction was in appeal—Hence, present appeal was filed—In agreement, appellant never asserted that lorry also belongs to him—Registration certificate of lorry belonging to his brother was given as security—There must be some understanding between him and his brother since ingredients of offence absent dispute is of civil nature, appeal was allowed. *George Zacharia* alias *Raju Karuvampiakka* v. *T.K. Varghese*, (1995) 1 CCR 33 (SC) : (1995) 1 ALT (Cr) 137 : 1995 SCC (Cr) 374 : 1995 MLJ (Cr) 302 (SC).

6. Quashing of proceeding.—When family settlement effected between parties, F.I.R. lodged may be quashed. *Ishwar* v. *State of Haryana*, 1994 (2) SLJ 1606 (P&H).

Proceedings in criminal Court will remain stayed till final disposed of civil sent pending between parties. *Ajmer Singh* v. *State of Haryana*, 1994 (2) SLJ 1049 (P&H).

7. Acquittal.—When all procedure for detaining passport was done though Travel Agency and offence as alleged committed by accused foreign national couple not proved, conviction set aside. *B. Balanathan Mahendran* v. *State*, 1996 Cri LJ 2619 (Mad).

When dispute is of civil nature, acquittal of accused by trial court not to be interfered with. *George Zacharia* v. *T.K. Varghese*, 1994 (3) Crimes 758 (SC).

8. Evidence.—Expert opinion must always be received with great caution. *Mohd. Isa Khan* v. *State of U.P*, 1993 (1) Crimes 9 (All).

9. Review.—Court cannot review its own order of discharge in offence of forgery. *Bhajan Lal* v. *State of U.P.*, (1995) 3 CCR 94 (All).

10. Sentence.—Where there was attempted withdrawal of pension by submitting forged papers. Petitioner stood ordeal of trial for about 7 years. Petitioner was *held* to be entitled to reduction of sentence. *Amreek Singh* v. *State of Haryana*, (1995) 3 Crimes 523 (P&H).

* * * * *

Sec. 420. Cheating and dishonestly inducing delivery of property.— Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, shall be punished with imprisonment of either description for a term which or anything which is signed or sealed, and which is capable of being converted into a valuable security, may extend to seven years, and shall also be liable to fine.

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1. Criminal Intent.—In order to make out an offence under this section, it is necessary to establish criminal intent at the time of the alleged bargain. The fact that the accused denies in Court the transaction altogether and refuses to return the money does not necessarily show that he had a criminal intent from the very beginning. 39 PLR 300 : 169 Ind Cas 1007 : 38 Cr LJ 845. The mere breach of contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act, but of which the subsequent act is not the sole criterion. In the absence of clear and conclusive evidence of the criminal intention of the accused at the time of the alleged commission of the offence, and when the aggrieved party has an alternative or remedy in the trial Court, the matter should not be allowed to be brought in a Criminal Court. 159 Ind Cas 167 : 16 PLT 553. Where a complaint of an offence of cheating is made on the ground that the accused has entered into a contract with the complainant to work for the latter and that he had not commenced work in spite of complainant making two payments as agreed, the complainant has to establish a pre-conceived intention on the part of the accused of not carrying out the terms of the agreement. 1953 Cr LJ 1359 : AIR 1953 J & K 22. In order to bring the case within the offence of cheating, it is necessary to prove that at the time the accused made the representation, he knew that it was false and it was made in order to deceive the person paying the money. 1962 Raj LW 229 ; *see* also ILR (1957) 2 Cal 443 (payment in cheque of goods purchased). AIR 1956 SC 541 : 1956 Cr LJ 948 (cheque not supported by credit in bank deposited by way of security) ; AIR 1956 Pat 256 : 1956 Cr LJ 916 : 1956 BLJR 86 (crossword competition—Condition that Editor's decision will be final, silence over competition correspondence no *mens rea* and no offence) ; AIR 1954 SC 724 : 1954 Cr LJ 1806 (non-payment of price of goods on delivery) ; 30 Cut LT 253 : ILR 1964 Cut 248 : (1964) 6 Ori JD 264 (process server recovering excess amounts under false representation).

In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had a fraudulent intention at the time of making the promise to say that he committed an act of cheating. A mere failure to keep up promise cannot be presumed as an act leading to cheating. *S.N. Palanitkar v. State of Bihar*, 2001 Cri LJ 4765(SC).

Criminal intention at the time of offence is to be established and mere breach of contract can not give rise to criminal intention. 1977 Cr LJ 463 : *see* also 1973 Cr LJ 1481 ; 1983 Cr LJ 1661. To hold a man guilty of offence of cheating it must be *held* that he had a dishonest intention at the time of making the promise. AIR 1973 SC 330 : 1983 (2) Crimes 904 ; 1979 Cr LJ 446 ; 1967 Cut LT 396.

Where there was dishonest intention of cheating essential to constitute offence—Petition was filed by complainant against refusal to frame charge against accused under Section 420, I.P.C.—Complaint was against Bank Manager who advised Complainant to pay due amount under gold loan account and at same time declined to deliver ornaments as he has to refer matter to controlling office—Complaint against the same was made—There being no dishonest intention in refusing to deliver ornaments and in asking him to pay due amount—Charge not framed against Manager—This order was not challenged and subsequent prayer to frame charge was refused. There being no serious prejudice caused to complainant, no interference warranted specially in absence of dishonest intention. *Uma Dutta* v. *G. Mahadevan*, (1994) 1 East Cr C 15 (Ori).

For making false document, intention must be dishonest or fraudulent as in case of cheating. *C.H. Logani* v. *State of Rajasthan*, 1992 RCC 335.

In the instant case where the accused agreed to sell a plot to the complainant but failed to execute sale deed on the stipulated date there was nothing in the complaint to show that the intention of the accused from the very beginning was fraudulent or dishonest. It was held that the complainants' allegations made out a case of breach of contract for which remedy was in the lure court and that criminal complaint was not maintainable. *Shashi Pratap Singh v. State of U.P.* 2001 Cri LJ 3900 (All) : 2001(2) A Cr R 1339 (1341, 1342) : 2001(1) UP Cr R 653 : 2001(42) Acc 172(2).

2. Cheating, ingredients of.—The offence is made up of two ingredients. Deception of any person and fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property. 1951 MWN 285 : 6 DLR 281 (Mad) : 5 Al Cr D 844 : (1951) 1 MLJ 554. It cannot be laid down as a proposition of law that in every case where cheating is based upon a void and illegal agreement, there can be no criminal prosecution for cheating. 5 Al Cr D 420 : 6 DLR (All) 195 : 1951 AWR (HC) 640. A wilful misrepresentation of a definite fact with intent to defraud would be cheating. 1952 Cr LJ 123 : AIR 1952 J & K 26. Under Section 420, the presentation may not be sole cause of the damage or loss. ILR 1953 Hyd 193. Mere parting with money is not sufficient to constitute cheating. (1960) 2 Ker LR 287 : 1961 Mad LJ (Cr) 350 : 1962 (1) Cr LJ 654. The ingredients of the offence under Section 420 are that the person deceived delivered to some one a valuable security or property, that the person so deceived was induced to do so, that such person acted on such inducement in consequence of his having been deceived by the accused and that the accused acted fraudulently or dishonestly when so inducing that person. AIR 1961 Pat 451 : 1960 (2) Cr LJ 677 ; (1960) 2 Ori JD 261 ; 1957 All WR (HC) 293 : 1957 All LJ 141 (breach of contract and cheating) ; 1964 Ker LJ 909 : 1964 Ker LT 724 : 1964 MLJ (Cr) 609 (accused collecting money by sale of lottery tickets, lots not drawn it amounts to cheating) ; 1963 (1) Cr LJ 716.

Accused cheated by executing false sale deeds. Complaint filed by real owner of property. Accused *bona fide* believed that suit property belongs to him. Purchaser also believed that suit property belongs to accused.

When a sale-deed is executed conveying a property claiming ownership thereto, it may be possible for the purchaser under such sale-deed, to allege that the vendor has cheated him by making a false representation of ownership and fraudulently induced him to part with the sale consideration. But in this case *the complaint is not by the* *purchaser. On the other hand, the purchaser is made a co-accused.* It is not the case of the complainant that any of the accused tried to deceive him either by making a false or misleading representation or by any other action or omission, nor is it his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce him to do or omit to do anything which he would not do or omit if he were not so deceived. Nor did the complainant allege that the first appellant pretended to be the complainant while executing the sale deeds. Therefore, it cannot be said that the first accused by the act of executing sale deeds in favour of the second accused or the second accused by reason of being the purchaser, or the third, fourth and fifth accused, by reason of being the witness, scribe and stamp vendor in regard to the sale deeds, deceived the complainant in any manner. As the ingredients of cheating as stated in Section 415 are not found, it cannot be said that there was an offence punishable under Section 417, 418, 419 or 420 of the Code.

A clarification

When we say that execution of a sale deed by a person, purporting to convey a property which is not his, as his property, is not making a false document and, therefore, not forgery, we should not be understood as holding that such an act can never be a criminal offence. If a person sells a property knowing that it does not belong to him, and thereby defrauds the person who purchased the property, the person defrauded, that is the purchaser, may complain that the vendor committed the fraudulent act of cheating. But a third party who is not the purchaser under the deed may not be able to make such complaint. The term 'fraud' is not defined in the Code. The dictionary definition of 'fraud' is "deliberate deception, treachery or cheating intended to gain advantage". Section 17 of the Contract Act, 1872 defines 'fraud' with reference to a party to a contract. In *Dr. Vimla vs. Delhi Administration*, AIR 1963 SC 1572, this Court explained the meaning of the expression 'defraud' thus :

> "The expression "defraud" involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied".

The above definition was in essence reiterated in *State of U.P. vs. Ranjit Singh*, 1999 (2) SCC 617 = AIR 1999 SCW 863.

The Penal Code however defines 'fraudulently', an adjective form of the word 'fraud', in Section 25, as follows : "A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise". The term "fraudulently" is mostly used with the term "dishonestly" which is defined in Section 24 as follows :

> "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing "dishonestly". To 'defraud' or do something fraudulently is not by itself made an offence under

the Penal Code, but various acts when done fraudulently (or fraudulently and dishonestly) are made offences. These include :

(i) Fraudulent removal or concealment of property (Sections 206, 421, 424)

(ii) Fraudulent claim to property to prevent seizure (Section 207)

(iii) Fraudulent suffering or obtaining a decree (Sections 208 and 210)

(iv) Fraudulent possession/delivery of counterfeit coin (Sections 239, 240, 242 an 243)

(v) Fraudulent alteration/diminishing weight of coin (Sections 246 to 253)

(vi) Fraudulent acts relating to stamps (Sections 261-261)

(vii) Fraudulent use of false instruments/weight/measure (Sections 264 to 266)

(viii) Cheating (Sections 415 to 420)

(ix) Fraudulent prevention of debt being available to creditors (Section 422)

(x) Fraudulent execution of deed of transfer containing false statement consideration (Section 423)

(xi) Forgery making or executing a false document (Sections 463 to 471 and 474)

(xii) Fraudulent cancellation/destruction of valuable security etc. (Section 477)

(xiii) Fraudulently going through marriage ceremony (Section 496).

It follows, therefore, that by merely alleging or showing that a person acte fraudulently, it cannot be assumed that he committed an offence punishable under th Code or any other law, unless that fraudulent act is specified to be an offence under th Code or other law.

Section 504 of Penal Code

The allegations in the complaint do not also made out the ingredients of an offenc under Section 504 of the Penal Code. Section 504 refers to intentional insult with inter to provoke breach of peace. The allegation in the complainant is that when he enquire with accused about the sale deeds, they asserted that they will obtain possession land under the sale deeds and he can do whatever he wants. The statement attribute to appellants, it cannot be said to amount to an "insult with intent to provoke breach peace". The statement attributed to accused, even if it was true, was merely a statemen referring to the consequence of execution of the sale deeds by first appellants in favou of the second appellant.

Conclusion

The averments in the complaint if assumed to be true, do not make out any offenc under Sections 420, 467, 471 and 504 of the Code, but may technically show th ingredients of offences of wrongful restraint under Section 341 and causing hurt unde Section 323 of IPC. *Md. Ibrahim & Ors. vs. State of Bihar & Anr.*, 2010 (2) CrLJ 222 (SC).

For a person to be convicted under Section 420, it has to be established not on that he has cheated some one but also that by doing so he has dishonestly induced th person who cheated to deliver any property *etc*. A person can be said to have done thing dishonestly if he does so with the intention of causing wrongful gain to one perso or wrongful loss to another person. Wrongful loss is the loss by unlawful means of property to which a person is entitled while wrongful gain to a person means a gain to him by unlawful means of property to which the person gaining is not legally entitled. (1963) 2 SCJ 274 : 1963 (1) Cr LJ 623 : AIR 1963 SC 666.

Where the case of cheating is concerned with the first portion of Section 415 in the definition of cheating, the question of inducing the person deceived to do or omit to do anything and the question whether the act or omission caused or was likely to cause damage or harm to that person in mind, body, reputation do not enter into the picture at all. 1963 (1) Cr LJ 716.

A false representation must relate to some fact that is either past or present. A statement purely affecting the future will not suffice. 1965 (2) Cr LJ 499 (1) : AIR 1965 Guj 269. In order to constitute an offence of cheating, it is to be proved that the accused dishonestly induced the complainant to part with his property. 1965 ALJ 272 : 1983 Cr LJ 2266 ; AIR 1983 SC 1149 : AIR 1970 Pat 20.

3. Scope.—"An increased punishment may be awarded where the cheating causes any property to be delivered 'dishonest' that is where it is of the kind which the first clause of the definition in Section 415 describes ; where it causes a valuable security as a title-deed, bond, bill of exchange, receipt, *etc.*, to be made, altered, or destroyed or where it causes such a document as a deed, bond, bill of exchange, receipt, *etc.* which has been prepared, but which still continues in the hands of the person who will be bound thereby and has not yet taken effect or come into operation to be made that is completed and brought into force by delivery, *etc.*, altered, or destroyed".—*Morgan and Macpherson*, 387. An offence under Section 420 of the Penal Code, does consist merely in a fraudulent or dishonest representation but also requires the delivery of property by victim. 32 Cr LJ 611 : AIR 1931 Pat 102. Obtaining money by cheating is an offence under Section 420, and not under Section 417. AIR 1933 Lah 1009. In cases under Section 420, intention to defraud must be clearly established before allowing criminal prosecution to start. 134 Ind Cas 309 : 32 Cr LJ 1133 : 1933 Cr C 604 : 53 Cr LJ 457 : AIR 1931 Cal 452. Issue of cheque knowing it will be dishonoured is an offence under this section. AIR 1923 Oudh 3 : 9 OWN 1136. Where money was taken for bringing the public servant, the accused can be convicted under this section. AIR 1933 Rang 199 : 34 Cr LJ 1255 : 146 Ind Cas 240. An attempt to obtain money from another by inducing him to believe that God has ordered him to pay, constitutes an offence of attempt to cheat. 48 M 774 : 26 Cr LJ 755 : AIR 1925 Mad 480. Silence may amount to deception. 52 Cal 347 : 29 CWN 447 : 84 Ind Cas 1041. A man may be guilty of an attempt to cheat, although the person who attempts to cheat is forwarded and is therefore, not cheated. AIR 1941 Oudh 3 : 41 Cr LJ 881. In framing a charge under this section, it is necessary to set out not merely the fact that the accused had obtained goods by dishonest means, but also the deception which has been practised. ILR 1938 Lah 662 : AIR 1939 Lah 95 : 40 Cr LJ 494. Suppression of material facts in the prospectus is fraudulent. AIR 1944 Mad 410 : 46 Cr LJ 266. Where married girl of 14 years was married by accused to another person on taking bride price from him, concealing the fact that the girl has already been married, when the girl's mother is a consenting party, an offence under Sections 420 and 366 has been committed. AIR 1943 Pat 212 : 44 Cr LJ 590. Where due to false application and false endorsement, the transfer to export *quota* rights of tea was granted the *quota* transfer certificate which enabled him to transfer export *quota* rights far in excess of what was to his credit and thereby made a huge wrongful gain, he commits an offence under this section. AIR 1940 Mad 155 : 41 Cr LJ 388. It is no defence that the association of the accused with the complainant has resulted in a net profit to the complainant. AIR 1943 Sind 51 : 44 Cr LJ 324. The view that a criminal prosecution for cheating must fail if it is based upon a contract which could be enforced in a Civil Court is wrong. AIR 1941 Oudh 3 : 41 Cr LJ 881. When an officer of a Board delivers a false bill, he commits an offence under this section. AIR 1940 Bom 35 : ILR 1940 Bom 29 : 41 Cr LJ 456. As regards what is preparation and attempt to commit an offence under this section, *vide* AIR 1941 Oudh 3 : 41 Cr LJ 881. (Note doubling case). An appeal to the gambling instinct of humanity does not *per se* amount to cheating. AIR 1939 Cal 327 : 43 CWN 388 : 40 Cr LJ 600. Obtaining possession of property by trick is an offence under this section. AIR 1942 Sing 167 : 44 Cr LJ 123. Where the accused got investment of money by the complainant, who himself is a business man, by making certain representation, no offence under this section has been committed. AIR 1942 Sind 198 : 43 Cr LJ 73. A person who sells bottles of liquor with false lables representing the liqour to be genuine is guilty under this section. AIR 1940 Cal 205 : 41 Cr LJ 556. In a charge of cheating it must be considered whether the offence of cheating is compatible with honest action. 44 Cr LJ 230. Where the balance of consideration of a sale-deed is not paid the dispute is of a civil nature and there is no offence of cheating. 43 Cr LJ 287 : 27 Cr LJ 588 : 94 Ind Cas 204. It is not proper to put the exact dates of the commission of offence in the charge. 27 Cr LJ 909.

Deception may be practised by representation made through an innocent agent, 101 Ind Cas 458 : 28 Cr LJ 426 : AIR 1927 Sind 161. The question whether an offence has been committed under Section 420, does not depend upon the accused's success in swindling of the amount or times that he has managed to obtain property by cheating but depends on the successful inducement of person cheated. 165 Ind Cas 817 : 1936 Cr C 935. AIR 1936 Cal 678. Breach of contract or breach of faith does not amount to the criminal offence of cheating punishable under this section. 164 Ind Cas 144 : 37 Cr LJ 907 : AIR 1936 Oudh 372 : 1936 Cr C 981. *J* went to M and told him that two ornaments of gold were for sale which he could secure for him cheap, and on the latter, agreeing introduced *A* who sold certain jewels to *M*, An assurance was given by *A* to *J* that ornament were of pure gold. In fact they were not so and *J* not *A* were prosecuted for an offence under Section 420. *Held*, that in order to sustain the conviction of *J*, it was necessary for the prosecution to establish that he acted dishonestly and fraudulently in the transaction since it might be that he was himself duped by *A*. 28 PLR 171 : 102 Ind Cas 553 : 28 Cr LJ 585. In a prosecution for cheating the essential points which the prosecution has to prove are that the accused certain representations knowing them to be false and as a result of such representation money was handed over to the accused. 39 MLT 596. Where the dispute between the parties seems to be of a civil nature the conviction on a charge of cheating is unsustainable. AIR 1928 Pat 13. Mere handing over the rules of a club by its servant does not make members criminally responsible for representations contained in the rules. AIR 1928 Mad 224. Although there is a common feature between the extortion and that of cheating yet they cannot be regarded as two aspects of one offence. AIR 1928 Bom 346. This section has no application to the delivery of immovable property. AWN 1882, 6. Property in this section means money. 32 Cal 22 : 3 CWN 784 : 1 Cr LJ 794. Where a charge of cheating rests upon a representation which is impugned as false and which relates not to an existing fact but to a certain future event, it must be shown that the representation was false to the accused's knowledge at the time when it was made. 15 Bom LR 297 : 14 Cr LJ 232 : 19 Ind Cas 328. Where the complainant was not really deceived, a conviction under this section is not tenable. Rat Un Cr C 301 ; *see* also 9 Cr LJ 261 ; 146 Ind Cas 552 : AIR 1933 Lah 215. The mere suppression of some facts at the time of borrowing money does not amount to cheating, where there is no evidence of either active deception or dishonest fraudulent action. 40 PWR 1910 Cr : 8 Ind Cas 256 : 11 Cr LJ 610. No offence under this section is committed by misrepresentation to a *patwari* and *Naib Tahsildar* that certain person, who is not a vendor is the vendor of the property and thereby induced the *patwari* and *Naib Tahsildar* to effect mutation in the register. AIR 1941 Lah 460 : ILR 1941 Lah 718 : 43 Cr LJ 254. In a prosecution under this section, if misrepresentation has to be proved, it would be better to get exact words used by the accused. AIR 1940 Pat 603 : 41 Cr LJ 523 : 187 IC 862. Financial scheme of "Snow Ball' nature does not amount to cheating. ILR (1939) 2 Cal 81; *see* also AIR 1936 Cal 440 : 38 Cr LJ 209. In a Land Acquisition proceeding, a person who files a false claim and withdraws compensation money awarded to him commits no offence under this section. 49 CWN 309. A conviction under this section is not tenable where it has not been proved that at the time when the money was delivered to the accused that it was not his intention to utilise the same in the way in which he represented it was to be utilised. (1947) 2 MLJ 594 : AIR 1948 Mad 258 : 49 Cr LJ 443.

To constitute the offence of cheating, it is not necessary that the deception should be by express words, but it may be conduct or implied in the nature of the transaction itself. 10 PWR 1912 : 114 PLR 1912 ; but *see* 30 NLR 303 : AIR 1934 Nag 149. The mere fact that a scheme is of a highly speculative nature is not in itself evidence that it is scheme put upon the public to deceive. There must be evidence of the some deception. 168 Ind Cas 827 : 38 Cr LJ 651 : AIR 1937 Sind 58 ; *see* also AIR Rang 301. A person who pays a bill by means of a cheque (whether post-dated or not) and gets the bill with the endorsement "received by cheque" duly stamped as a receipt cannot be *held* dishonestly induce another to deliver any property or valuable security within the meaning of Section 420, I.P. Code, where the latter cheque is dishonoured when presented for payment. 39 CWN 1182 : 62 Cr LJ 119. Fraudulent admixture of inferior cotton with good cotton by the accused is an offence under this section. 14 Bom LR 137 : 14 Ind Cas 669 : 13 Cr LJ 285 ; 15 Bom LR 568 : 20 Ind Cas 593. Receipt of advance by execution of hand notes but by false representation of supplying goods may amount to an offence under this section. 6 LBR 38 : 13 Ind Cas 389 : 13 Cr LJ 50 : 4 Bur LT 79. There cannot be any conviction under this section for cheating in respect of an immoral contract, 14 Bom LR 503 : 15 Ind Cas 793 : 13 Cr LJ 521. In a case of cheating, it is open to the prosecution to show that the acts charged against the accused were parts of a series of similar acts committed by him, or in which he was concerned, at or about the time in question. Evidence of such other acts, whether previous or subsequent to the frauds charged against the accused is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent. 269 PLR 1914 : 26 PWR 1910 Cr : 6 Ind Cas 964 : 11 Cr LJ 428. Dishonest intention is the gist of the offence of cheating. 6 Bur LT 201 : 15 Cr LJ 80 : 7 LBR 143 : 22 Ind Cas 438 ; 57 Ind Cas 103 : 21 Cr LJ 583 ; 68 Ind Cas 621 : 23 Cr LJ 589 ; 23 Cr LJ 664. In this case, the findings of facts are that the petitioner who was indebted to the complainant despatched from

Benares to the latter in the Gujarat district an envelope insured for Rs. 530/- containing two pieces of waste paper, apparently post office forms, 'that the envelope was delivered in the presence of postal official to the complaint, who found that it contained only two pieces of paper, *held*, that the facts did not justify a conviction under Section 420, I.P. Code, but constituted an attempt to cheat them within the definition contained in Sections 415 and 511, I.P. Code. 10 PR 1913 Cr : 14 Cr LJ 436 : 20 Ind Cas 590 : 299 PLR 1913. Where a person is misguided and then his money is taken off, the offence is one of theft and not of cheating, AIR 1932 Cal 865 : 36 CWN 791 : 55 CLJ 448 : 33 Cr LJ 828. Deception is proved where a person not being a police-officer wears *Khaki* and threatens another to take to *thana*. AIR 1933 Cal 308 : 34 Cr LJ 530 : 56 Cr LJ 73 : 1933 Cr C 308. Deception without motive is not an offence under this section. 145 Ind Cas 229 : 34 Cr LJ 922 : AIR 1933 Rang 114. In the absence of misleading or deceptive representations, a conviction under the section is not maintainable. 35 Bom LR 1181 : 35 Cr LJ 644 : 148 Ind Cas 271.

Offence is not made out when co-owner sells the house. *Tarsem Lal* v. *Koer Chand*, (1994) 2 Recent CR 57 (P&H).

When petitioner floated a scheme to supply articles to customers after some initial deposit there was no report by any customer—Cognizance of offence was taken by Police—A person embarking upon a business which melted a couple of lacs within few months. Accounts were not maintained since inception. It is not known how this wizard was going to manage his affairs in absence of account. All this material appears sufficient to satisfy a reasonable person of commission of cognizable offence of cheating. *Mohammad Habeeba Meera* v. *State of M.P*, 1994 Cr LR (MP) 1 : 1994 MPLJ 235.

When amount was withdrawn from co-operative society—It was *held* that liability shall be civil only and not the criminal. *Nathu Singh* v. *Ram Singh*, (1994) 31 ACC 835 (All).

When civil suit by complainant is already pending, criminal complaint and civil suit tried by same judge exercising civil and criminal powers. *Karamjit Singh* v. *Smt. Kaushalya Devi*, (1993) 2 Recent Cr R 52.

When charge-sheet not showing that accused, had dishonest intention when he mediated into matter, there is no criminal liability against him. *G. Ramachandraiah* v. *State*, 1993 (2) ALT (Cri) 292.'

Dispute as to receipt of certain amount words sale consideration of truck, in which forged receipt was alleged, is of civil nature, to be decided by Civil Court. *Jarnail Singh* v. State *of Haryana*, 1992 Cr LT 103 (P&H).

A manufactured spurious trinkets, and took them to *N* saying that they were of gold, and that they were stolen property (which was not also true) and that *A* does not like to sell them in *bazar* and asked him to buy. *N* did not buy, but *A* was arrested. *Held*, that the act of *A* amounted to an attempt of cheating punishable under Sections 420, 511, I.P. Code, 13 PWR 1914 Cr : 66 PLR 1914 : 15 Cr LJ 265 : 23 Ind Cas 473 : 14 PR 1914 Cr.

To describe a *Brahman* woman as *Kirari* is not cheating by personation but may be an offence under Section 420, I.P. Code. 13 PR 1904 Cr : 114 PLR 1904. Where the accused obtained the complainant's money by a promise which he knew he could not fulfil, he committed an offence under this section. 13 CWN 728 : 9 CLJ 605 : *see* also 2 Bom LR 621. Inducing execution of bonds for fictitious amounts, does not amount to cheating. 18 Cr LJ 131 : 37 Ind Cas 483. A person who by representing a woman to be a *Jat* widow, when she is only a sweeper whose husband is alive, induces another to pay Rs. 300/- to him commits the offence of cheating. 6 PR 1918 Cr : 49 Ind Cas 351 : 19 Cr LJ 335 ; 58 Ind Cas 820. The accused had executed a *kobala* in favour of the complainant and presented it for registration but took it back from the Sub-Registrar before registration on the pretext that he could not understand whether it was a mortgage or *kobala*, and having thus obtained possession of the document, he tore it to place. *Held*, that a charge of cheating cannot be maintained as the person cheated was the sub-Registrar and he did not complain. 30 Cr LJ 175 : 54 Ind Cas 64. It is absurd to expect a Court to take any notice of complaint of cheating except where it is put in by the person actually defrauded. 63 Ind Cas 464 : 22 Cr LJ 672. Accused pawned six rings which he said were of gold. Subsequently, it was discovered that the rings were of silver gilt. Accused was charged with an offence under Section 420, I.P. Code. *Held*, that the burden of proving that the accused knew that the rings were not what he suggested them to be was on the prosecution. 53 Ind Cas 609. For a conviction under Section 420, it was necessary for the prosecution to prove that these had been not only an act of cheating on the part of the accused but also by that very act of cheating the person cheated was induced to deliver property. If property is delivered owing to the effective inducement of a third person's assurance, there is no offence under this section. 18 ALJ 371 : 55 Ind Cas 730 : 21 Cr LJ 362. The word "dishonestly" in this section implies deliberate intention to cause wrongful gain, or wrongful loss, and when this is coupled with cheating the offence is punishable under this section. Section 417 covers cases of cheating in which though there is fraud there is no intention of causing wrongful gain. 13 Bur LT 239 : 64 Ind Cas 33 : 22 Cr LJ 721. Where none of the complainants has suffered damage or harm in body, mind, reputation or property, a conviction under this section is not maintainable. AIR 1934 Pesh 5 : 35 Cr LJ 872 : 148 Ind Cas 960. Where the accused set fire to a car which was insured and then submitted false information to the company, an offence under Sections 420/511 has been committed and he should be severely punished. 151 Ind Cas 249 : 35 Cr LJ 1345 : AIR 1944 Pesh 67. So also a person who after collecting funds for charitable institutions pockets the money himself should be severely punished. AIR 1934 Pat 114 : 1934 Cr C 400 : 15 Pat LT 318 : 35 Cr LJ 1167 : 150 Ind Cas 927.

The question, that arises for consideration, is as to why the receipts and the summaries were forged by the accused. As stated above, the persons, who purportedly signed these receipts, denied their handwriting and signatures thereon as also the deposit of the amount and refund thereof. Since it was proved, beyond a reasonable doubt, that the receipts and the summaries, referred to above, were in the handwriting and under the signatures of the accused and as such, he forged these documents, it was he, who was to be benefitted by preparation of the same. Under these circumstances, it could be said that by forging the receipts and summaries, the only motive of the accused, was to withdraw the money. Such a withdrawal/refund of the money, depicted in the receipts, which was never deposited, was nothing but illegal. The amount of the receipts was neither deposited by the consignees, nor refunded to them. The only inference that could be drawn was that the accused by forging the receipts and obtaining the refund on the basis thereof of the amount, which was never deposited.

cheated the Northern Railways. The trial Court was, thus, right in holding that the accused by his such act and conduct, committed the offence, punishable under Section 420 of the Indian Penal Code. This Court, on re-appraisal and re-appreciation of the evidence of the prosecution, also comes to the same conclusion. The findings of the trial Court, in this regard, being based, on the correct appreciation of evidence, are upheld. *Lall Chand vs. State of Punjab & Anr.*, 2010 (1) Cri LJ 699 (P&H).

In case, there are both complaint case and state case, both cases were to be tried together. *Naresh Kumar* v. *State of Punjab*, 1994 (2) Recent Cr R 406 (P&H).

Offences committed under Trade and Merchandise Marks Act, but charges framed under Section 420, I.P.C., not valid. *Syed Kaleem* v. *M/s. Mysore Lakshami Beedi Works*, 1993 Cri LJ 232 (Kant).

The accused drew a *hundi* and borrowed money on it without assuring himself that the drawee, with whom he had no previous dealings and who was not supplied with funds, would honour the same. The money so borrowed was spent by him on his own purposes. The *hundi* when presented for payment was dishonoured by the drawee. The accused though appraised of the dishonouring, took no steps either to have the *hundi* honoured or to repay the money borrowed on the *hundi*. But he made himself scarce. *Held*, that the accused was guilty of cheating. 23 Bom LR 340 : 60 Ind Cas 993 : 22 Cr LJ 305. Inducing by false personation to part with property and subsequently offering to credit the value thereof against sum due under an alleged contract unfulfilled, does not amount to an offence under this section. 25 CWN 618 : 60 Ind Cas 618. A person who takes property under a hire-purchase system arrangement, but sells it before the instalments are paid, commits criminal breach of trust. 45 All 588 : 21 ALJ 510 : 73 Ind Cas 508. In a Criminal Court, it has to be shown that the man who plays the part of the confidence man is putting forward what he knows to be untrue and in many cases, shares in the proceeds. LR 4 A 83 Cr : AIR 1923 All 285. Petitioner was convicted of cheating on the ground that in spite of receiving from his debtor, cash and cattle in payment of what he owed him, he gave him notice later on for payment of the debt originally due. and denied what he had already received. *Held*, there was nothing to show that the petitioner received payment with the pre-conceived intention of denying it later on. If he subsequently denied it, he cannot be said to have cheated the debtor though this conduct of him was highly reprehensible. AIR 1923 Lah 621. In a case of cheating, the Court is to *see* the intention of the accused at the time of the offence and judge of the consequences of the act or omission itself. 40 Cr LJ 283 : AIR 1925 All 100. A person cannot be charged under this section for deceiving Court and Judges by institution of false case and get a decree, because a decree does not come within the definition of valuable security. 28 CWN 414 : 39 CLJ 122 : 81 Ind Cas 810. An offence under Section 420 of the Indian Penal Code cannot be tried by a second class Magistrate. 25 Cr LJ 1193 : 82 Ind Cas 57 : 20 LW 919. An attempt to commit the offence described in Section 420, Penal Code, and thereby induce delivery of property is known to the law. 25 Cr LJ 475 : 77 Ind Cas 827 : AIR 1924 Nag 120 ; *see* also 25 Cr LJ 1175. The accused having no account at a Bank drew a cheque in favour of a vendor of goods as if in payment of the price and signed the cheque with a name other than his name. The cheque was dishonoured and it was found that the accused had a cheque with a view to induce to vendor to deliver the goods. *Held*, that the accused was guilty of an offence under this section. 40 Cr LJ 256 : AIR 1925 Lah 14 ; 47 Punj LR 474 : 1965

Cur LJ 470 : 1965 All Cr R 261 (post-dated cheque dishonoured). No offence under this section is committed on the refusal of the accused to admit legal liability. 26 Cr LJ 1303 : 89 Ind Cas 247 : AIR 1925 Sind 231. Where a Railway employee obtained a free pass for his wife and mother and handed over the pass to a stranger to be used by her, he commits an offence under this section. 88 Ind Cas 524 : 26 Cr LJ 1164 : AIR 1925 Oudh 479. Where a defect in framing a charge under this section does not materially affect the accused, the trial is not vitiated. 29 CWN 483 : 26 Cr LJ 906. But where the charge is too vague and indefinite to give the accused proper notice of the manner of deception, the charge is bad. 41 Cr LJ 172 : 29 CWN 408 : 26 Cr LJ 849. In a prosecution for cheating the essential points which the prosecution has to prove are that the accused made certain representations knowing them to be false and that a result of such representations money was handed to the accused. 39 MLT 596. Under this section some sentence of imprisonment must be given and the Court has a discretion to add or refrain from adding a fine, for to the latter, an offender is only liable. 27 ALJ 400 : 114 Ind Cas 733 : 30 Cr LJ 340 : AIR 1929 All 260. A second class Magistrate has no jurisdiction to try an offence under this section. 12 Lah LJ 87 : AIR 1930 Lah 664 ; AIR 1933 Lah 1009 : 1934 Cr C 1554.

A conviction of an accused person under Section 420 would be valid though the charge is under Section 420 with Section 34, unless prejudice is shown to have occurred. AIR 1957 SC 857 : 1958 SCA 665 : 1958 SCJ 111 : 1957 Cr LJ 1346.

The promise to pay cash against delivery is an intention to do, the fact that he did not pay would not convert the transaction into that of cheating. AIR 1954 SC 724 ; AIR 1974 SC 301 ; AIR 1983 SC 1149 : 1983 All LJ 522 (the fact does not disclose the offence of cheating) ; 1976 Cr LJ 446 ; *see* (1932) 2 GLR 110 (there must be criminal intention at the time of bargain); AIR 1963 SC 671 (there are two facts of the definition of dishonestly and it is enough to prove the existence of one of them). How far inference may be drawn about the dishonest intention. AIR 1973 SC 326 ; 1983 (2) Crimes 904 ; 1973 Cr LJ 1661.

Magistrate can take cognizance of complaint lodged by an employee of firm instead of by proprietor of firm. *M.C. Saxen* v. *Madan Mohan*, (1993) 3 Recent Cr R 391.

An important ingredient is that the person complaining should have been, by deception, fraudulently or dishonestly induced to do or omit to do certain thing. *Inayatullah* v. *Guruswamy*, 1994 (38) MLJ (Cri) 316.

There is no legal bar to continuance of civil and criminal proceedings simultaneously but however, criminal proceedings should be given preference. *M/s Krishko International* v. *M/s. Adwait Steel and Metal (P.) Ltd.*, 1994 (3) CC Cases 97 (Del).

When civil litigation already pending between parties, trial in criminal case may be stayed when it offers to be just and fair. *Hazura Singh* v. *Nirmal Singh*, 1991 (1) CC Cases 573 (P&H).

When a building contractor managed to obtain steel from CPWD store in excess of quantity required and after completion of work small quantity of sub-standard steel returned to CPWD, it was case of misappropriation and a case under Section 420. I.P.C., and corruption and not a case of civil liability. *Rakesh Kumar* v. *Central Bureau of Investigation*, (1993) 3 Recent Cr R 686 (P&H).

The *mens rea* for the charge of cheating has to be considered on the date of fraudulent or dishonest representation. 1977 Cr LJ 463. In a complaint that the accused from the very beginning has the intention to exploit the complaint physically and therefore, by practising fraud and deceit he used to show affection and had several intercourse with her, would not constitute the offence of cheating. 1979 Cr LJ 446. The term 'property' is wide enough to include anything capable of ownership. AIR 1961 SC 1698 (admission card) ; AIR 1960 AP 405 (non-mention of encumbrance by a vendor the document of sale). Failure to fulfil a promise is not an offence under Section 420, I.P. Code. 1983 Cr LJ 105 ; 1978 Cr LJ 429 ; 1982 Cr LJ 1482 (dishonoured cheques).

Where accused agreed to sell land and executed power of attorney in favour of complainant and subsequently cancelled same and not executing sale-deed, no complaint under Section 420, I.P.C., made out as dispute is of civil nature. *Mohinder Singh* v. *Balwant Singh Saini*, 1994 (1) Recent Cr R 212 (P&H).

Dishonest intention at the time of committal of offence is essence of offence of cheating. *A.K. Mitra* v. *P.K. Mohanty*, (1993) I CCR 317 (Ori).

For the same incident, there can be both civil and criminal proceedings. *Mohan Mukherjee* v. *State*, 1992 (3) Crimes 80 (Cal).

In case transaction in question involved dispute of civil nature, criminal court may refuse to go ahead with proceedings. *Anil Kumar* v. *Ajay Butail*, 1992 (2) SLJ 1472 (HP).

When Section 420, is not mentioned in complaint nor in verification statement. Court can still take cognizance of offence if ingredients are made out to take action under Section 420, I.P.C. *Pawan. Kumar* v. *Ashish Enterprises*, Registered Partnership Firm, 1992 Cr LJ 1619 (Bom).

Though the crime is registered on the basic of the F.I. Statement given by one of the depositors regarding a small amount, the accused cannot escape from the liability for the offence punishable Under Sec. 420 of the IPC in case the investigation revealed that the accused had collected huge amounts from large number of creditors and cheated them by merely contending that the *de facto* complainant had only complained of cheating of Rs. 3000/- and the accused is prepared to settle that amount. *Babu Varghese* v. *Deputy Superintendent of Police, Kottayam* 1999 CriLJ 1111 (Ker).

4. Juristic Persons.—Section 420 provides that accused shall be punished with imprisonment of either description for a term which may extend to seven years. The word "shall be punished" makes it compulsory on the Court to impose punishment with imprisonment if accused is found guilty. Admittedly, Essar Constructions Ltd. is a juristic person, punishment of imprisonment cannot be awarded. Hence, prosection of Esar Constructions Ltd under Section 420, I.P.C., does not appear to be legal, permissible and justified. *Essar Constructions Ltd.* v. *Central Bereau of Investigation*, 1999 Cri LJ 1861 (Bom).

It is crystal clear from the allegations made in the complaint itself that GFFL was not a company on paper. The company had substantial assets in the form of 250-300 acres of land and it has in fact planted more than one lac Eucalyptus trees on the said land. Therefore, the mere fact that later on the accused turned dishonest and misappropriated the whole amount will not lead to an inference that their intention from the very beginning was fraudulent. Therefore, the contention on behalf of the petitioners is correct that the liability of the accused, if any, is of a civil nature and it is a case of breach of contract.

The transaction between the parties was of a civil nature and it is a case of mere breach of agreement for which the remedy was to file a civil suit. No criminal offence is made out from the allegations made in the complaint. There does not appear to be any conspiracy in floating the Company. Necessary facts to establish inducement of allurement are wanting in the complaint. It is not the accused who approached the complainant. It is stated in paragraph 4 of the complaint that the complainant came into contact with the accused through his cousin at Bombay. Merely giving an exaggerated account of the scheme cannot be said to be cheating. Company is not a paper Company. It has substantial assets in the shape of 250-300 acres of land. The company had actually planted more than one Lac Eucalyptus trees. The mere fact that the accused retained the sale proceeds of trees will not render their action as of criminal nature. *Kamal Krishna Chopra* v. *State of U.P.*, 1999 Cri LJ 2345 (All).

5. Conspiracy to cheat.—Where five persons are alleged to have combined to deceive another and four are given the benefit to doubt, the position of the remaining accused who is found guilty of deception is not affected. 162 Ind Cas 748 : 37 Ind Cas 697 : 1936 A Cr C 77 : 1936 ALJ 413 : AIR 1936 Cr C 421 : AIR 1936 All 357. In case of distinct offences but inter related, single charge is permissible. AIR 1963 SC 1620 : 1963 (2) Cr LJ 529. For charge of conspiracy to cheat. *See* AIR 1957 SC 340 : 1957 Cr LJ 422 ; 1980 All Cr R 76 : 1980 (UP) Cr LR 155.

When conspiracy and forgery of master, rolls by several persons are established, finding of trial court about conspiracy upheld. *State of T.N.* v. *T. Thulasingam*, 1994 SCC (Cri) 1504.

Accused cheated by executing false sale deeds. Complaint filed by real owner of property. Accused *bona fide* believed that suit property belongs to him. Purchaser also believed that suit property belongs to accused.

When a sale-deed is executed conveying a property claiming ownership thereto, it may be possible for the purchaser under such sale-deed, to allege that the vendor has cheated him by making a false representation of ownership and fraudulently induced him to part with the sale consideration. But in this case *the complaint is not by the purchaser. On the other hand, the purchaser is made a co-accused.* It is not the case of the complainant that any of the accused tried to deceive him either by making a false or misleading representation or by any other action or omission, nor is it his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce him to do or omit to do anything which he would not do or omit if he were not so deceived. Nor did the complainant allege that the first appellant pretended to be the complainant while executing the sale deeds. Therefore, it cannot be said that the first accused by the act of executing sale deeds in favour of the second accused or the second accused by reason of being the purchaser, or the third, fourth and fifth accused, by reason of being the witness, scribe and stamp vendor in regard to the sale deeds, deceived the complainant in any manner. As the ingredients of cheating as stated in Section 415 are not found, it cannot be said that there was an offence punishable under Section 417, 418, 419 or 420 of the Code.

A clarification

When we say that execution of a sale deed by a person, purporting to convey a property which is not his, as his property, is not making a false document and, therefore, not forgery, we should not be understood as holding that such an act can never be a criminal offence. If a person sells a property knowing that it does not belong to him, and thereby defrauds the person who purchased the property, the person defrauded, that is the purchaser, may complain that the vendor committed the fraudulent act of cheating. But a third party who is not the purchaser under the deed may not be able to make such complaint. The term 'fraud' is not defined in the Code. The dictionary definition of 'fraud' is "deliberate deception, treachery or cheating intended to gain advantage". Section 17 of the Contract Act, 1872 defines 'fraud' with reference to a party to a contract. In *Dr. Vimla vs. Delhi Administration*, AIR 1963 SC 1572, this Court explained the meaning of the expression 'defraud' thus :

> "The expression "defraud" involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied".

The above definition was in essence reiterated in *State of U.P. vs. Ranjit Singh*, 1999 (2) SCC 617 = AIR 1999 SCW 863.

The Penal Code however defines 'fraudulently', an adjective form of the word 'fraud', in Section 25, as follows : "A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise". The term "fraudulently" is mostly used with the term "dishonestly" which is defined in Section 24 as follows :

> "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing "dishonestly". To 'defraud' or do something fraudulently is not by itself made an offence under the Penal Code, but various acts when done fraudulently (or fraudulently and dishonestly) are made offences. These include :

(i) Fraudulent removal or concealment of property (Sections 206, 421, 424)

(ii) Fraudulent claim to property to prevent seizure (Section 207)

(iii) Fraudulent suffering or obtaining a decree (Sections 208 and 210)

(iv) Fraudulent possession/delivery of counterfeit coin (Sections 239, 240, 242 and 243)

(v) Fraudulent alteration/diminishing weight of coin (Sections 246 to 253)

(vi) Fraudulent acts relating to stamps (Sections 261-261)

(vii) Fraudulent use of false instruments/weight/measure (Sections 264 to 266)

(viii) Cheating (Sections 415 to 420)

(ix) Fraudulent prevention of debt being available to creditors (Section 422)

(x) Fraudulent execution of deed of transfer containing false statement of consideration (Section 423)

(xi) Forgery making or executing a false document (Sections 463 to 471 and 474)

(xii) Fraudulent cancellation/destruction of valuable security etc. (Section 477)

(xiii) Fraudulently going through marriage ceremony (Section 496).

It follows, therefore, that by merely alleging or showing that a person acted fraudulently, it cannot be assumed that he committed an offence punishable under the Code or any other law, unless that fraudulent act is specified to be an offence under the Code or other law.

Section 504 of Penal Code

The allegations in the complaint do not also made out the ingredients of an offence under Section 504 of the Penal Code. Section 504 refers to intentional insult with intent to provoke breach of peace. The allegation in the complainant is that when he enquired with accused about the sale deeds, they asserted that they will obtain possession of land under the sale deeds and he can do whatever he wants. The statement attributed to appellants, it cannot be said to amount to an "insult with intent to provoke breach of peace". The statement attributed to accused, even if it was true, was merely a statement referring to the consequence of execution of the sale deeds by first appellants in favour of the second appellant.

Conclusion

The averments in the complaint if assumed to be true, do not make out any offence under Sections 420, 467, 471 and 504 of the Code, but may technically show the ingredients of offences of wrongful restraint under Section 341 and causing hurt under Section 323 of I.P.C. *Md. Ibrahim & Ors. vs. State of Bihar & Anr.*, 2010 (2) CrLJ 2223 (SC).

6. Abetment of the offence.—*N*, a close acquaintance of the accused allowing himself to be represented as a *munim* in a bogus transaction with *G* and extracting money from him is guilty of abetment of the offence. AIR 1952 Ajmer 60.

7. Attempt to cheat.—*Vide* 1935 Cr C 1213 : AIR, 1961 Rang 456 ; 12 Mys LJ 467 ; AIR 1961 SC 1698 : 1961 SCD 885 : (1962) 1 SCJ 183 : 1961 (2) Cr LJ 822. Where it was *held* that a person commits the offence of attempt to commit particular offence when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with intention to commit the offence does an act towards its commission such an act need not be the penultimate act towards the commission of that offence but must be an act towards the commission of that offence and must' be an act during the course of committing that offence. *See* also AIR 1960 SC 979 : (1960) 3 SCR 544 : (1961) 1 SCJ 76 : 1961 All Cr R 11 : 1960 Cr LJ 1383 (accused representing to complainant that he could duplicate currency notes and complainant giving some currency notes—Two of the ingredients of the offence of cheating, false representation and delivery of property had taken place and they were acts done towards the commission of offence within the meaning of Section 511); AIR 1960 All 103 : 1960 Cr LJ 189 ; 1983 Cr LJ 318.

Alleged attempt to draw pension of freedom fighter by submitting forged papers petition for conviction was filed. The finding of Court below is upheld as the offence of attempt to cheat is established. *Amreek Singh* v. State *of Haryana*, (1995) 3 CC Cases 114 (P&H).

8. Procedure.—Cognizable—Warrant—Bailable—Compoundable, with permission of the Court—Triable by Magistrate of the first class. (In view of the provisions of Section 29 (1) Cr. P.C. the Chief Judicial Magistrate is also competent to try the case).

See AIR 1962 Andh Pra 257 : 1962 (2) Cr LJ 21 (charge under Section 420, read with Section 511) ; 64 Punj LR 874 : 1962 All Cr R 351 : 1961 All WR (Sub) 83 ; 1962 Cr LJ 801.

9. Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the* accused) as follows :—

That on or about the...........day of..........you cheated *A,B*, by dishonestly inducing him to deliver.........(*mention the property*) to you which was the property of the said *A, B [or* to make, alter or destroy the whole or any part of a valuable security (or anything which is signed or sealed, which is capable of being converted into a valuable security) and that you thereby committed an offence punishable under Section 420 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

In framing a charge under Section 420, it is necessary to set out not merely the fact that the accused has obtained goods by dishonest means, but also the deception which has been practised. The nature of the representation by which the complainant was induced to make over the goods should be mentioned in the charge. The need of framing a precise charge is all the stronger when the charge is based on obtaining goods by tendering post-dated cheque in which the representation is implied rather than directly expressed. AIR 1939 Lah 95 : ILR 1938 Lah 662.

In absence of any material to show fraudulent intention to cheat no charge under Section 420, I.P.C. can be framed. *Tek Chand Gain.* v. *State*, (1992) 47 DLT 28.

10. Punishment.—This section requires that on a conviction being recorded, a substantive term of imprisonment should be awarded. 1946 AMLJ 8 ; *see* also AIR 1950 All 639. Where there is strong indication, on the evidence on record, that there were other and perhaps bigger persons involved in the fraud for which the accused was tried and they are not brought to book, the circumstance though it does not excuse or exonerate the accused from his guilty which has established beyond reasonable doubt has, nevertheless, a bearing on the question of sentence. 1953 Ker LT 295 : 1953 Cr LJ 1928 : AIR 1953 SC 462 ; AIR 1960 SC 734 ; 1969 Cr LJ 1148 ; AIR 1974 SC 898 : 1974 Cr LJ 751 ; 1981 (Supp) SCC 82 : 1982 SCC (Cr) 470.

When a forged certificate is not used, it is covered under Section 465, I.P.C., and punishable. *Narendra Kumar* v. *State of M.P.*, 1974 Cr LR 310 (MP).

11. Fraudulent representation.—A fraudulent representation within the meaning of Section 470 may be made directly or indirectly. A fraudulent representation caused to be made through a person acting as an agent for the accused amounts to fraudulent representation by and on behalf of the accused. 1962 (2) Cr LJ 722 : 1962 All WR (HC) 507 : AIR 1962 All 582 ; AIR 1954 Mani 13 : 1954 Cr LJ 1713.

Where the suitor's money in deposit with the Government is fraudulently and negligently allowed to be withdrawn from Government deposit by the conduct of the Government servants, the suitors cannot be made to suffer and the Government will have to make good the amount, though the Government may realise the money from their servants who are at fault in so allowing the money to be withdrawn. 1963 (2) Cr LJ 36 : AIR 1963 Pat 262 ; *see* in this connection. 1963 (1) Cr LJ 716 ; *see* also 1962 (2) Cr LJ 722 : 1962 All LJ 639 : 1962 All Cr R 285 : AIR 1962 All 582. In case of non-mention of prior encumbrance of property in a sale by public auction, it could not be said that there was any dishonest representation or concealment of anything which the accused were bound to disclose. AIR 1960 Andh Pra 405 : 1960 Cr LJ 1067 ; *see* also 1959 Cr LJ 740 : AIR 1959 SC 740.

12. Property.—An admission card to university examination is a .property within the meaning of Section 420. AIR 1961 SC 1698 : 1961 SCD 885 : 1962 All Cr R 17 : (1962) 1 SCJ 188 : 1961 (2) Cr LJ 822. An import licence even when it is in the hand of the licensing authority is property within the meaning of Section 420. AIR 1955 Bom 82 : 56 Bom LR 188 : ILR 1954 Bom 554 : 1955 Cr LJ 289.

"Property" within meaning of section 420, I.P.C. includes certificate of Registration of societies obtained through forgery and fraud. *State* v. *Dr. Nagendra Pal Singh*, 1994 Cri LJ 2373 (Del).

13. Proof and evidence.—In a case of cheating, it is for the prosecution to show that at the time the accused entered into the transaction with the complainant, the accused had no intention to pay the money that he was actuated by a dishonest intention to cheat the complainant. AIR 1960 AP 311 : 1960 CrLJ 787. In prosecution under Sec. 420, it is the prosecution to prove affirmatively that the accused knew that the representations made by him are false. In the absence of circumstances from which it can be gathered that any such knowledge can be imputed to the accused, it is a case in which the benefit of reasonable doubt should be given to the accused. The burden of proof is never shifted to the accused. And if a reasonable explanation is given by the accused, the Court will have to take that into consideration and that if it thinks that the explanation may reasonably be true, though it is not convinced about the truth, it should acquit the accused. AIR 1957 SC 466 : 1957 CrLJ 583.

The question, that arises for consideration, is as to why the receipts and the summaries were forged by the accused. As stated above, the persons, who purportedly signed these receipts, denied their handwriting and signatures thereon as also the deposit of the amount and refund thereof. Since it was proved, beyond a reasonable doubt, that the receipts and the summaries, referred to above, were in the handwriting and under the signatures of the accused and as such, he forged these documents, it was he, who was to be benefitted by preparation of the same. Under these circumstances, it could be said that by forging the receipts and summaries, the only motive of the accused, was to withdraw the money. Such a withdrawal/refund of the money, depicted in the receipts, which was never deposited, was nothing but illegal. The amount of the receipts was neither deposited by the consignees, nor refunded to them. The only inference that could be drawn was that the accused by forging the receipts and obtaining the refund on the basis thereof of the amount, which was never deposited, cheated the Northern Railways. The trial Court was, thus, right in holding that the accused by his such act and conduct, committed the offence, punishable under Section

420 of the Indian Penal Code. This Court, on re-appraisal and re-appreciation of the evidence of the prosecution, also comes to the same conclusion. The findings of the trial Court, in this regard, being based, on the correct appreciation of evidence, are upheld. *Lall Chand vs. State of Punjab & Anr.*, 2010 (1) Cri LJ 699 (P&H).

The fact that the *Hundi* was not actually paid when it was presented for payment would not by itself make the accused guilty of cheating. The accused can be *held* guilty of cheating only if on the circumstances proved by the prosecution the Court could draw a clear inference and the only inference that the intention of the accused at the time when he passed the *Hundi* to a certain firm was to cheat the firm, not otherwise. AIR 1957 All 246 : 1957 Cr LJ 438 : 1957 All LJ 158. Where there is no clear and conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed and where the party is said to be aggrieved has an alternative remedy in a Civil Court, the latter should not be allowed to be fought in a Criminal Court. AIR 1959 Trip 38 : 1959 Cr LJ 1027 ; (1957) 2 Andh WR 368 : 1957 MLJ (Cr) 603 : 1957 An LT 777 (civil liability made out but no intention to defraud proved).

Trolley sold to petitioner was different from trolley sold. The meticulous and minute scrutiny of evidence is not required at the stage of framing charges. *Amra Ram* v. *State of Rajasthan*, (1995) 2 RCD 532 (Raj).

Offence of fraud alleged to have been committed by Bank Clerk—Conviction was challenged in appeal. The offence is proved by oral and documentary evidence and opinion of handwriting expert. Hence, conviction confirmed. *O. Ravindranath* v. *State of A.P., rep. by the Inspector of Police, C.B.I., Visakhapatnam.* (1995) 2 APLJ (Cr) 157 (AP).

Regarding proof of conspiracy direct evidence not necessary. *Nellai Ganesan* v. *State*, 1991 Cr LJ 2157 (Mad).

See AIR 1974 SC 1560 (*mens rea* on the part of the accused is to be established). Onus is on the prosecution to prove the dishonest intention and other ingredients. AIR 1980 SC 409 : 1980 Cr LJ 220 ; AIR 1973 SC 326 : 1972 Cr LJ 1243 ; AIR 1974 SC 1560 : 1974 Cr LJ 1026 (error of judgment or breach of performance cannot be equated with dishonest intention). AIR 1980 SC 499 : 1980 Cr LJ 229 (mere suspicion or even reasonable doubt commit take place of proof) ; *see* also AIR 1981 SC 476 : 1980 Cr LJ 1474 (absence of evidence that another partner had knowledge of the state of affairs, would not be sufficient to convict the another partner under Section 20, read with Section 34.

Statement of a witness would not be read as evidence against a party unless he was cross-examined or opportunity for same was afforded. *Almadia A.D.* v. *State*, 1996 (1) Crimes 416 (Mad).

Dishonest intention must be proved to exist at the time of cheating. 1986 Cr LJ 1271 (Ori).

Where *prima facie* documentary evidence that possession of vehicle delivered after payment of full consideration and charge of cheating cannot stand, it is fit to discharge accused. 1987 Cr LR (Guj) 356.

14. Cheating by impersonation.—The accused was charged with the offence of cheating by impersonation. It was observed that there was definite evidence that by cheating officers accused dishonesty induced them to make or prepare appointment letters and deliver the same. There could be no doubt that the letter of appointment was "property" and also "valuable security" within the meaning of those terms appearing in Section 420. Consequently charge under Section 420 to be made against accused. 1987 Cri LJ 933 (All).

Magistrate was not justified in making an order of discharge before recording any evidence from complainant. *Robert Costa Fernandes* v. *Americ Joseph Fernandes*, 1993 (1) Crimes 542 (Bom).

Where there was conviction for offence under Section 420, I.P.C.—Revision petition was filed against the same. Evidence insufficient to establish that articles pawned were the same which were produced by the prosecution, conviction was not *held* sustainable. *Ram Saran* v. *State*, (1995) 4 Crimes 522 (All).

Where there was a criminal conspiracy by accused appellants, appellants conspired to enroll a fictitious person for his insurance. Insurance policy thus was issued by Insurance Company in name of such person. Subsequently, they reported death of that person and applied for insurance money in name of *B* as father of that fictitious person. Company suspected foul play and initiated their prosecution and appeal against their conviction was filed. Whether appellants forged, signature of *B* not proved, beyond reasonable doubt even by handwriting expert. Entries in papers was not proved false. Trial Court expected accused to prove their innocence. It was *held* that accused was to be treated as innocence unless prosecution proved his guilt beyond reasonable doubt. Conviction set aside. *Bahadur Singh* v. *State*, 1995 Cr LR 346 (MP).

In absence of any proof that entries were false, no offence is proved. *Bahadur Singh* v. *State*, 1995 Cr LR 346 (MP).

15. Acquittal under Sections 419 and 420.—The effect of the order of acquittal of the accused in respect of charges under Sections 419 and 420 was that he could not be convicted of this offence under Section 465. AIR 1955 Cal 473 : 96 CLJ 177 : ILR (1957) 1 Cal 576 : 59 CWN 832 : 1955 Cr LJ 1246.

In conspiracy case when co-accused was acquitted, appellant should also be acquitted as he was only used by some one to sign alleged forged document. *Nand Kishore* v. *State of M.P.*, 1994 (1) Crimes 362 (MP).

Acquittal on ground that accused is lady, is illegal. *State of M.P.* v. *Sadhna @ Mona Naidu*, 1991 Cr LR 457 (MP).

Order of acquittal of accused by Magistrate without taking notice of his statement under Section 313, Cr. P.C., admitted offence at earlier occasion. is not proper. *Selladurai* v. *Sridhar*, 1996 Cri LJ 659 (Mad).

When forged documents were conspired by the accused persons and co-accused was acquitted. Appellant was charged that he had signed on the forged documents. Appellant did nothing himself, as he was used by some one—Conviction cannot be sustained. Appeal was allowed. *Nand Kishore* v. State *of M.P.*, (1994) 1 Crimes 362 : (1994) 1 CCR 390 (MP).

Where accused said to have forged signature of Principal of College on nomination from the opinion of the same was of handwriting expert. Comparison of forged signature with specimen signature of complainant. Expert not given detailed report, some similarities found. F.I.R. was lodged after 2 years. Hence, some dissimilarities in signatures of complainant may develop. Some rivalries existed between accused and complainant. It was *held* that acquittal by trial Court require no interference. *State of Punjab* v. *Jasjit Singh*, (1994) 1 Crimes 186 (P&H).

In absence of any evidence to indicate that accused had dishonest intention to cheat I.T. Department for encashment of forged I.T. Refund orders in name of facilities persons, accused entitled to acquittal. *N. Durga Prasad, Spl. Asstt., Syndicate Bank* v. *State of AP*, 2004 Cr LJ 242 (AP) : 2003(2) ALD (CRL) 545 : 2004(1) Guj LH 408.

The accused merely introducing co-accused to bank for opening of account. Co-accused after six months presenting bogus drafts and withdrawing amount but accused was in no ways connected with all this. It was held that accused appellant was in no way related to the fraud committed by co-accused due to which bank had suffered losses. the conviction of accused was accordingly set aside. *Manoranjan Das* v. *State of Jharkhand*, 2004 CR LJ 3042 : 2004(5) SRJ 180 : 2004(5) Scale 157.

The allotment of government land by Public servant was made as per law but allegation was that this allotment was illegal. Public Servant involved in process of allotment were held entitled to the acquittal. *State* v. *Govind Ram Bagdiya*, 2003 Cr LJ 1169 (Raj).

16. Sanction.—In AIR 1950 Raj 51 at p. 53, the Court observed : "As far as the offence under Section 420 or Section 120-B, read with Section 420 is concerned, I feel no difficulty in holding without hesitation, that the sanction of the Government is necessary for prosecuting a public servant for these offences. In the present case, the committing Magistrate has not written anything in his judgment as to how the offence under Section 420 is made out against the applicants. A public servant can cheat the Government only by an official act done in official capacity. I cannot conceive of any case where a Government can be cheated by the private act of public servant. As far as the offence under Section 120-B, read with Section 420, is concerned, the learned Government Advocate has not pressed the point before me at all. It is obvious from *H.B. Gills* v. *King*, AIR 1948 PC 128 : 49 Cr LJ 503, that sanction to prosecute a public servant under Section 120-B read with Section 420 was obtained. Hence, the view of the committing Magistrate that no sanction is ever required for prosecuting a public servant under Section 420, read with Section 120-B is wrong." In case of a person who moves about in business community and does business, whether small or large, any conviction or any sentence however small is ruinous. Severe sentence is not therefore, called for in such case. AIR 1957 All 246 : 1957 Cr LJ 438 ; *see* also AIR 1960 SC 734 : 1960 Cr LJ 1148.

Where there was quashing of sanction under Section 197, Cr. P.C., not obtained—Petitioner, a *patwari*, forged a certificate—Prosecution who filed against him. Since *patwari is* removable by Collector and not by State Government, no sanction under Section 197 is required—Alleged forged certificate was not used, hence, offence is covered under Section 465—Charges framed under Sections 468, 420 and 471 was quashed. *Narendra Kumar* v. *State of M.P*, 1994 Cr LR 310 (MP).

Gram Sachiv being Government employee, cognizance of offence cannot be taken without sanction of proper authority. *Janardhan Dass* v. *Prem Chand*, 1994 (3) Recent Cr R 55 (P&H).

Absence of sanction for prosecution of public servant, render prosecution void in law. *Abdul Hamid Ismail* v. *State of Maharashtra*, (1994) 2 Bom CR 235.

17. Conviction.—Where property was mortgaged for Rs. 40,000/- and property was sold to complainant—Rs. 12,000/- withdrawn by accused. Complainant unknown offence of cheating was made out. *Inayathullah* v. *Guruswamy*, (1994) 38 MLJ (Cri) 316.

Sufficient material for Conviction.—Conspiracy for drawing scholarship on the basis of fictitious post metric students of Government Junior College. Accused, officials of Social Welfare Department. Prosecution able to prove its case of conspiracy amongst the accused persons in drawing money twice over in respect of students on the basis of fictitious names. *Y. Venkaiah vs. State of Andhra Pradesh*, AIR 2009 SC 2311 : 2009 CrLJ 2834 : 2009(12) SCC 126 : 2009(4) Scale 154 : 2009(4) JT 432.

Where there was enough material on record to show that accused had filed false affidavits for purpose of allotment of plots under LIG Scheme therefore conviction and sentence of accused under Section 420, IPC warrants no interference. *Karamjit Singh* v. *State (UT) Chandigarh*, 2005 Cr LJ 1306 (P&H) : 2005(1) All Cri LR 825 : 2005(2) Cur Cri R 263 : 2005(1) Rec Cri R 686.

Material on record showed that accused had accepted forged documents for making payments from account of complainant whereas these documents were not fit for acceptance. His conviction was upheld but instead of sending him to jail, a fine of Rs. 25000/- was imposed. *Uma Shankar Pandey* v. *CBI*, 2004 Cr LJ (NOC) 225 (Jhar) : AIR 2004 Jhar HCR 2295 : 2003(3) BLJR 2190 : 2003(3) East Cri 511.

In the instant case, the accused stayed in house of deceased on fateful night and committed murder of deceased and looted amount and thereafter fled away after putting lock to house from outside. Recovery of blood stained clothes of deceased on the basis of disclosure statement was proved. Motive that deceased was denying to return back amount of accused was also proved. Conviction of accused was held proper. *Harum Ilani Mugani* v. *State*, 2004 Cr LJ 2462 (Bom) : 2004 All MR (Cri) 2460.

In absence of any pecuniary advantage to accused, mere suspicion that accused may have some connection with other accused will not be sufficient to convict him. *R.M. Vellaiyan* v. *State of T.N.*, 1995 (2) LW (Cri) 426 (SC).

When articles pawned as gold and silver found to be brass and gillat, in absence of evidence that articles were sealed at spot and were not tested by complainant at the very time, conviction cannot be sustained. *Ram Saran* v. *State*, 1995 (4) Crimes 522 (All).

In absence of any explanation as to where from accused obtained forged currency notes, conviction proper. *Ponnuswamy* v. *State*, 1995 Cri LJ 2658 (SC).

Excess amount demanded and received but deposited in revenue account less, it is cheating, and conviction under Section 420, I.P.C., justified. *Ram Chandra* v. *State of Rajasthan*, 1992 Cr LR 422 (Raj).

In absence of any scope to hold that accused cheated or attempted to cheat, conviction can be set aside. *M. Muniswamy* v. *State of Karnataka*, 1993 (1) Kar LJ 72.

Where accused was found in possession of forged currency notes—Where from obtained such notes accused not giving any explanation. Conviction of accused was *held* proper. *Ponnusmamy* v. *State*, 1995 AIR SCW 1788 : 1995 Cr LJ 2658 (SC).

Accused agreed to supply *dal* to firm and used railway and *dal* was stolen by him. Bank in response to *Hundi* and R.R. collected amount from drawee firm and remitting it for payment to accused. Evidence shown that accused cheated firms by forging letters, *Hundies*, RRs and making use of such forged documents. Hence, offence of cheating and forgery proved. Hence conviction proper. *Satrangi Lal* alias *Kishan Lal* v. *State of Haryana*, 1995 Cr LJ 969 (P&H).

Where there was charge against five accused persons including appellant (A-2) for offences under Section 420, read with Sections 34 and 5(1)(d) and 5(2) of P.C. Act—A-3 and A-5 acquitted and conviction of A-1 and A-4 not challenged—Conviction of appellant was confirmed by High Court which was challenged in appeal. The penal provisions of Section 5(l)(d) or 5(2) of P.C. Act or Section 420, I.P.C., are not attracted and mere suspicion that appellant may have some connection with A-4 will not be sufficient to convict appellant. *R.M. Vellaiyam* v. *State of Tamil Nadu*, (1995) 2 LW (Cr) 426 (SC)..

18. Sentence.—When accused was rightly convicted for fraud committed by him, his sentence can be reduced to period already undergone in view of protracted trial. *Deep Chand* v. *State of Haryana*, 1993 (2) Recent Cr R 369 (P&H).

Reduction—Appellant as a public servant.—Northern Railways, by forging the receipts and the summaries and by misusing his official position withdrew the money, by way of refund, on the basis of the said documents, though no such amount was deposited with the Railways. If a public servant, acts in this manner, then he brings disrepute to the Institution, as a whole. The trial Court, as is evident, from the record, in my opinion, took a lenient view and awarded sentence of rigorous imprisonment for a period of one year on each count. The sentence awarded by the trial Court, being already on the lower side, no ground, whatsoever, is made out, for reduction of the same. However, the mere fact that the appellant has been facing the criminal proceedings, for the last more than 20 years, in itself, is not sufficient to reduce the sentence, awarded to him by the trial Court. Further reduction of sentence, would amount to mockery and travesty of justice. *Lall Chand vs. State of Punjab & Anr.*, 2010 (1) CrLJ 699 (P&H)

19. Cases.—Where there was allegation under Section 420, dishonour of post-dated cheque, complaint was justified against post-dated cheque. Plea was rejected. *S. Muthukumar* v. *State*, (1994) 1 LW (Cri) 264 (Mad).

Where complaint was filed and F.I.R. also lodged and alleged offence under Sections 420, 468 and 471, both the cases may be tried together. All witnesses should be cross-examined. *Naresh Kumar* v. *State of Punjab*, (1994) 2 Recent Cr R 406 (P&H).

Where there was sale of *Gram Panchayat* land by *Sarpanch*—Sale was by permission of Commissioner—Allegation against that no depositing of money found in sale—Election cannot be contested without 'No dues certificate' which was continued as *Sarpanch* for 7 years. It was *held* that F.I.R. was unjustified and with ulterior motive. *Dhan Pal Rai* v. *State of Haryana*, (1994) 1 Recent Cr R 510.

When loan was not returned and civil suit decided in the favour of bank, subsequent criminal proceeding was justified. *B.L. Dalmia* v. *State of Haryana*, (1994) 2 Recent Cr R 305 : 1994 Cr LJ 2493 (P&H).

Where there was preparation of fictitious and forged sale-deed and registration—Mutation proceedings taken secretly and real owner of land not impleaded in civil suit there was no dispute for possession—Criminal liability fastened. It was *held* that F.I.R. cannot be quashed and petition was dismissed. *Narendra Singh* v. *State of U.P*, 1994 ACC 124 (All).

When cheque was dishonoured—Statutory provision complied was with and notice was given by petitioners 3 and 4, non-active members—Prosecution proceedings against them quashed—Petitioner numbers 1 and 2 active members—Petition against them was dismissed. *Om Prakash* v. *Ravinder Bhusan*, (1994) 3 CC Cases 393 (P&H).

Filing of charge-sheet was established—Petition was filed challenging F.I.R.—Respondent counsel filed on many dates the illness slip, final disposal done with direction to dispose of the case to trial Court. *Ganesh Dhar Dubey* v. *Prem Pd. Srivastava, Branch Manager, State Bank of India, Govindpur Branch, District Sonbhadra*, 1994 UP Cr R 98 (DB).

Two accused set informant's house on fire, and informant in her evidence attributed act of setting house on fire to only one accused and the fact was supported by another eye-witness also. This was in conflict with FIR over number of persons committing arson. No objective evidence collected from place of occurrence produced to corroborate prosecution case. Other evidence was also not reliable. The accused was held entitled to benefit of doubt. However, conviction under Sections 452 and 380 with the aid of Section 34 was upheld. *Dinesh Chaudhary* v. *State of Bihar*, 2004 Cr LJ 4360 (Pat) : 2004 (3) BLJ 488.

Complaint case was filed against offence of cheating—Petitioner registered company—Depositing and returning by direction of Reserve Bank of India. It was *held* that it is not a case of civil nature under Section 482, Cr. P.C. no inquiry can be made. *Roshan Lal Saini* v. *U.T. Chandigarh Admn.*, (1994) 2 CC Cases 203 : (1994) 1 Recent Cr R 489 (P&H).

For offences under Sections 78 and 79 of Trade and Merchandise Marks Act, charge under Section 420 is wholly inapt. *Syed Kaleem* v. *M/s. Mysore Lakshmi Beedi Works and another*, 1993 Cri LJ 232 (Kant).

Plea of accused while admitting to have forged signature of Agent on blank bank draft that he only tried to oblige other accused and knew nothing more about offence, is not acceptable. *Amicito Lobo* v. *State*, 1994 Cri LJ 1582 (SC).

When complaint was filed after two years of sale-deed, it can not be dismissed on account of delay. *Sobna Ram* v. *Inderpal Sharma.*, (1993) 1 Recent CR 682 (P &H).

In absence of any clear report from handwriting expert simple refusal of accused to give his specimen signatures before Magistrate is of no consequence when his signature is already available in records. *State of Punjab* v. *Jagjit Singh*. 1994 (1) Crimes 186 (P&H).

Compliance of procedure contemplated under Section 195(b)(ii), Cr. P.C., "before proceeding with investigation, is necessary. *Andhra Bank* v. *S.H.O., Pattabhipuram*, 1996 Cri LJ 277.

Cheating of huge amount of public money cannot be lightly viewed. *Rajdhar Dubey* v. *State of U.P.*, 1992 (2) Crimes 306 (All).

When accused obtained a bank draft by fraud and deposited in bank order of trial Court allowing accused to withdraw this amount before conclusion of trial is illegal. *State of Manipur* v. *K.K. Singh*, 1994 (3) Crimes 415 (Gau).

After submission of final report of police and its acceptance, when on further investigation Magistrate took cognizance of offence, it is proper. *State of Rajasthan* v. *Aruna Devi*. 1994 (3) Crimes 899 (SC).

Bar of Section 397(2), Cr. P.C. cannot be circumvented by invoking inherent powers of High Court under Section 482, Cr. P.C. *Shiv Kumar* v. *Ramesh Chand*, 1994 (1) Recent Cr R 142 (P&H).

When two accused colluded with each other to cheat complainant, that would not satisfy requiremetns of Section 109, IPC. *Man Mohan Chopra* v. *Ravi Prakash*, 1992 (I) Crimes 607 (Mad).

Order of Magistrate directing police officer to investigate case and submit report is legal as it was passed before taking cognizance of offence. *Dautla Radhu Bhatija* v. *State*, 1996 Cri LJ 2158 (Del).

As Lapse atributed to accused public servant not covered under section 161, IPC, Or section 5(2) of Prevention of corruption Act, accused was rightly discharged. *State of Punjab* v. *Unnikrishanan*, 1991 (1) CC cases 63 (P&H).

When cheque was dishonoured for any other ground than "insufficiency of funds" no offence under Section 138, N.I. Act, is made out. Further, when payment of cheque was stopped and cheque was issued to discharge pre-existing liability, offence under Section 420, I.P.C., is also not made out. *Ram Gupta* v. *Bakeman's Home Products*. 1992 (2) Crimes 1047 (P&H).

When wife as owner of plot did not give consent to husband to sell plot, husband committed offence under Section 420. I.P.C., in selling the plot. *Ranjit Kumar Lohria* v. *Madan Lal*, 1993 (1) Recent CR 121.

When there is *prima facie* case of cheating police can take cognizance of this offence in spite of fact that there was complaint from any customer. *Mohammad Haneeba Meera* v. State *of M.P.*, 1994 Cr LR 1 (MP).

Complaint for offence under Section 420. I.P.C., filed at Moga. Punjab is not maintainable as entire transaction regarding sale of plot situated at Bombay was carried out at Bombay. *Mohinder Singh Brar* v. *Rattan Lal Wadhwa*, (1994) 1 Crimes 268 (P&H).

Person in debt issuing post-dated cheques towards it discharge amounts only to promise to discharge debt on future date and on dishonour of cheques, it only amounts to breach of promise liable for civil remedy and not for criminal offence. *M/s. Mulji Mehta* v. *M/s. Sugesan Finance Investment*, 1991 MLJ (Cri) 168.

In case of suit for recovery as well as criminal complaint, High Court was not correct in staying suit for recovery on account of criminal trial. *State of Rajasthan* v. *M/s. Kalyan Sundaram Cement Ind. Ltd.*, 1996 (3) Crimes 92 (SC).

Through interim report submitted by police final report not being submitted in spite of several adjournments sought for and petitioner suffering great loss Court directed Magistrate to enquire into case. *M/s. Apronto Tools Pvt. Ltd.* v. *State*, 1994 Cri LJ 421.

When case against accused was registered 30 years back and prosecution took 17 years to frame charges and trial not yet started, prosecution discontinued. *State of U.P.* v. *Parshottam*, AIR 1991 SC 1015 : 1991 SCC (Cr) 1016 : 1991 Supp(2) SCC 124 : 1991 Cr LJ 741.

When order of assessment of income-tax is set aside and re- assessment ordered, criminal proceedings under Section 420, I.P.C. may be stayed till reassessment order. *Vinod Kumar* v. *A.C. Income Tax*, (1994) 2 Bom CR 47.

Delay in lodging FIR is not fatal but when there was likelihood of exaggeration or false accusation being thought of, then onus lies one prosecution to explain delay satisfactorily. *Sadananda Das* v. *State of Orissa*, 1991 (2) Crimes 343 (Ori).

Dishonour of cheque on ground of non-availability and instruction of stoppage of payment, shows dishonest intention. *K.C. Chibber* v. *State*, (1994) 2 CC Cases 311 (Del).

Where before presentation of cheques for encashment notice was issued to him not to present cheque and yet payee in due course presented same to bank and returned on instructions of drawer, no offence under Section 138 of N.I. Act was made out. *K.K. Sidharthan* v. *T.P. Praveenachandran*, 1996 (4) Crimes 102 (SC) : 1996(9) JT 191 : 1996(6) SCC 369 : 1996(7) Scale 454 : 1996(7) Supreme 453.

When cognizance of offence was already taken before filing of document in Civil Court and original was not filed, Magistrate is at liberty to proceed with trial of criminal case. *Surjit Singh* v. *Balbir Singh*, 1996 Cri LJ 2304 (SC) : AIR 1996 (SC) 1592 : 1996(3) SCC 533 : 1996(3) JT 363 : 1996(2) Scale 865 : 1996(3) Supreme 250.

Order of discharge of accused on application of complainant to the effect that dispute between them had been settled, not legally sustainable. *In re. State of Maharashtra*. (1992) 1 Crimes 406 (Bom).

When once will was declared null and void by Civil Court, complaint now filed for alleged forgery in will is abuse of process of Court. *Amrik Singh* v. *State of Haryana*, 1994 (1) Crimes 789 (P&H).

Where power of attorney and written statement were forged outside Court, Section 195, Cr. P.C. is not attracted. *Alka Katari* v. *State of Haryana*, 1993 (2) CC Cases 76 (P&H).

Charge-sheets filed under Sections 420 and 467, I.P.C., and also under Essential Commodities Act are justified on facts. *Rajendra Chandra Jain* v. *State of U.P.*, 1991 Cri LJ (NOC) 29 (All).

When public money was squandered away connivance of bank officers cannot reduce *prima facie* liability of accused. *Kamal Kishore Shukla* v. *State of U.P.*, 1993 (2) JIC 608 (All).

Offence of forging signature coins under Section 467, I.P.C., and not cheating under Section 420, I.P.C. Ram *Jiyavan Jaiswal* v. *State of U.P.* (1995) 2 CCR 162 (All).

In *Y.K. Gupta* v. *State of U.P.*, 2001 Cri LJ 339 (All.) : 2001(1) UP Cr R 20 (All). Assistant Manager in Financial Corporation provided loan to a small enterpreneur. The plant and machinery purchased by the loanee was old but it was shown to be new one. The Covenant made by the loanee was that the plant and other assets to be mortgaged were absolute property of the loanee free from any prior charge and having exclusive power to mortgage the plant and other assets. No part of the mortgage deed suggested that the loanee was required to purchase mortgage new plant and machinery. The loanee was thus not obliged to purchase new plant and machinery from out of the amount of loan sanctioned to him by the U.P. Financial Corporation. No doubt, the loanee said that he purchased the new plant and machinery. But that ins itself did not absolve the prosecution from the liability to establish that the plant and machinery to be acquired from out of the loan were required to be new. Thus, on the one hand, there was nothing on behalf of the prosecution that the loanee was required to purchase new machinery or the loan was sanctioned for the purchase of new plant and machinery and in the other hand, there was nothing on record to show that the loan could not have been disbursed on the basis of old plant and machinery. The Court, after examining the documents and considering the evidence, observed as under:

> "In the circumstances, there is nothing on record to establish that *Mohammad Hanif* has purchased old machinery and had thereby tried to cheat the U.P. Financial Corporation. He had purchased machines documents of which could not be retired by the U.P. Financial Corporation. He then applied for change of supplier and then again purchased the plant and machinery. A small scale entrepreneur living in a village cannot be presumed to have technical knowledge and in such circumstances, it is difficult to say that he was cheating. Moreover, seeing the nature and value of security having been offered by Mohd. Hanif, cheating seems to be a far fetched perception.
>
> "Much emphasis has been laid by the prosecution on fact that the supplier when contacted could not be found at the address given in the cash memo No buyer can be *held* guilty of a crime if the supplier from whom he purchased the machinery had at a subsequent time chose to close down the business or to shift from the given address. The mere fact that the supplier was not found at the given address will not make the purchase of machinery by a buyer illegal or unauthorised, nor any criminal liability can be fastened on account of shifting of premises or closure of the business by the seller of the machinery".
>
> "Even if the machinery was old but of the value thereof was sufficient to meet the liability, it is not possible to say that the question of cheating is involved as the machinery was of much larger amount likely to fetch much more than the loan disbursed".

The Court ultimately came to the conclusion that there was no intention to defraud on the part of the Assistant Manager (accused) and, therefore no offence of cheating or forgery was made out.

It was alleged that the cheating was committed by not disclosing original religion at time of marriage and a complaint was filed against respondent for taking the cognizance of offence. On investigation having been made by the police it was found that no material to frame the charge of cheating was available and magistrate dismissed the complaint. Dismissal of complaint by magistrate was held proper. *Mohd. Gyasuddin* v. *Jahangeer Karanjrab*, 2003 Cr LJ 966 (AP) : 2002(2) ALD (CRL) 654 : 2003(1) Andh LT (Cri) AP 1.

Govt. land was purchased by Chief Minister's firm but there was no evidence that land was undervalued and definitely sale was by open tender. No charge under Section

420 was made out and C.M. was acquitted with the condition that purchased land shall honourably be returned unconditionally to the seller *i.e.* TANSI. *R. Sai Bharathi* v. *J. Jayalalitha*, 2004 Cr JL 286 (SC) : AIR 2004 SC 692 : 2003 AIR SCW 6349 : 2004(1) Crimes 43 : 2003(9) JT 343 : 2002(2) ALD (CRL) 654.

20. Quashing of proceeding.—When petitioner issued cheque of Rs. 10,000/- in lieu of past rent due, cheque was dishonoured—Complaint was that, cheque was issued knowingly that there was no money in bank account. There was no occasion for fraudulent or dishonest inducement of complainant by petitioner—It was only breach of promise and not a criminal liability under Section 420—Complaint was quashed. *Susemma Bijoy* v. *Mohinder Kumar Guleria*, (1994) 3 Crimes 164 (HP).

Complaint against petitioner was filed when complainant filed suit to declare will null and void, no allegation of forgery was made. It was only alleged that will was obtained by practising fraud and undue influence—Will bore signatures of complainant and petitioner as attesting witnesses—Civil Court has declared will null and void—Present proceedings initiated against petitioner being abuse of process of Court liable to be quashed. *Amrik Singh* v. *State of Haryana*, 1994 (1) Crimes 789 (P&H).

In a complaint case, pursuant to an application certain machinery was seized from the accused. It was handed over to the complainant by way of *supurdgi*. The accused moved an application under Section 482, Cr. P.C. for quashing the order of the Magistrate for *supurdgi*. On examination of record, it was found that the applicant accused had purchased it *i.e.*, his liability was thus of a civil nature and as such his claim for *supurdgi* is superior. (1986) 2 Crimes 236 (All).

Complaint under Section 156, Cr. P.C., before Addl. C.J.M., New Delhi, Magistrate ordering investigation by police at pre-cognizance stage—Writ petition for quashing of the order. It was *held* that when a Magistrate receives a complaint, he is not bound to take cognizance if facts alleged in the complaint disclose the commission of an offence. The Magistrate has discretion in the matter. If he finds the allegations therein disclose a cognizable offence and forwarding of the complaint to the police for investigation will be conducive to justice and save valuable time of Magistrate, he will be justified in adopting that course. There is no ground for quashing the investigation. *Daulat Radhu Bhatjia* v. *State*. (1994) 2 CC Cases 433 (Del).

Where case under Section 420/376, I.P.C., was registered against *K* and petitioners who are his sisters—Petition under Section 482, Cr. P.C., was filed for quashing of F.I.R. and other proceedings. It is evident from application submitted by *K* that she has effected compromise with petitioners and she does not want to pursue the case. Although the offences mentioned in the F.I.R. are not compoundable yet since parties have amicably settled that the trial will not end in conviction of the petitioner and no useful purpose will be served by continuation of the proceedings, hence, F.I.R. and proceedings quashed. *Harbans Kaur* v. *U.T. Chandigarh*, (1994) 2 SLJ 1109 (P&H).

Where there was notation proceeding forged based on forged document civil suit was pending criminal proceeding on this ground may not be quashed. Both proceedings may be continued simultaneously. *Suba Singh* v. *State of Haryana*, (1994) 1 Recent Cr R 215 (P&H).

When final report was submitted by police—Further investigation ordered by SP existing--Magistrate order for further investigation. Charge sheet was submitted—High

Court quashed the proceedings—Appeal against the same was filed proceedings was wrongly quashed. *State of Rajasthan* v. *Aruna Devi*, (1994) 3 Crimes 849 (SC) : 1995(1) SCC 1 : 1994(7) JT 522 : 1995 JCC 190 : 1995 SCC (Cr) 1.

Petition under Section 482, CrPC, for quashing of the offence was filed the petitioner was found in possession of forged books for sale other than those published by Punjab School Education Board. Hence, F.I.R. cannot be quashed at this initial stage. *Dharam Pal* v. *State of Punjab*, (1994) 2 Crimes 291 : (1994) 2 Recent CR 283 : (1994) 1 Recent Cr R 332 (P&H).

The cheque issued by respondent to petitioner was returned unpaid as account in the bank was closed. The fresh cheque was issued in lieu of earlier cheque. It was held that in the absence of specific allegation about dishonest intention to cheat a case for cheating is not made out and proceedings were liable to be quashed. *(M/s.) Siddhartha Electronics* v. *M/s. Videocon International Ltd.*, 2003 Cr LJ 4038 (AP) : 2003(1) Andh lT (Cri) AP 409 : 2003(3) Crimes 33.

Where there was complaint against petitioner—When complainant filed suit to declare will null and void, no allegation of forgery was made. It was only alleged that will was obtained by practising fraud and undue influence—Will bore signatures of complainant and petitioner as attesting witnesses—Civil Court declared will null and void—Present proceedings initiated against petitioner being abuse of process of Court was *held* liable to be quashed. *Amrik Singh* v. *State of Haryana*, (1994) 1 Crimes 789 : (1994) 1 CC Cases 505 : (1994) 2 CC Cases 71 : (1994) 1 Recent Cr R 326 (P&H).

Where the allegation of cheating by evading sales tax—F.I.R. under the same was made petition under Section 482, Cr. P.C., for quashing of, the same was filed the petitioner is agent of railway authorities and books consignment of general public and issues R.R. on behalf of Railways. Where neither overt act has been attributed to petitioner nor that petitioner was acting as a kind of dealer under General Sales Tax Law of State, the F.I.R. registered stands quashed *qua* the petitioner. *Saral Kumar* v. *State of Haryana*, (1994) 3 CC Cases 138 (P&H).

Where there was offences of sale of underweight cement—F.I.R. for offences under Sections 420/120-B, I.P.C.—Petition under Section 482, Cr. P.C. for quashing of the same was filed. The said contravention of Section 39(7) is punishable under Section 63 of the Act. Section 75 of the Act operates as bar for the trial under the Indian Penal Code since the cognizance of offence under the Act can be taken only on basis of complaint under Section 72 of the Act, no valid prosecution could be launched and hence, the F.I.R. and charge-sheets liable to be quashed. *Jatinder Gupta* v. *U.T. Chandigarh*, (1994) 2 CC Cases 562 : (1994) XXI Cr LT 150 (P&H).

Where complaint case under Sec. 420, IPC, pending in Court of C.J.M.—Petition praying for quashing as no criminal case is made out. The parties entered into an agreement and they also entered into transaction and petitioner also paid amount on several occasions. Therefore, it cannot be said that there was any *mens rea* on part of the petitioner-accused at the time of beginning of the agreement. Hence, essential ingredients to constitute the offence under S. 420, IPC, are not complete and complaint is therefore, liable to be quashed. *Kamail Singh* v. *State of U.P.*, 1994 UP Cr R 330.

When cheque dishonoured, offence under Section 420 was not made out. Cheque was issued for the services rendered as for realization of debt. No further investigation can be *held*, proceeding was quashed. *V. M. Shanmuga Sundaram* v. *Margabandhu*, (1994) 1 LW (Cri) 210 : 1994 Mad LJ (Cr) 104 (Mad).

Where there being a regular contract of sale of paddy between parties. There was running account between the same, accusation was that, signatures procured by accused on account sheets were by misrepresentation and considerable amount still outstanding. Criminal offence was not made out, as it gives rise to civil action. Criminal proceedings of cheating was finally quashed. *(M/s.) Kalyani Modern Rice Mill* v. *State*, 1994 Cr LJ 1123 (AP).

When F.I.R. was registered against petitioner only on account of political rivalry and no case of cheating is established, F.I.R. is quashed. *Dhan Pat Rani* v. *State of Haryana*, 1994 (1) Recent Cr R 509 (P&H).

In a Supreme Court case where the Gujarat Cancer Society paid custom duty in respect of machinery imported without taking advantage of exemption certificate and evidence showed that there was no fraudulent or dishonest intention on part of GCS or its office bearers intentionally to retain the property, it was held that the ingredients of offence of cheating were missing and FIR was quashed. *Hira Lal Hari Lal Bhagwati* v. *CBI, New Delhi*, 2003 Cr LJ 3041 (SC) : AIR 2003 SC 2545 : 2003 AIR SCW 2735: 2003(3) Crimes 100: 2003(4) Scale 471.

Where allegations made in FIR *prima facie* does not make out a criminal case against petitioner but it has been lodged by respondent with a view to harass, pressurize and intimidate petitioner, FIR is liable to be quashed. *Uttam Kr. Bose* v. *National Capital Territory of Delhi*, 2005 (2) Crimes 474 (Del).

The appellant beverages company entered into bottling agreement with complainant bottling company for a period of 5 years. Subsequently trademark of appellant company was purchased by another industries (A6) to which the agreement was assigned but they gave notice to the complainant for termination of agreement. The complaint was then filed against Beverages Company and its directors alleging the offence of cheating. It was held that as no *mens reas* could be attributed on part of appellant to cheat or deceive complainant, the complaint was, therefore, liable to be quashed. *Ajay Mehta* v. *State of MP*, 2003 Cr LJ 1249 (SC) : AIR 2003 SC 1069 : 2003 AIR SCW 592 : 2003(2) Crimes 196.

In a HP case the accused was alleged to have availed of benefits of a government scheme by forging purchase documents under the scheme the government loan and subsidy was extended to poor people for purchase of cattle including mule and buffaloes. Setting aside the discharge of accused it was held that *prima-facie* case against the accused was made out. *A.K. Kacharoo* v. *State*, 2003 Cr LJ 3510 (HP).

In the instant case, the averments are not only against the company but also against the petitioners/directors. There were averments that the company had published advertisements in newspaper and in application made for grant of licence giving false information and misled the public. It was held that incorrect assertion by company in newspapers *etc.* could not be without knowledge and permission of directors and therefore proper investigation was required in public interest. In view of the above, the proceedings against directors could not be quashed. *Rajiv Kumar Gupta* v. *State of Maharashtra*, 2006 Cr LJ 581 (Bombay).

Where mutation of land effected on the basis of forged document and both criminal complaint and civil suit filed, pendency of civil suit is no ground to quash a stay criminal proceedings. *Suba Singh* v. *State of Haryana*, 1994 (1) Recent Cr R 215 (P&H).

Where there was offence under Section 420, I.P.C., and quashing of summoning order—Presence of fraudulent intention of cheating must be there from very inception of transaction—No such intention mentioned in complaint being present at the time of entrustment of dowry/*stridhan*. Hence summoning order was quashed. *Sawindero* alias *Saurinder Kaur* v. *Banso*, 1995 XXII Cr LT 110 (P&H).

When case was registered after enquiry and matter of evidence over copy of wall to be averred by Court, F.I.R. and charges cannot be quashed. *Dewan Chand* v. *State of Haryana*, (1992) 2 Crimes 1 (P&H).

When accused faced criminal proceedings for 5 years and suffered mental agony, proceedings quashed on ground of right of speedy trial. *Sohan Lal* v. *State of Rajasthan*, 1994 R CC 359.

When criminal case arose out of civil transaction between parties and civil suit compromised and withdrawn, F.I.R. in respect of same dispute is quashed. *Maqi Bhim Raj Sharma* v. *State*, 1992 JCC 382 (Del).

In offence of fabrication of agreement by petitioner a deed writer when F.I.R. not showing that petitioner knew complainant criminal proceedings against him quashed. *Brij Mohan Datta* v. *State of Haryana*, 1991 (1) CC Cases 180 (P&H).

When after issue of summoning order complainant died, complaint can not be dismissed. *Amrik Chand* v. *Karnail Singh*, (1994) 2 Recent Cr R 390 (P&H).

When after issue of summons to accused, magistrate concludes that no offence was made out against him, he can discharge accused but order issuing summons not to be quashed. *Som Nath Tyagi* v. *State of U.P.*, 1993 JIC 817 (All).

In an Allahabad case, the accused was charged of taking part in auction held by Northern Railway and purchasing scrap iron without paying any tax to state. It was held that the accused could not be said to have cheated or dishonestly induced either Northern Railway or State to deliver him scrap Iron which he had purchased in auction. *Atique Ahmad* v. *State*, 2003 Cr LJ 3431 (All) : 2003 All LJ 1640 : 2003(1) All Cri R 888.

When material on which police relied against petitioner accused does not survive and charges can not be sustained, because of intervening circumstances, F.I.R. quashed. *Charan Singh Sharma* v. *State*, 1992 JCC 533 (Del).

When books found in possession of accused were not genuine published by Education Board, F.I.R. can not be quashed. *Dharam Pal* v. *State of Punjab*, 1994 (2) Crimes 291 (P&H).

Preparation of forged gift deed—Order taking cognizance of offence without application of mind cause miscarriage of justice and thus liable to be quashed. *Ghisa Lai Saini* v. *State of Rajasthan*, (1992) 1 RLR 543.

Since no overt act has been attribute to petitioner, F.I.R. against him is quashed. *Saral Kumar* v. *State of Haryana*, 1994 (3) CC Cases 138 (P&H).

When allegations in agreement to sell constitute civil liability for return of consideration, impugned F.I.R. quashed. *Sukhdev Khanna* v. *U.T. of Chandigarh*, 1992 (2) CC Cases 121 (P&H).

When accused, a public servant, not subjected to disciplinary action and no inquiry caused to him merely on account of registration of F.I.R. against him and moreover no sanction for his prosecution so far granted F.I.R. can not be quashed at this stage. *Trilok Chand* v. *State of Rajasthan*, 1992 (1) WLC 628 (Raj).

When F.I.R./complaint *prima facie*, disclosing offence of cheating proceedings can not be quashed. *Rajinder Chand Abrol* v. *State of H.P*, 1995 Cri LJ 800 (HP).

If purchaser makes default in making payment of certain instalments, then remedies of civil nature are available to him and no criminal liability can be fastened on guarantor. In the absence of evidence that accused had guaranteed or purchased the vehicle under said agreement with a dishonest intention no *prima facie* case of cheating is made out. *Basantheswar Prasad v. The State*, 2003 Cr LJ 3809 (Jhar.) : AIR 2003 Jhar HCR 1007 : 2003(2) Crimes 163 : 2003(1) East Cri C 641.

Where the offence was of dishonour of post-dated cheque—Complaint lodged before Central Crime Branch and case registered under Section 420, read with Section 34, I.P.C.—Petition under Section 482, Cr. P.C., to quash the proceedings was filed—There is nothing in the complaint to show that the petitioner had either dishonest or fraudulent intention at the time the complainant parted with the money. So this is a fit case where proceedings are to be quashed by invoking the inherent powers of High Court under Section 482, Cr. P.C. *Ganesan* v. *State rep. by Sub-Inspector of Police, Central Crimes Branch. Egmore, Madras*, (1995) 1 LW (Cr) 97 (Mad).

Proceedings against accused Licence Assistant for issuing import licence falsely and fraudulently, cannot be quashed on ground with accused acted an instruments of his superior officer who had been absolved of the charge. *Pran Nath Sharma* v. *Union of India*, (1994) 2 Recent Cr R 485 (P&H).

When complaint not disclosing any deception practiced by accused not away cognizable offence, proceedings quashed. *S.D. Ashok Kumar* v. *State*, 1991 Cri LJ 1963 (Mad).

Where accused persons through forged power of attorney, got sale- deed of land registered and complaint was filed and civil suit also filed wherein matter was compromised and price of land was received by complainant who subsequently trial, criminal proceedings quashed. *Ajit Singh* v. *Sohan Singh*, 1994 (1) Recent Cr R 83 (P&H).

When allegations made in complaint are absurd and inherently improbable, complaint is liable to be quashed. Prof. *T.K.N. Unithan* v. *Dr. Madhukar Shyam Chaturvedi*, (1993) IV CCR 2834 (Raj).

When chances of conviction is weak, F.I.R. liable to be quashed. *Babulal* v. *State of Haryana*, (1993) 3 Recent Cr R 725 (P&H).

Magistrate can drop proceedings when due is satisfied on consideration of complaint that there was no offence for which accused could be tried. *Kamaludin @ Kamal* v. *Mangal Das*, (1994) 2 Recent Cr R 82 (P&H).

There was contract for supply of fine metal extract between two respondent companies and the petitioners were acting as their agents. Documents exchanged between parties and their contract did not disclose any inducement involving *mens rea* on part of petitioners. By suggesting one of Companies to lift goods on the basis of promise of reimbursement of demurrage and detention charges by them petitioner had merely conveyed correspondence between two respondent companies. *Glucose India Private Ltd.* v. *Metalman Industries Ltd.*, 2003 Cr LJ 3368 (MP) : 2003(9) All Ind Cas 197 : 2003(3) MPLJ 161.

When offence of cheating was made out—Applicant's son's marriage settled with respondent's daughter—Goad ceremony performed and presents given—Marriage date was fixed—Meanwhile applicant performed marriage of his son at some other family—Complaint was filed—Summons was issued. It was *held*, that it being breach of contract no offence of cheating made out. Complaint quashed and present application allowed. *K.L. Ramaiya* v. *Ram Charan*, (1995) 1 CCR 219 (Alld).

Where there was withdrawer of money from bank by forged signature—Charged under Section 420, I.P.C.—Final report was submitted by police—Magistrate issued summons to applicant on protest—Complaint challenged under Section 482, Cr. P.C., for quashing of the same was filed—No offence under Section 420, for cheating is made out as offence of forging signature comes under Section 467, I.P.C. Hence, complaint is quashed. *Ramjiyavan Jaiswal* v. *State of U.P*, (1995) 2 CCR 162 (Alld).

When *prima facie* case appeared and process issued by Magistrate it was wrongly set aside by serious judge in revision on erroneous discrepancy. *Harakchand Bhagchand Oswal* v. *Santinggappa Bhagwanappa, Hapse*, 1991 (1) Crimes 531 (Bom).

21. Offence—What constitutes ?—Issuance of cheque towards services already rendered—Offence under Section 420 *held* not made out. *V. M. Shanmugga Sundaram* v. *Margabandhu*, 1994 Mad LJ (Cr) 104 : (1994) 1 LW (Cr) 210 (Mad).

Where respondent's allegations was that appellant accused has induced complainant to pay certain amount for purchasing company's shares—Version of complainant himself that said amount was paid to a broker of Stock Exchange and not directly to company and it was *held* that ingredients of cheating not coming out for framing any charges against accused and discharge of accused by Magistrate was proper. *Prabhat Kumar Bose* v. *Tarun Kanti Bagchi*, 1994 Cri LJ 1211 (SC) : AIR 1994 SC 960.

Petition was filed to quash criminal prosecution—Petitioner invited applications for admission to *yoga* course making false representation that course recognised by Government of India—Students applying for admission deposited caution-money of Rs. 1,000/- each—Offence of cheating was fully established—Charge-sheet was submitted by police and trial was started—Petition to quash proceedings was liable to be rejected. A fraudulent representation can be made directly or indirectly. The case of the prosecution before court was that the petitioner by knowingly making a false assertion that the course was recognised by the Government of India. Ministry of Education and Social Welfare (Department of Education) induced unwary students to apply and obtain admission and to pay Rs. 1.000/- each as caution-money, and thereby cheated the students. This is a case which is clearly borne out from the First Information Report as well as from the evidence collected during investigation and since there is evidence to the effect that the course had never been recognised and that students had actually parted with Rs. 1,000/- each on the basis of the fraudulent misrepresentation and since the deceit was preceded by the payment of Rs. 1,000/- by each student, it cannot be said that the ingredients required to constitute the offence of "Cheating" under

Section 415 was missing. *Swami Dhirendra Brahmachari* v. *Shailendar Bhushan*, (1994) 1 Crimes 981 at p. 986 : (1995) 53 DLT 696 : (1994) 2 Recent Cr R 473 : (1994) 2 CC Cases 135 (Del).

When Rs. 300 were illegally taken for the connection of LPG Gas—and the accused was not licensee to issue legal connection, offence was not made out. *Karpal Singh* v. *State of Haryana*, (1994) 2 Recent Cr R 536 (P&H).

When driver authorised by owner for putting his own signature for the purpose of renewal, it is not that the petitioner contemplated to the vehicle registered or transferred in his own name or in name of any person other than the true owner. It could not be proved that petitioner deceived the complainant to deliver any property or valuable. Hence, no offence is made out. *Harinder Kumar Gulati* v. *State of Haryana*, 1994 Cr LT 309 (P&H).

A bank officer was charged with negligence of duty and cheating. He had passed a cheque by comparing the signature with the specimen signature which was not authenticated by any bank officer. That resulted in loss to the bank. *Held*, that bank officer could not be charged with cheating because offence of cheating presupposes the act or omission of the accused having been done dishonestly and fraudulently. Charge of cheating not sustained. 1987 Cri LJ 222 (P&H).

Absence of initial inducement—Extension of the subsequent inducement does not constitutes the offence. *M.S. Natarajan* v. *Ramasis Shaw*, (1995) 2 Cal HN 78 (Cal).

When petitioners inherited a house by way of will and sold the house, complaint under Section 420, I.P.C., against them on ground that they were not full owners and could not sell house, not maintainable as no offence of cheating is made out. *Tarsem Lal* v. *Koer Chand*, (1994) 2 Recent Cr R 357.

When accused informed telegraphically to complainant not to present cheque for collection as he was expecting funds, there was absence of dishonest intention at the time of issuance of cheque and thus no offence is made out. *Ganesan* v. *State*, 1995 (1) LW (Cri) 97 (Mad).

On dishonour of cheque when drawer had no fund in his account on date cheque was drawn, he committed offence under Section 420, I.P.C. *Amar Nath Singh* v. *Savinderi Singh*, (1993) 1 Recent Cr R 134 (P&H).

Offence under Section 420, I.P.C. is made out when post-dated cheque is dishonoured. *S. Muthu Kumar* v. *State*, (1994) 7 LW (Cri) 264.

When accused was old customer of complainant company and cheque issued by him was bounced, it was not case of cheating but may amount to breach of contract. *Radharaman Sahu* v. *Trilochan Nanda*, 1991 Cri LJ 1603.

When in spite of engagement ceremony having been performed, applicant performed marriage of his son on other family, it is breach of contract and no offence of cheating is made out. *K.L. Ramaiya* v. *Ram Charan*, (1995) 1 CCR 219 (All).

Use of false trade-mark in selling goods, does not constitute offence of cheating. *Zahir Ahmad* v. *Azamkhan*, 1996 Cri LJ 270 (Cal).

Chit amount not paid to successful bidder, it is breach of promise to pay and no criminal offence is made out. *Gopalakrishnan* v. *State*, 1994 Mad LJ (Cr) 494.

No offence under Section 420, I.P.C., is made out in absence of fraudulent or dishonest inducement of complainant. *Susemma Bijoy* v. *Mohinder Kumar Guleria*, 1994 (3) Crimes 164 (HP).

In case of dishonour of cheque when dishonest intention is lacking no offence of cheating is made out. *Dattatraya* v. *Dilip*, 1991 (2) Crimes 413 (Bom).

To constitute offence under Section 420, I.P.C., criminal intention to sheet is necessary at the time of entrustment of money. *Sawidero* v. *Banso*, 1996 (1) Crimes 319 (P&H).

Mere charge that signature procured by accused on account sheet were by misrepresentation and considerable amount still outstanding, constitute no criminal offence but only civil liability. *M/s. Kalyani Modern Rice Mill* v. *State*, 1994 Cri LJ 1123 (AP).

When accused-petitioner entered into agreement for sale of his land and received advance money but issued no receipt and then he avoided to execute sale-deed, *prima facie* offence under Section 420, I.P.C., is made out. *Maj. Gen. V.N. Kapur* v. *M/s. Procc Systems (P) Ltd.*, 1991 JCC 543 (Del).

For constituting offence under Section 420, I.P.C., there must be some inducement by accused to complainant at initial stage. *M.S. Natarajan.* v. *Ramasis Shaw*, 1996 (3) Crimes 269 (Cal).

When an alleged accused induced complainant to pay some amount for purchasing shares of company and complainant admitted that he did not pay directly to company but to a broker, no offence of cheating is made out of against accused. *Prabhat Kumar Bose* v. *Tarun Kanti. Bagchi*, AIR 1994 SC 960 : 1994 Cri LJ 1211 (SC).

When accused collected Rs. 300/- each from consumers for supply of LPG gas connections but no obtaining licence under Indian Explosives Act and other competing formalities, no offence of cheating is made out as accused can still obtain licence and fulfill promise made to consumers. *Karpal Singh* v. *State of Haryana*, (1994) 2 Recent Cr R 536 (P&H).

Dishonest use of forged document by offender as genuine to derive some tbenefit is sufficient to constitute offence. *G. Nageswara Rao* v. State *of A.P.*, 1992 (3) ALT 546.

Person posing himself as owner of rubber estate and obtaining rupees by one lakh from a firm, *prima facie* commits offence of cheating. *Hari Ram Sastri* v. *Inspector of Police*, 1991 MLJ (Cri) 258.

When complainant has proved that he made deposits and demand of its withdrawal, then unless there was contract that amount is to be returned only (after a specific period, then refusal to return amount amounts to criminal offence under Section 420, I.P.C. *Roshan Lal Saini* v. *U.T. Chandigarh*, (1994) 2 CC Cases 203 (P&H).

Court has to accept F.I.R. on its face value and in case no offence is made out Court then can intervene. *Sharda Devi* v. *State* of *Rajasthan*, 1994 (2) Crimes 675 (Raj).

When in agreement to sell plot of land seller accepted earnest money but she did not own any plot, criminal offence is made out. *Rajinder Singh* v. *Ghansham Singh*, 1991 (2) CC Cases 300 (P&H).

When cheque was issued towards services already rendered, it would amount to issuance of cheque for a past debt, so no offence under Section 420, IPC, is made out. *V.M. Shanmuga Sundaram* v. *Margabandba*, (1994) LW (Cri) 210.

When accused in spite of promise to make payment after dishonour of cheque, did not make payment, he commits an offence of cheating. *N.W. Ravichandran* v. *Vellaiyappan*, 1992 MLJ (Cri) 618.

Where the complainant was induced to supply plywood and other material on the inducement of the accused that they would pay the prince within three days the said averments constituted offence of cheating. *Vijay Prakash* v. *State of U.P.*, 2000 Cri. LJ 4157 (All).

Offence of cheating is complete on day when fraudulent representations were made and acted upon resulting dishonest inducement to part with seizable amount by complainant. *K.N. Sadagopan* v. *State*, 1991 MLJ (Cri) 245.

In absence of allegation that accused himself had written manuscript and represented it to be that of other person, no offence of forgery is made out. *Guru Bipin Singh* v. *Chougtham Manihar Singh*, 1997 Cri LJ 724 (SC) : 1996(11) SCC 622 : 1996(9) JT 516 : 1996(7) Scale 694 : 1996(7) Supreme 678 : 1996(4) Crimes 135 (SC) : AIR 1997 (SC) 1448.

22. Jurisdiction.—When sale agreement to sell the plot was not executed—Complaint under Sections 406 and 420, I.P.C., lodged at Ambala Court—The petitioner is resident of Panchkula and plot is situated at Panchkula. It is evident that although agreement was executed at Chandigarh various acts were done in pursuance of that agreement at Panchkula and Kalka and the Court at Ambala has jurisdiction to try the case. The F.I.R. is not liable to be quashed simply on the ground that Court at Ambala has no jurisdiction. *Narinder Singh* v. *Yash Pal Singh*, (1994) 2 Recent Cr R 714 : (1994) 3 CC Cases 123 (P&H).

When vehicle involved in offence though registered at Raipur was seized at Bilaspur and retained at Bilaspur, the Court at Bilaspur has jurisdiction. *Manoj Kumar* v. *State of M.P.* 1991 (1) Crimes 614 (MP).

Police has no jurisdiction to take cognizance of offence under weight of gas cylinders under special statute. *Vijay Kumar* v. *State of Punjab*, 1991 (2) CC Cases 325 (P&H).

Charge under Section 420, I.P.C., is triable neither summarily nor by special Judge. *Inderchand* v. *State of M.P.*, 1991 Cr LR 178 (MP).

Complaint against quality of material used for fabrication of plant and also its failure to work upto mark, concerns breach of warranty, conditions and remedy lies in civil Court. *P.K. Gupta* v. *Amrit Papers*, 1992 Cr LT 17 (P&H).

23. Offence compoundable.—After an inquiry by the police, the accused was charge sheeted. The accused moved a petition under Section 482, Cr. P.C., Since the offence was compoundable a petition for compounding it was also moved but it was dismissed for want of prosecution. On examination of the record, it was found, the action by the Magistrate was an abuse of the process of law since favourable orders could be passed in his absence. (1986) 2 Crimes 393 (Ker).

24. Protection.—A dealing assistant employed in the office of the Regional Settlement Commissioner who was to have received a letter from an Assistant Settlement Commissioner. It was not properly checked pursuant to the discharge of his official duties but instead it was received by another person who took advantage of the claim having been sanctioned to the applicant. The dealing assistant did not derive any benefit from the reimbursement of the amount to the person who presented the claim other than the right claimant. The dealing assistant was tried since 1969. *Held*, he can be released on probation. (1986) 2 Crimes 536 (P&H).

A postman removed R.R. and bills from a registered cover. His brother took delivery of the goods without payment to the addressee. Bank was required to collect payment from the party. The postman was charged for abetment under Section 109. He sought probation of Sec. 197, CrPC. *Held*, he was not entitled to it. (1986) 2 Crimes 575 (Cal).

25. Probation.—When accused was released under Probation Act with surety for period of two years and appeal coming up for hearing after long gap there is no need for directing appellant to furnish further bonds after such a long period. *Lakhpat Rai* v. *State of U.P.*, 1992 (29) ACC 361.

26. Bail.—When challan not filed within 90 days of arrest of accused and co-accused already granted bail, bail may be granted. *Dana Ram* v. *State of Rajasthan*, 1993 Cr LR 597 (Raj).

When a finance company floated loan and got deposited margin money, but subsequently no loan was given nor margin money refunded, and accused is Assistant Branch Manager of company, bail may be granted to him. *Shambhu Singh* v. *State of Rajasthan.*, 1994 RCC 484.

Public employee involved in such offence does not deserve to be released on bail. *Anand Mohan Srivastava* v. *State of U.P*, 1994 JIC 750 (All).

27. Criminal matter—Stay of.—In ends of justice progress of criminal matter should be stayed during pendency of civil suit. *Jaipal* v. *Narain Singh*, 1997 (1) Crimes 525 (P&H).

28. Arbitration clause in agreement.—Merely because there is an arbitration clause in the agreement, that cannot prevent criminal prosecution against the accused if an act constituting a criminal offence on made out even *prima faice. S.N. Palanitkar v. State of Bihar*, 2001 Cri LJ 4768(SC).

29. Sale of misbranded ghee.—During the course of hearing, the court was informed by the learned Govt. Advocate appearing for the State that the case has been registered against the petitioner on the basis of the FSL report dated 14.9.2001 under the PFA Act and the proceedings are pending for adjudication before the competent Court. On the strength of this argument, it has been sought to be contended that since the case has already been registered against the petitioner under the Act and the proceedings are in progress, no purpose would be served by keeping the investigation pending further. The FIR for offence under Section 420 IPC is not sustainable inasmuch as the cognizance of the matter having been taken by the Court for the offenses punishable under PFA Act, the present proceedings under the impugned FIR are not sustainable. *Kailash Chand Gupta v. State of Rajasthan and another*, 2002 Cri LJ 2439 (Raj.) : 2002(1) FAC 388 : 2002(2) Raj LW 1004 : 2002(2) WLC 740.

30. Bank Account—Cheque.—Accused who had borrowed money from complainant issued post dated cheque for discharge of debt. Bank Manager categorically stated that accused had closed account much prior to issuance of cheque. Thus, his intention to deceive complainant from inception was clear. *D. Atchyutha Reddy vs. State of A.P.,& Anr.* 2010 (2) CrLJ 1265 (AP)

The cheques were post dated ones. Admittedly they were issued in the year 1996. They were presented before the bank on a much later date. They were in fact presented only on 10.01.2001. When the cheques were issued, the accounts were operative. Even assuming that the account was closed subsequently the same would not mean that the appellant had an intention to cheat when the post-dated cheques were issued. Even otherwise the allegations made in the complaint petition, even if given face value and taken to be correct in its entirety do not disclose commission of an offence under Sec. 420 of the Indian Penal Code. They do not satisfy the ingredients of the suit provision. It is, therefore, in the fact situation obtaining in the instant case, difficult to hold that the provisions of Sec. 420 of the Indian Penal Code were attracted. *Subodh S. Salaskar v. Jayprakash M. Shah and Anr.*, AIR 2008 SC 3086 : 2008 (8) JT 637 (SC) : 2008 (11) Scale 42 (SC) : 2008 (7) SLT 127 (SC) : 2008 (8) SRJ 292 (SC) : 2008 CrLJ 3953 (SC) : 2008 (3) JCC 330 (NI) : 2008 (3) RecentCR 875 (SC).

31. Cheating and forgery.—It is true that the disclosure of material information is necessary for processing an Application seeking grant of Arms Licence to an applicant and the record shows that the petitioners have disclosed almost the entire details of pending criminal cases and have submitted application form for issuance of Arms Licence for protection of their persons and property as well as their family members and, therefore, it could not be believed that there was any deliberate concealment of information about the solitary criminal case. Since, the petitioners have honestly made disclosure of pending criminal cases against them in the application form, and adequate information about its correctness was available with the District Magistrate in the form of recommendation of the Superintendent of Police, therefore, it could not be said that either the petitioners have made concealment of the material information or the Investigating Authority was unaware of the fact of pending cases against the petitioners.

Therefore, in the peculiar facts and circumstances of the case, it appears that there was no criminal intention of the petitioners in not disclosing about the remaining criminal case, pending against them while submitting the application form and as such, no case of concealment of material information is even *prima facie* made out. Since the record fails to demonstrate that there exist a criminal intention even in the mind of the alleged wrong doer, therefore, it could not be said that they have committed either of the offences. The elements of cheating require that one has to deceive or induce any person, fraudulently or dishonestly to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induce the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and that act or omission causes or likely to cause damage or harm to that person in body, mind, reputation or property and since, all these mandatory elements are missing, it cannot be said that even a *prima facie* case exist against the petitioners for being tried in relation to the alleged commission of offence in terms of Ss. 420, 467, 468 and 471 of IPC. *Ummed Singh & Ors. vs. State of M.P.*, 2010 (2) CriLJ 1257 (M.P).

32. Forgery or permit.—Accused working in office of civil supplies Inspector. Allegation that they prepared and signed permit for issuance of Palmolein Oil. While Permit was found to be issued in favour of an other accused a shop owner. Counterfoil retained in office was for other shop. Witnesses produced by prosecution for proof of handwriting and signature of accused on Permit, not stating that interpolation was in hand of accused.

Witness stated in his examination-in-chief that he knew the accused persons, viz., accused was working in Civil Supplies Inspector's Office in the rank of UDC and that he had earlier worked with him in the Finance Department. Witness has however, nowhere stated in the examination-in-chief that the present instance of interpolation or forgery was in the hand of accused. In the cross-examination, witness stated that although he had worked along with accused in the Finance Department, but he was working in a different section of the Department. He has clearly stated that he was working in the Budget Section called F1 whereas accused was working in the Motor Conveyance Section called F2 Section. It has also been brought to notice that in the cross-examination, it was said that the files dealt by A2 and F2 Section in the Finance Department never came to the F1 Section where witness was working. Therefore, the interpolation as also the initials appended thereto have not been proved and established to be in the hand of accused.

In that view of the matter, the prosecution has miserably failed to prove and establish that the alleged interpolation and forgery was done by either accused. *Ravichandran vs. State by Dy. Superintendent of Police, Madras*, 2010 (3) CrLJ 2879 (SC).

33. Framing of charge.—The reliance of the High Court on the ruling was totally uncalled for as the factual situation in that case was entirely different than the one prevalent here in this case.

We were also taken through the report of the Central Vigilance Commission. Para 7.21 of the said report reads as under:

> "The allegations against Shri V.K. Bhutiani are held proved only to the extent of making a faulty judgment in recommending the proposal for the PC limit as pointed out in para 6.61 and the article of charge is held proved only to the extent as various allegations have been substantiated or otherwise as mentioned in the assessment portion of the report."

Thus, it cannot be held that the Central Vigilance Commission had given a clean chit to the respondent-accused.

In our opinion, though the report of the Central Vigilance Commission may be a relevant factor, it cannot be held to be "be all or end all" of the matter for prosecuting the accused persons of such serious offences.

We do not find any such reasoning having been given in the present case by the High Court. On the other hand, a perusal of the impugned order suggests that the High Court did not examine the material available by way of charge-sheet and has proceeded to follow the ruling of *P.S. Rajya* We are, therefore, satisfied that this appeal has to be allowed by setting-aside the impugned order passed by the High Court. Accordingly, the appeal succeeds. The impugned order is set-aside and the matter is remanded. Now the trial Court shall proceed with the trial since the charges have already been framed. All the contentions in law and fact shall be available to the respondent as well as the prosecution. This judgment shall not be treated to be an expression of opinion on our part. *C.B.I. vs. V.K. Bhutiani*, 2009 (10) SCC 674 : 2009(13) Scale 64.

34. Criminal breach of trust and cheating.—As essential ingredients of Sec. 405 and Sec. 420 were missing, no offence is made out against appellants.

Appellants, partners of firm in which Complainant was also a partner, allegedly conspired and cheated him to deprive him of share in profit by dissolving firm behind his back. Partnership firm in question was constituted on premises that four persons of a Company would represent firm. Partnership stood dissolved at very inception as it was never acted upon. In view thereof, question of any wrongful act on part of accused does not arise

We, however, in this case are satisfied that the appellants by no stretch of imagination can be said to have committed an offence particularly when admittedly the new firm has been cancelled from its very inception. If the new firm has not derived any income, the question of depriving the claimant therefrom does not arise. Whether the constitution of the said firm was illegal, or *mala fide*, thus, need not be gone into as by reason thereof the respondent cannot be said to have suffered any loss.

We may notice that as regards commission of an offence in terms of Sec. 405 of Indian Penal Code, this Court in *Indian Oil Corpn. v. NEPC India Ltd. and others*, (2006) 6 SCC 736 : 2006 AIR SCW 3830] held that where the first ingradient of criminal breach of trust, that is, entrustment is missing, the same would not constitute a criminal breach of trust.

As regards essential ingredients of the offence of cheating, it was stated :

> "(i) deception of a person either by making a false or misleading representation or by other action or omission, (ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property."

The aforementioned ingredients of Sec. 420 of Indian Penal Code are also absent in the instant case. [*See also Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd. and Ors.*, 2008 (1) SCALE 331 : 2008 AIR SCW 1956]. *V.R. Dalai and Ors. v. Yogendra Naranji Thakkar and Anr.*, AIR 2008 SC 2793 : 2008 (9) SCR 107 (SC) : 2008 (6) JT 564 (SC) : 2008 (8) Scale 156 (SC) : 2008 (4) Supreme 374 (SC) : 2008 (5) SLT 289 (SC) : 2008 (2) JCC 1418 (SC).

35. Sections 415 and 420—Ingredients of offence of.—An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied : (i) deception of a person either by making a false or misleading representation or by other action or omission; (ii) fraudulently or dishonestly inducing any person to deliver any property; or (iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit."

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out. *Harmanpreet Singh Ahluwalia vs. State of Punjab*, 2009 (7) SCC 712 : 2009 CrLJ 3462 : 2009 (7) SCR 563 : 2009 (6) JT 375 : 2009 (7) Scale 85 : 2009 (4) SLT 341.

36. Civil dispute—Quashing of complaint.—Indisputably, the parties entered into a contract in terms whereof the firm was to manufacture a machine to purify and desalt the dyes of a particular quality and quantity. The specifications for the machine were changed.

We may reiterate that one of the ingredients of cheating as defined in Section 415 of the Indian Penal Code is existence of an intention of making initial promise or existence thereof from the very beginning of formation of contract.

An offence of cheating may consist of two classes of cases :

(1) Where the complainant has been induced fraudulently or dishonestly. Such is not the case here;

(2) When by reason of such deception, the complainant has not done or omitted to do anything which he would not do or omit to do if he was not deceived or induced by the accused.

It is in that sense, a distinction between a mere breach of contract and the offence of cheating should be borne in mind. We, having regard to the facts and circumstances of the case, are of the opinion that no case has been made out and against the appellant so as to hold that he should face the criminal trial.

No exception can be taken to the aforementioned principles of law, as therein also it has categorically been held that exercise of inherent power under Section 482 is permissible where allegations set out in the complaint do not constitute the offence for which cognizance has been taken by the Magistrate. It is evidently a case of that nature.

For the reasons aforementioned, the judgment of the High Court cannot be sustained. It is set aside accordingly. Criminal proceedings against the appellants are quashed. The appeal is allowed. *V.Y. Jose vs. State of Gujarat*, 2009 (3) SCC 78 : 2008 (16) Scale 167 : 2008 (17) SCR 588 : 2009 (1) SLT 535.

Quashing of criminal complaint—Power of Attorney.—The submissions made on behalf of the respective parties and the complaint filed by the father of the Respondent, we are inclined to agree with the views expressed by the High Court that a *prima facie* case had been made out to go to trial. There is a positive assertion in the complaint that an assurance had been given by the Petitioner to the complainant that the property in question was free from all encumbrances and that the Accused was the sole owner of the property. It has been mentioned in the complaint that had not such a representation been made relating to the status of ownership of the property in question, the complainant may not have entered into the transaction at all. Whether or not the Petitioner was truly mistaken with regard to the information given by him is a question of utmost importance in answering a charge of the nature indicated in the complaint. Merely because the Petitioner had received part payment of the consideration amount and had made over the same to the Accused and merely because possession of the land had been handed over by him to the complainant, cannot form the basis of a presumption that he had no knowledge that there was a dispute regarding the ownership of the property, as to whether the same belongs to a HUF or not. Section 415 IPC, which defines the offence of cheating, provides in Illustration (g) as follows :

> "(g). A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract."

The provision of Section 415, IPC which define cheating, clearly indicates that if at the very initiation of the negotiations it was evident that there was no intention to cheat, the dispute would be of a civil nature. But such a conclusion would depend on the evidence to be led at the time of trial. In the instant case, the complaint does make out a *prima facie* case to go to trial. The Petitioner may have discharged his functions as a constituted attorney for the Accused by acting as a liaison between the Accused and the father of the Respondent, but that does not in itself indicate that he did not have any knowledge of the status of ownership of the land forming the subject matter of the transaction. *S.P. Gupta vs. Ashutosh Gupta*, 2010 (3) CriLJ 3428 (SC).

37. Cheque discounting facility.—Grant such facility to customer by Bank. Cheques of accused were discounted after purchasing. Circumstances are not sufficient to hold accused persons guilty for commission of offence u/Sec. 420. All actions of Bank Officers were in consonance with long standing banking practice. The upshot of our discussions is :—

(a) The prosecution did not lay down any foundational facts to arrive at a finding of dishonest intention on the part of the appellants, nor any such finding has been arrived at by the trial Court or the High Court.

(b) The circumstances which were considered sufficient to bring home the charges against the appellant were : the cheques of accused Nos. 1, 2 and 3 were discounted after purchasing cheques; cheques were deposited after a gap of 1 to 4 days; only later the amounts were deposited in the account which circumstances, in our opinion, are not sufficient to hold the appellants guilty for commission of offence under Sec. 420 of the IPC as all the actions on the part of the bank officers were in consonance with the long standing banking practice.

(c) Accused No. 4 had taken care of having adequate security to ensure that the bank does not suffer any loss, the gain if any was caused to the Bank.

(d) Appellants acted on instructions by the higher authority.

(e) The prosecution evidence does not establish any conspiracy on their part.

S.V.L. Murthy v. State. Rep. by C.B.I., Hyderabad., AIR 2009 SC 2717 : 2009 (7) SCR 784 (SC) : 2009 (6) SCC 77 : 2009 (7) JT 385 (SC) : 2009 CrLJ 3930 (SC) : 2009 (6) Scale 758 (SC) : 2009 (4) Supreme 399 (SC).

38. Transfer of criminal case—Apprehension of miscarriage of justice.—The analysis of all the materials, the transfer of the case as sought for, at this stage, is not only against the interest of prosecution but also against the interest of other accused persons, the prosecution witnesses and the convenience of all concerned in the matter. For the sake of repetition, it is relevant to mention that when the complainant was examined as PW. 56, he disowned his complaint and asserted that it (complaint) was not filed by him though he admitted his signature found therein. Further, all important witnesses particularly government officials informed that what they said before the Court alone is absolute truth and they were forced to make false statement at the time of registering the complaint. As stated earlier, similar transfer petition which was filed before the High Court ended in dismissal and it became final. We are satisfied that the presiding officer of the Special Court is conscious of his power and how to conduct fair trial at the same place. We are also of the opinion that the public prosecutor cannot act on the dictates of the State Government, he has to act objectively as he is also an Officer of the Court. The Special Court is free to assess whether prosecution has established its case. We have already pointed out that a mere allegation that there is apprehension that justice will not be done in a given case alone does not suffice. Considering the totality of all circumstances, we are of the opinion that in a secular, democratic Government, governed by the rule of law, the State of Punjab is responsible for ensuring free, fair and impartial trial to the accused, notwithstanding, the nature of the accusations made against them. In the case on hand, the apprehension entertained by the petitioners cannot be construed as reasonable one and the case cannot be transferred on a mere allegation that there is apprehension that justice will not be done.

Taking into consideration the entire facts and circumstances of the case and the materials on record, we are of the view that the petitioners have not made out a case that they have reasonable apprehension of not availing justice in the State of Punjab. We would like to clarify that we have not expressed anything on the merits neither of the prosecution case nor the defence of the accused and whatever said in the earlier paragraphs are applicable only for disposal of transfer petitions and ultimately it is for the Special Court to decide the issues in the light of the material placed and in accordance with the law. The inevitable conclusion is that both the transfer petitions filed by the petitioners deserve to be dismissed. *Amarinder Singh vs. Prakash Singh Badal*, 2009 (6) SCC 260 : 2009 (3) Crimes 174 (SC) : 2009 (7) JT 187 : 2009 (7) Scale 382 : 2009 (9) SCR 194 : 2009 (5) Supreme 95 : 2009 (4) SLT 415.

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OF FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY

Sec. 421. Dishonestly or fraudulent removal of concealment of property to prevent distribution among creditors.—Whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a terms which may extend to two years, or with fine, or with both.

Synopsis

1. Scope 2733
2. Procedure 2733
3. Charge 2733

1. Scope.—This section is intended to cover *benami* transaction is fraud of creditors rather than fraudulent preferences given to the *bona fide* creditor over another. In order to support a conviction under this section, it is necessary to prove that a transfer was, (1) fraudulent, (2) without adequate consideration, and (3) with intent to prevent a ratable distribution among creditors. LBR (1893-1900). 593. The Presidency-Towns Insolvency Act does not take away a Magistrate's jurisdiction to try the insolvency for an offence under Section 421. 6 Rang 664 : 30 Cr LJ 345 : AIR 1929 Rang 14. Moveable property in a Foreign State belonging to the insolvent would ordinarily vest in the receiver in insolvency and the latter can take steps to recover it through the insolvent or otherwise so as to make it available and distributable among the creditors. It may be that in some cases he may not succeed in doing so, but the liability of the property being distributed among creditors does remain accordingly to the law of British India, and if a dishonest or fraudulent transfer, removal of concealment or delivery of such property, is made by the insolvent without adequate consideration so as to prevent its distribution among his creditors according to that law, the offence under Section 421, I.P. Code, would be established even if the property is in a Foreign State. A contract with a Foreign State for cutting of trees in that State to be converted into charcoal is an agreement relating to movable property by an insolvent is an offence under Section 421, I.P. Code. 60 Bom 706 : 162 Ind Cas 310 : 37 Cr LJ 577 : 38 Bom LR 168 : 1936 Cr C 359 : AIR 1936 Bom 167. It cannot be held, without further proof, that a shop-keeper who has stocked his shop with goods obtained on credit and who sells these goods without making any payment to his creditors has committed an offence punishable under Section 421, Indian Penal Code. AIR 1938 Rang 242 ; 1982 Cr LJ 2266. Where the offence committed by the accused, fell under Section 206 and not under Section 421 the Magistrate had no jurisdiction to entertain the complainant. AIR 1942 Mad 675 : 44 Cr LJ 129. It applies to both movable and immovable property. (1961) 2 Cr LJ 705 (SC).

2. Procedure.—Not cognizable—Warrant—Bailable—Compoundable with the permission of the trial Court—Triable by Presidency Magistrate or Magistrate of the first or second class.

3. Charge.—"I *(name and office of the Magistrate, etc.)* hereby charge you *(name and accused)* as follows :—

That on or about the .... day of .... at .... you dishonestly, (or fraudulently) removed (or concealed or delivered or caused to be transferred to *A.B.*) without adequate consideration, certain property, to wit ....intending thereby to prevent (or knowing it to be likely that he will thereby prevent) the distribution of that property accordingly to law among your creditors (or the creditors of any other person, to wit *C.D.*), and that you thereby committed an offence punishable under Section 421 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 422. Dishonestly or fraudulently preventing debt being available for creditors.—Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

Synopsis

1. Scope 2734
2. Procedure 2734
3. Charge 2734

1. Scope.—"The object of the provisions under this head appears to be the punishment of dishonest and fraudulent debtors. The civil law fixes the relative rights of debtors and creditors, and assigns the latter remedies for the recovery of their just demands. It also provides for the distribution of a debtor's property among his creditors if he becomes insolvent and is unable to satisfy their claims in full. But if he endeavours to evade his just liabilities by a fraudulent disposal of his property, he is treated as a criminal. Section 421—24 seem to be intended to protect the general body of creditors from such fraudulent dealings and disposition of his property (whether by deeds, or writings or otherwise) by the debtor as to prevent or likely to prevent the fair distribution of his property according to law."—*Morgan and Macpherson*, 388. *See* also 22 WR Cr 46 ; 18 Ind Cas 839 ; 28 Cal 314 : 5 CWN 174.

2. Procedure.—Not cognizable—Warrant—Bailable—Compoundable with the permission of the trial Court—Triable by any Magistrate.

3. Charge.—The charge should run thus :

"I (*name and designation of Magistrate*), hereby charge you, (*name and the accused*), as follows :

That you on or about .... (date) ....(time) ....(place) .... dishonestly (or fraudulently) prevented a debt (or demand), to wit ....due to yourself (or to another person, namely .... from being made available according to law for the payment of said debt and thereby committed an offence punishable under Section 422, I.P. Code, and within my cognizance.

And I hereby direct that you be tried on the said charge'."

* * * * *

Sec. 423. Dishonest or fraudulent execution of deed or transfer containing false statement of consideration.—Whoever, dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Synopsis

1. Scope 2735
2. Procedure....................2735
3. Charge 2735

1. Scope.—The law does not make punishable every false statement in an instrument of transfer. The false statement must relate to the consideration or the person to be benefited by it in order to become criminal. 37 M 47. A false and exaggerated declaration of consideration in a sale-deed, with the consent of the purchaser, for the purpose of defeating the claims of the pre-emptor is an offence under this section, the purchaser being guilty under Section 423. 19 PR 1932 Cr : 16 PR 1908 Cr : AWN 1883, 209 : 16 PR 1907 Cr : 25 All 31. A *Kabuliyat* is not a document contemplated under this Section. 46 Cal 686. "Fraudulently" in this section does not connote deprivation of property. It is not essential that the person deceived or to be deceived and the person injured or intended to be injured should be one and the same. 66 Ind Cas 996 : 26 Cr LJ 340 : 48 Cal 911. Where document is executed with false recital as to consideration with fraudulent intent and in that context, an offence under Section 423 is committed. AIR 1933 Pat 495 : 34 Cr LJ 846 : 1933 Cr C 1029 : 144 Ind Cas 791. The false statement of the accused was not one which would be punishable under Section 423 as it was not clearly a false statement relating to the consideration for the charge which was created on their land. 1952 Cr LJ 1089 : AIR 1952 Pat 285 : BLR 1952 Pat 179. According to Section 423, the false statement must relate to the person or persons for whose use or benefit the transfer is really intended to operate. The 'person or persons' must mean the purchaser or purchasers as the case may be. AIR 1958 Cal 130 : 61 CWN 723 : 1957 All WR (Sup) 81 : 1983 All LJ 983.

Where no proper sanction to life prosecution against public servants accused under Sections 2 and 3 and *prima facie* case not made out, it was held that process was issued without application of mind and deserves to quashed. 1987 Cr LR 352 (Guj).

2. Procedure.—Not cognizable—Warrant—Bailable—Compoundable with the permission of the trial Court—Triable by any Magistrate.

3. Charge.—"I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows—

That on or about the..................day of...............at............you dishonestly (or fraudulently) signed (or executed or be cause a party to) a deed (or instrument) which purported to transfer (or subject to a charge) any property, to wit.......... (or any interest therein, to wit......) which contains a false statement (relating to the consideration for the said transfer (or charge) or relating to the person (or persons) for whose use (or benefit) it is really intended to operate) and that you thereby committed an offence punishable under Section 425 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 424. Dishonest or fraudulent removal or concealment of property.—Whoever, dishonestly or fraudulently conceal or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Synopsis

1. Gist of the offence 2736
2. Procedure....................2737
3. Charge 2737

1. Gist of the offence.—One of the necessary elements of Section 424 is that some dishonesty or fraud should be made out against the accused. 1935 OWN 879. To sustain a charge under this section, there must be evidence of the persons intended to be defrauded by the concealment. 16 PR 1869 Cr. In the application of this section, care should be taken that civil rights are not made the basis of criminal prosecution. 1 Weir 483. Parties should not be encouraged to resort to the Criminal Court in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court. In the absence of proof of dishonesty a conviction under this section is unsustainable. 22 Cr LJ 142 ; 2 Pat LT 627 ; 1 Pat LT 318 : 1 Weir 848 ; AIR 1929 Pat 513 ; AIR 1929 Pat 520 ; *see* also 25 M 729 : 1 Weir 485 ; 26 M 481 ; 1 Weir 483 ; 8 WR 17 Cr. Where the procedure has not been followed, conviction under this section should be set aside. AIR 1928 Rang 285. Magistrate's jurisdiction is not taken away by Presidency Towns Insolvency Act, 1929 Rang 14. The cardinal question for determination under Section 424 is whether the alleged removal of property is dishonest or fraudulent and therefore if persons claiming title to a property under attachment in execution of a decree on another remove the same, the matter whether such property belonged to the accused or not has to be determined by Criminal Court before deciding upon conviction. AIR 1930 All 329. The act of taking away property by others with a view that it may be attached if done with a dishonest intention would fall under Section 424, I.P.C. 126 Ind Cas 601 : 31 Cr LJ 1086 : A1R 1930 Mad 670. Section 424 is intended to punish fraudulent debtor and their accomplices and does not intend to punish persons who claim under a right, such as partners of firms. (1964) 2 Andh LT 138 : (1964) 2 Andh WR 151 : 1964 MLJ (Cr) 518. No question of fraudulent removal or concealment arises when the accused has openly taken the property in the exercise of his *bona fide* claim to inherit it. (1965) MLJ (Cr) 39. Removal of crops under illegal attachment is no offence under Section 424. AIR 1930 Mad 509 : 58 MLJ 509 : 1930 MWN 352 : 127 Ind Cas 296 ; 29 SLR 190 ; but *see* 162 Ind Cas 653 : 37 Cr LJ 675 : 1936 Cr C 428 : 1936 ALJ 283 : AIR 1936 All 364 : 1936 A Cr C 106. Removal of property attached under defective warrant does not constitute an offence. AIR 1942 Pat 180 : 43 Cr LJ 796. The removal referred to in Section 424 is *ejusdem generis* with concealment which proceeds it. AIR 1939 All 710 : 41 Cr LJ 111. Under Section 424, there may be concealment with or without removal. Neither word is any more general than the other. 1956 Pat LR 104. The removal referred to in Section 424 is *ejusdem generis* with concealment which proceeds it. (1905) MLJ (Cr) 139. Where a judgment-debtor knowing that the crop is attached removes it, he commits an offence under this section. AIR 1938 All 449. But where the crop has not been duly attached no offence under this section has been committed. (1936) MWN 492 ; AIR 1936 All 364 : 37 Cr LJ

675 ; AIR 1936 Oudh 195 : 37 Cr LJ 1037 ; AIR 1936 Sind 20 : 37 Cr LJ 485 : AIR 1934 All 711 : 35 Cr LJ 1307. Partners who are joint owners of the books of the partnership are entitled to retain them. AIR 1948 Cal 292 : 49 Cr LJ 543 : 52 CWN 441. A removal of property is nonetheless dishonest or fraudulent because it is removed not at night but in broad day light when the servant of the complainant was protesting against such removal. 4 DLR (All) 3. Where a person knowing attachment of his crop in execution removes it, he is guilty under Section 424. AIR 1938 All 449 : 1938 ALJ 538. In addition to the action against the tenant as provided for in Section 71 (4) of the BT Act, he may be proceeded against under this section, if dishonesty is proved. 1 Pat LJ 353 : (1917) Pat 71 : 17 Cr LJ 315 : 3 Pat LW 4 : 35 Ind Cas 491. Tenants under *Bhooi Danabandi* system carrying away the out-turn of lands, commit an offence under Section 424 if the landlord has no reasonable time to appraise it. 18 Cr LJ 687 : 1 Pat LW 891 : 40 Ind Cas 335. Where tenants holds lands of *waram* tenure, reaping and removal of crops by him, without landlords knowledge in order to defeat landlord's claim is an offence under this section. 1932 MWN 639 : AIR 1932 Mad 1223 : *see* also 1913 MWN 1049. A person cannot be charged under Section 424, I.P.C. for removing crops not validly attached. AIR 1934 All 711 : 1934 ALJ 749 : 151 Ind Cas 366 : 1934 Cr C 901 ; *See* also 1933 MWN 722 ; AIR 1933 All 46. Refusing to return is not removing. So refusing to return is not an offence under this section. AIR 1934 All 46 : 1933 Cr C 52 : 1933 ALJ 1 : 144 Ind Cas 32.

Where property has been legally attached by a Court, the possession of the same passes from the owner to the court or its agent. In that situation, the owner of the said property cannot take the law in his own hands, but can file a claim petition to enforce his right. If he resorts to force to get back his property, he acts, unlawfully and by taking the property from the legal possession of the Court or its agent, he is causing wrongful loss to the Court. The Judgment-debtors in unlawfully taking away the cattle seized in attachment in execution of decree against them from the possession of the decree holder with whom they were entrusted by and therefore, who is only a bailee or the *Sapurdar*, cause wrongful loss to him and therefore, guilty of an offence under Section 428 (AIR 1930 All 329 was reversed) AIR 1961 SC 803 : 1961 SCD 331 : 1961 All Cr R 198 : (1962) 1 SCR 75 : (1962) 1 SCJ 439 : (1969) 1 SCA 504 : 1961 (1) Cr LJ 859 ; *see* in this connection, AIR 1960 All 453 : ILR (1960) 1 All 53 : 1960 All Cr R 1 : 1960 Cr LJ 104. Where there is no allegation about the removal of concealment of the property this section has no application. 1979 Cr LJ 738.

2. Procedure.—Not cognizable—Warrant—Bailable—Compoundable with the permission of the trial Court—Triable by any Magistrate.

3. Charge.—"I (*name and office of Magistrate, etc.*) hereby charge you (*name and accused*) as follows :—

That on or about the.........................day of........ at........you dishonestly (or fraudulently concealed or removed) a certain property, to wit...................... belonging to yourself (or to *A.B.*) (or dishonestly (or fraudulently) assisted in the concealment (or removal thereof (or dishonestly released a certain demand, to wit............), and that you thereby committed an offence punishable under Section 424 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

OF MISCHIEF

Sec. 425. Mischief.—Whoever, with intent to cause, of knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits “mischief.

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations

(a) *A* voluntarily burns a valuable security belonging to *Z* intending to cause wrongful loss to *Z*. *A* has committed mischief.

(b) *A* introduces water into an ice-house belonging to Z and thus causes the ice to melt, intending wrongful loss to *Z*. *A* has committed mischief.

(c) *A* voluntarily throws into a river a ring belonging to *Z*, with the intention of thereby causing wrongful loss to *Z*. *A* has committed mischief.

(d) *A*, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to *Z*, destroys those effects, with the Intention of thereby preventing *Z* from obtaining satisfaction of the debt, and of thus causing damage to *Z*. A has committed mischief.

(e) *A* having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. *A* has committed mischief.

(f) *A* causes a ship to be cast away, intending thereby to cause damage to *Z* who has lent money on bottomry on the ship. *A* has committed mischief.

[g] *A*, having joint property with *Z* in a horse, shoots the horse, intending thereby to cause wrongful loss to *Z*. *A* has committed mischief.

(h) *A* causes cattle to enter upon a field belonging to *Z*, intending to cause and knowing that he is likely to cause damage to *Zs* crop. *A* has committed mischief.

Synopsis

1. Scope 2739
2. Intention 2741
3. Wrongful loss 2741
4. Damage 2741
5. Property 2742

6. *Bona fide* claim 2742
7. Change...2743

1. Scope.—"In the offences against property which have hitherto been considered, the purpose of the offender ordinarily is to cause a wrongful gain of property : there is a transfer of property which is the subject of the offence from the rightful possessor to the offender or to some other person, or there is an appropriation or conversion of it by the offender. In the offence of mischief, there is not necessarily any transfer of property or any wrongful gain to the offender. The property continues with the possessor (unless the mischief extends to his absolute destruction), but it does not continue in his possession without charge or diminution in value. Some injury has been sustained by it, and this injury, if it is intentionally caused, constitutes mischief. This offence is commonly perpetrated from vindictive motives but absence of spite will be no answer to a charge of mischief, nor is it essential that any motive for the mischievous acts should be assigned, if the intention to cause wrongful loss is shown".—*Morgan and Macpherson*, 397. Where the accused removed an obstruction from a property which they believed to be their own, the accused cannot be said to have caused any wrongful loss to the complainant under Section 425. 99 Ind Cas 414 : 28 Cr LJ 158 : AIR 1927 Lah 145. In order to constitute an offence under this section, something should be done to property contrary to its natural use. AIR 1929 Mad 5. It is no mischief if a person innocently removes a barricade placed by Municipality on a piece of land in front of his house, which impairs his ingress and egress to or from the said house. Rat Un Cr C 745. Where the accused blocked a channel, the result of which was that the surplus water flowed direct on the complainant's land and damaged his crop, and the site of the channel was the common property of all the accused. *Held*, that the act of the accused did not constitute the offence of mischief and that complainant's remedy for any damage he had sustained lay in an action in the Civil Courts. 8 MLT 385 : 8 Ind Cas 128 : 11 Cr LJ 566 ; *see* also 1913 MWN 179 : 19 Ind Cas 305 : 14 Cr LJ 209. The authority vested in the Criminal Court of punishing persons for acts of mischief is one which must be exercised with great caution, and it must be very clear, before conviction, that the accused has brought himself within the true meaning of Section 425 of the Penal Code. 6 WR Cr 59., The act of impounding cattle does not amount to causing such a charge in the situation of property as diminishes its utility or value. AWN 1881 158. The accused apprehending that the water in his tank would overflow, caused a breach in the bank of the complainant's field so as to let the surplus water from the tank overflow complainant's land, it was found that there were no crops in the field, and apart from the damage done to the back no other damage was caused to the complaint. *Held*, that the accused was guilty of the offence of mischief. 49 Ind Cas 861 : 20 Cr LJ 237. Where there is a Hindu good over a *chabutra* of a mosque surrounded by a wall belonging to Mohammedans, the breaking of the wall for widening the doorway is an offence under Section 425. 96 Ind Cas 210 : 27 Cr LJ 898 : AIR 1936 All 704. The word "change" in this section means physical charge in composition or form and a change in value is not sufficient to constitute mischief. 105 Ind Cas 672 : 28 Cr LJ 960 : AIR 1928 Sind 49. So mere omission to give light to house by falling to switch on the light is not an offence under this section. *Ibid*. If the landlord after the surrender of the land by the *raiyat*, entered the land and dispossessed the under *raiyat* up rooting seeds sown by him, he cannot be convicted under this section. 9 Pat LT 728 : 110 Ind Cas 98

29 Cr LJ 642 ; 55 MLJ 767. Where the harvesting and removal of the crop by the *raiyat* is dishonest, his conviction under Section 424 is right, 1943 MWN 1049. The expression "wrongful loss or damage" means lossor damage by unlawful means. There is nothing unlawful in the accused installing an oil-engine in his own property and working it in any way he chooses, although if his working causes damage to a neighbour's property, the accused would be liable to a civil suit for damage. The damage cannot be said to be coused by any unlawful means and the accused is not liable to be convicted for mischief. AIR 1935 Bom 165 : 59 Bom 177 : 156 Ind Cas 459 : 36 Cr LJ 940 :37 Bom LR 96 : 1935 Cr C 324. Non-fulfilment of agreement by landlord with the tenant to pump out water from reservoir is not an offence under this section. 51 CWN 751 : 49 Cr LJ 314 : AIR 1948 Cal 197. Where it is found that the accused acted in the exercise of a *bona fide* claim of right, they cannot be guilty of the offence of causing wrongful loss or damage, *etc.*, 4 DLR (Cal) 88 : AIR 1949 Cal 237 : 50 Cr LJ 463. Mischief to joint property is an offence under this section. AIR 1951 VP 1.

Mere carelessness or negligence on the part of the accused without establishing the intention to cause damage or knowledge that their animals were likely to cause damage would not attract the ingredients of the offence. *Suyambu Nadar* v. *State*, 1999 Cri LJ 394 (Mad).

Section 425 necessitates three things (1) an intention or knowledge of likelihood to cause wrongful loss or damage to the public or any person, (2), causing the destruction of some property or any change in it or in situation, and (3) such change must destroy or diminish its value or utility or affect it injuriously. No mischief can, therefore, be committed where the act complained of amount to invasion of civil right. AIR 1958 Cal 668 : 1958 Cr LJ 1396. In order to maintain a conviction under Section 425, it is necessary that the loss or damage must be due to any act of the accused which causes destruction of the property itself by reducing its value or utility. AIR 1957 All 465 : 1958 All Cr R 228 : 1957 Cr LJ 702.

Where in a trial of an offence under Section 425, the judgment of the trial Court does not show that the Court was satisfied as to under which the various alternative given in that section the case against the accused could come, where it had only quoted the section and held that they were guilty either under one alternative or the other, the finding is not sufficient to convict the accused, AIR 1954 Pat 309 : 1954 Cr LJ 998.

Where cattle sent for grazing under the supervision of a cow-herd strayed into the complaint's field due to negligence and carelessness of the cow-herd, the owner of the cattle cannot be held to have any intention to cause damage and knowledge that his cattle were likely to cause damage. In case of mischief, the master cannot vicariously liable for any damage caused by the conduct of his servant. *Saday Ram* v. *Upendra Malakar*, 1963 (2) Cr LJ 112. Owner of land even if he has the right to eject the trespasser has no right to destroy whatever property of the trespasser the owner may find on the land. 1964 Ker LT 757 : (1964) 2 Ker LR 97 : 1964 Ker LJ 1036. If the landlord fails to pay electricity dues, even assuming that the failure is deliberate and thereby causes a situation in which the Madras Electric Supply Corporation is constrained to cut off electricity supply to the tenants the landlord would certainly not be committing mischief as defined in Section 425. ILR (1964) 2 Mad 357 : (1965) 1 MLJ 347 : 1965 MLJ (Cr) 194. The first part of the section is *mens rea* and the second part is *casus rea.* (1965) 2 Andh LT 345.

2. Intention.—The intention to cause one wrongful loss or damage to the property is essential. An act which harms or lessens the value of property if it is done by accident—or mistake and not willfully, does not make the doer an offender under the Penal Code, although he may be answerable in a civil suit for such damage. The wrongful loss be to any person, or to the public, or to any class of the public or any community as the inhabitants of a particular village. Where the act which causes damage is done without any criminal intention to cause bar, and in good faith for the purpose of preventing or avoiding other harm to person or property, the doer commits no offence *(see* Section 81)—*Morgan and Macpherson,* 391. But in a Bombay case (Rat Cr C 690) it was held that the terms of this section were satisfied where there was a district finding as to the prisoner's knowledge and that the question of intention was material only as regards to wrongful loss *see* also 2 LBR 158. 1 Weir 488. To sustain a conviction for the offence, it must be shown that there has been an intention or knowledge that, from the destruction of the property wrongful loss should or would accrue. 1 Weir 488 ; 25 WR Cr 65 ; 8 Bom LR 489 ; Rat Un Cr C 88 Rat Un Cr C 357 ; Rat Un Cr C 189 ; 1 Weir 492 ; 11 Cr LJ 168 ; 9 PR 1878 Cr ; 1 Weir 489 ; 3 BLRA Cr C 17 ; Rat Un Cr C 87 ; Rat Un Cr C 199 ; 7 CWN 713 ; 8 Ind Cas 318 ; 28 Ind Cas 498 ; 26 Ind Cas 171 ; 23 Cr LJ 321 ; 8 Rang 13 : AIR 1933 Rang 158 : 125 Ind Cas 271 ; 21 Cr LJ 828 ; 24 Cr LJ 693 ; 21 Cr LJ 450 ; AIR 1934 Pat 221 ; 1937 MWN 1238 ; 1953 Cr LJ 1350 : AIR 1953 Sau 158 ; AIR 1957 Andh P 100 : 1956 Andh WR 784 : 1957 Cr LJ 627 ; AIR 1955 Trip 1 : 1955 Cr LJ 736. Mere negligence is not enough. 1958 Cr LJ 1460 : AIR 1933 Trip 7. The offence of mischief as defined in Section 425 relates only merely to intention but also to the knowledge of the likelihood of wrongful loss being caused. (1961) 1 MLJ 372 : 1961 (2) Cr LJ 501 ; AIR 1958 Raj 347 : 1959 Cr LJ 87.

The express mention of damage is indicative of the fact that the purview of the offence of mischief is not included to be confined only to cases of wrongful loss but also to engulf within all such cases of damage by unlawful means. AIR 1969 Ori 200 ; (1967) 2 Cr LJ 501 (blocking the channel through which the applicant had a right to take water) ; 1956 And WR 784 (driving a truck with hopelessly poor light) ; (1983) 1 Crimes 409 (incident of fire) ; AIR 1969 Ori 200 (destruction of crop) ; AIR 1968 Ker 126 (claim of right is a valid defence) ; (1979) 4 SCC 340 ; 1975 Cr LJ 1044 *(bona fide* assertion of right).

3. Wrongful loss.—Where a person obstructs a, right of water course to which another person is entitled, he commits an act of trespass and if the person whose right is obstructed destroys the obstruction in order to exercise his own right of water course. the loss which he may be caused in doing so cannot be a wrongful loss within the meaning of Section 426. AIR 1938 Pat 538 : 1938 PWN 642 : 19 PLT 703.

4. Damage.—This section does not necessarily contemplate damage of destructive character. It is only necessary that there should be an invasion of right and diminution of the value of one's property, caused by the invasion of right, which must have been contemplated by the doer of it when he did it. 12 Cal 55 ; 12 Cal 660 ; 7 Bom 126 ; 9 Bom 173 ; 6 Bom LR App 3 ; 23 PR 1904 Cr ; 10 WR 29 Cr ; 1 Weir 487 ; Rat Un Cr C 60 ; 1 Weir 497 ; 7 Bom LR 86 ; 1 Weir 496 ; 4 Bom LR 463 ; 1 Weir 489 ; 37 PR 1866 Cr ; 24 PR 1905 Cr ; 1947 OWN 481 : 49 Cr LJ 543 : AIR 1948 Oudh 97. To cut ripe crops which are grown, it be cut is not to destroy them or affect them injuriously within the meaning of Section 425 land is not mischief. AIR 1934 Oudh 182 : 11 OWN 508 : 35

Cr LJ 797. The essence of the offence of mischief is that the property must be destroye or have some change caused in it or its situation, which destroys or diminishes it value or utility or affects it injuriously. UBR (1897-1901) Vol. 1, 347 ; Rat Un Cr C 185 Rat Un Cr C 318. Mischief cannot be committed in respect of one's own property. AI 1926 Pat 244 : 7 PLT 79 : 27 LLJ 392 : 93 Ind Cas 40 ; *see* also 24 Cr LJ 467 : 72 In Cas 883 ; 66 Ind Cas 817 : 3 PLT 335. It is not an offence to remove lateral support an cause damage unless the right to support has been acquired by prescription for 2 years. 68 Ind Cas 831 : 14 MLW 728. Throwing a heavy stone at a cow that had straye into the field and fracturing her leg is mischief. 18 Cr LJ 286 : 12 NLR 188 : 38 Ind Ca 318 ; *see* also 1960 BLJR 713 : 1961 (2) Cr LJ 265 ; AIR 1961 Assam 18 : ILR (1958) 1 Assam 124 : 1961 (1) Cr LJ 226.

The dispute between the accused and the complainant about the ownership of th *pardha* wall would not entitled the accused to demolish the wall, when it is found tha the wall was the common property of both. 1953 Cr LJ 905 : AIR 1953 All 409.

Collision of jeep with lorry due to rash and negligent act will not amount t mischief as there is no *mens rea*. (1962) 2 Cr LJ 760 : AIR 1962 Guj 318. In (1962) 2 C LJ 692 (utility for the purpose of this section was held to mean utility from the point o view of the owner). *See* also 1977 Cr LJ 1665 (value or utility of the property does no mean its market value or utility) ; 1962 MP LJ 822. The loss or injury should be th immediate result of the act complained of. AIR 1972 SC 665 : 1972 Cr LJ 482 ; (1975) Mad LJ 19 ; 1973 Cr LJ 490 ; 1972 Cr LJ 59 ; (1972) 38 Cut LT 496 (ordinance causin damage to owner's own property will not amount to mischief).

5. Property.—All kinds of property whether movable or immovable may be th subject of this offence. Some change or diminution in value or utility must be caused t the property. Such damage should be of a nature serious enough to be worthly o notice"—*Morgan and Macpherson*, 390. The word "property" means tangible propert capable of being forcibly destroyed, but do not include an easement. Rat Un Cr C 387 AIR 1939 Oudh 38 : 178 Ind Cas 665 : 1938 OWN 1127. This section refers to corporea property and provides for cases in which such property is either destroyed or altered o otherwise damaged with a particular intention. AIR 1944 All 60 : ILR 1944 All 189 ; AI 1941 Pat 492 : 42 Cr LJ 579. Persons driving the cattle to pound are not guilty o mischief under Section 425 because getting cattle into pound is not causing suc change in property as would diminish its utility. AIR 1943 Oudh 280 : 44 Cr LJ 640 Postal receipt is such a property. 24 PR 1905 Cr ; AIR 1930 Mad 973 : 1930 MWN 909 1967 Cr LJ 1227 (what is affected is not property or its value but only a right o easement). *Res nulli and ferae nature* are not property. 1961 (1) Cr LJ 226 ; 1966 Cr L 375 (but ownership of which is not established is not property), Damage to publi property will amount to mischief under this section. 1979 Cr LJ 187. Cutting o electricity or water supply is an offence under this section ? *see* 1983 Cr LJ 1119 ; AI 1959 Cal 260 ; 1978 Cr LJ 848.

6. Bona fide claim.—When the defence raised a *prima facie* claim of right, the Court should determine whether the accused acted with any such intent as is specifie in this section. Rat Un Cr C 432 ; Rat Un Cr C 466 ; *see* also AIR 1923 All 428 : 21 AL 213 : 71 Ind Cas 645 ; 19 CLJ 729 : 5 Pat LW 114 : 46 Ind Cas 40 ; 4 Pat LW 291 : 44 Ind Cas 451 ; 40 Ind Cas 750 : 18 Cr LJ 750 : 2 Pat LW 49 : AIR 1943 Sind 127 : 44 Cr LJ 654. One of the several co-sharers in constructive possession of joint land has right to dig part of it with a view to apportioning it for his exclusive use. 35 Cr LJ 730 : 1934 ALJ 689 : AIR 1934 All 829. Where it is clear that the accused is acting in the exercise of a *bona fide* claim of right, which appears to be well founded, the ordinary presumption of dishonest intention has no place. That presumption is rebutted by the fact that the real intention was to exercise his own right. It is the duty of the Criminal Court to appreciate the difference between civil trespass and criminal trespass and between a Civil Court and the offence of mischief. It does not follow that in every case of civil trespass the offence of criminal trespass is made out. When there is no dishonest intention and there is positive evidence that the accused acted *bona fide* in the exercise of a claim of right, there can be no conviction under Section 426. 1937 MWN 390 ; AIR 1939 Mad 440 : 40 Cr LJ 656 ; AIR 1938 Rang 138 : 39 Cr LJ 607 ; AIR 1968 Ker 126 (claim of right is a valid defence) ; (1979) 4 SCC 340 ; 1975 Cr LJ 1044 ; (1968) 70 Bom LR 399 : 1969 Cr LJ 112 *[bona fide* assertion right). A person cannot be prosecuted for the offence of mischief where the dispute is purely of a civil nature. AIR 1958 Cal 668 : 1958 Cr LJ 1396 (but *see* 1981 Cr LJ 1362 : 1981 Ker LJ 153). If the accused honestly believed in good faith that he had the right to do what he did even if he did not have the right, he cannot be said to have had the necessarily intention or knowledge that he was likely to cause wrongful loss or damage. He cannot be guilty of the offence of mischief. 1978 Cr LJ 715 : 1979 Cr LJ (NOC) 79 : 1978 Cal HN 438. *See* (1981) 1 WLR 1446 (case under Section 5 (2) of Criminal Damage Act, 1971).

7. Change.—The word "change" in Section 425 means physical change in composition or form. AIR 1928 Sind 49 : 22 SLR 393 : 28 Cr LJ 960 : 105 Ind Cas 672. Mere omission to give light to the house failing to switch on the light does not involve change in the property even though it may diminish its value or utility. *Ibid.*

* * * * *

Sec. 426. Punishment for mischief.—Whoever commits mischief, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Synopsis

1. Scope 2743
2. Procedure 2748
3. Charge 2748
4. Conviction 2748
5. Sentence 2748

1. Scope.—Under this section mischief must be done to the property belonging to another person but where a person's right is declared by a Civil Court he commits no mischief by damaging the property. 7 Pat LT 79 : 93 Ind Cas 40 : 27 Cr LJ 392 : AIR 1926 Pat 244. Where there was no finding that the branches of trees were cut with intent to cause wrongful loss or damage but it appeared from the evidence that the branches were cut at the instance of the accused and with the knowledge that it was likely to cause wrongful loss, the accused can be convicted under this section. AIR 1927 All 610. In an offence of mischief, change, *i.e.* physical change in property is necessary. Only diminishing its use or utility is not sufficient. AIR 1928 Mad 49. The essence of the offence of mischief is that the property must be destroyed or have some change caus in it or its situation which destroys or diminishes its value or utility or affects injuriously. UBR (1897-1901) Vol. 1, 847. In order to convict of mischief under Sectio 426, the owner of an animal which has done damage to crops, it is not sufficient show that he was guilty of carelessness in allowing it to stray but the prosecution bound to show an intention on his part to cause wrongful loss or damage. Rat Un Cr 187. Negligently allowing one's cattle to stray into another man's garden does n amount to mischief within the meaning of Section 426, I.P.C. Rat Un Cr C 185 ; Rat U Cr C 199. But where the accused was present when his buffaloes destroyed some roa side trees, and being able to prevent the buffaloes from destroying the trees failed to so, *held*, that he was properly convicted under Section 426, I.P.C. Rat Un Cr C 318 ; *se* also 1 Weir 29. The cutting of paddy belonging to another, which is unripe and not fit be cut, amounts to mischief. 7 CWN 713. Ploughing *bona fide* on widowed daughter husband's land is not an offence under this section. 8 Ind Cas 118 : 11 Cr LJ 623 ; *se* also Rat Un Cr C 465. A mortgagee by openly cutting a few trees on the land mortgag to him in order to repair another part of the mortgaged premises is not guilty mischief. 15 Cr LJ 290 : 23 Ind Cas 498. Where a person cut his own trees and allow it to fall on another's tree to protect his own trees in spite of protest of that other, *held* that he must be presumed to have intended to cause damage to such tree. 98 Ind C 181. Where accused obtained an injunction restaining complainant, from obstructi the way by dams and when the complainant did not remove the dams he himself ha the dams removed, *held*, that the loss caused to complainant was caused by unlawf means and therefore accused was guilty of mischief. AIR 1917 Bom 363 : 51 Bom 417 29 Bom LR 484 : 28 Cr LJ 476 : 101 Ind Cas 604.

To make a breach in the wall of a canal is an act which causes such a change the property as destroys or diminishes its value or utility or affects it injuriously, an as such, it is an act of wilful mischief punishable under Section 426, Penal Code. 9 Al 162 : 13 Ind Cas 829 : 13 Cr LJ 141 : 34 All 210. The mere cutting of a few sma branches of no appreciable value for the sake of the leaves from a large tree, which not practically injured at all by the operation scarcely calls for punishment for theft mischief as it comes under Section 95. 8 CPLR Cr 15. Cutting a channel across one own land into a *Jhil* in possession of another, may amount to an offence under th section. 7 CWN 663.

Rash driving on a public road causing thereby collision with an injury to the hor of another carriage is punishable under Section 179, I.P.C., and not under Section 42 13 PR 1900 Cr ; 1961 (2) Cr LJ 660 (1) : AIR 1962 Guj 318. Throwing brickbats at th back of a house is an offence under this section. 5 LBR 100 : 4 Ind Cas 293 : 10 Cr I 552 ; *see* also 12 NLR 188. Cutting of trees to annoy a person is an offence under th section. 16 Cr LJ 544 : 29 Ind Cas 672. Where certain cattle in charge of a serva strayed or were driven on various occasions into Government gardens and there cause damage, *held*, that the master could not be convicted of the offence of mischief. 29 A 565 : AWN 1907, 170 : 6 Cr LJ 13. Section 426 deals with physical injury from physic cause, 24 All 555. Where a person inflicts wounds on one animal with a spear whereb it is disabled for some days, his offence falls within Section 426. 3 Bom LR 503. If on commits the offence of mischief by intentionally causing wrongful loss or damage another by entering on his land, he commits also criminal trespass. UBR (1892-189 ol. 1. 259 ; *see* also 11 CWN 467 : 5 Cr LJ 278. If a person takes possession of the site f a public road and builds upon it to the obstruction of the public, it is no offence for a ember of the public to pull down that obstruction and exercise his right of way. 15 Cr J 723 : 26 Ind Cas 171. The allowing of a buffalo to stray without a keeper does not onstitute the offence of mischief. Rat Un Cr C 357 ; Rat Un Cr C 60 ; 61 Bom LR 539. o support a conviction under Section 426, I.P.C., it must be proved that there was an ntention to cause wrongful loss or damage or to cause damage by wilfully turning an nimal into an enclosure, or at least that the accused was present and able to restrain he animal from causing damage and did not restrain it from so doing. Rat Un Cr C 57. But an offence under this section is committed if the accused grazed the cattle in ertain waste land, contravention of a notification by Government prohibiting the public rom grazing cattle there. 1 Weir 492. Disturbing graves for purposes of cultivation is an ffence under this section. 1 Weir 496. But destruction of carcass against customary ight to skin is not an offence. 8 Bom 295. But no such offence is committed where ombs with the land passed to the accused. 4 Bom LR 463. A person can be convicted nder this section for sending his cattle to graze on the *bund* of a tank belonging to the omplainant. AIR 1942 Mad 724 : 44 Cr LJ 140. Wrongfully cutting of trees standing on laintiffs land by defendant amounts to mischief. AIR 1942 Cal 544 : 46 CWN 943. No ffence is committed where accused removes a projection of adjoining house believing it o be trespass. AIR 1939 Mad 400 : 40 Cr LJ 656. An accused cannot be convicted nder this section where no offence has been committed according to the charge framed y the Magistrate. AIR 1942 Pat 150 : 43 Cr LJ 537. Where the Magistrate applies his nind to the evidence and in finding that the accused had caused mischief to the complainant, he must have satisfied that the ingredients of the offence defined in this section were present, the finding is sufficient to warrant a conviction. AIR 1941 Cal 185 : 42 Cr LJ 490. No offence under this section is committed by obstructing water course belonging to another. AIR 1938 Pat 538 : 40 Cr LJ 89. An offence under this section is committed by the accused, where he fills up a ditch made by the complainant. AIR 1939 Oudh 38 : 40 Cr LJ 138. But cutting away branches of trees belonging to the complainant overhanging his house is an offence under this section. AIR 1934 Pat 221 : 35 Cr LJ 1304. Where there is nothing in the sworn statement of the complainant at variance with the allegation in a complainant which disclosed an offence punishable under Section 427, I.P.C. and the Magistrate was not in a position to judge the extent of the damage caused, (and the only distinction between the offence punishable under Section 426. I.P.C., and one punishable under Section 427, I.P.C. is the extent of the damage done), the complaint cannot be taken on file for an offence under Section 426 and the Magistrate has no jurisdiction to acquit the accused under Section 247. Cr. P.C., which has no application to warrant cases. AIR 1942 Mad 594 : 43 Cr LJ 760.

The accused set fire to hear of rubbish in his field, which was close to a protected forest. The wind carried the flames to the forest and destroyed a part of it. *Held*, that on these facts, the accused could not be convicted of the offence of mischief punishable under this section. 8 Bom LR 851 : 4 Cr LJ 446 : 1 MLT 444. The accused caused diversion of the course of certain river, knowing that such diversion by him and the consequent destruction of very larger quantities of fish in the river would injuriously affect the person who as les*see* of Government held rights of fishery in the river. He was thereupon convicted by the lower Court under Section 426 of the Penal Code. 28 All 234 : AWN 1905. 255 : 1905 ALJ 826 : 2 Cr LJ 801. Where the properties of the complainant have been damaged by working of an engine in the premises belonging to the accused the latter cannot be convicted under this section. 59 Bom 177 : AIR 1935 Bom 164 : 1935 Cr C 324 : 37 Bom LR 96 : 36 Cr LJ 940 : 156 Ind Cas 459. While there is admittedly a *bona fide* civil dispute between the parties regarding a wall, and one of the parties pulls down a newly built wall in the *bona fute* exercise of his supposed right, he cannot be convicted under Section 426. 1 Weir 490 ; *see* also 73 PLR 1903 : 6 PR 1903 Cr; 2 Bom LR 340 ; AWN 1882, 209 ; 21 WR Cr 38 ; AWN 1881, 64. A bailiff cannot be convicted under this section for breaking open doors in execution of decree. Rat Un Cr C 949 ; *see* also 3 Cal 573 : 1 CLR 352, Where an accused person, who had no right to remove earth from an *odai*, did so in a manner so as to cause the destruction of the complainant's *bund* held, that he must have contemplated the result and that he was rightly convicted. 3 MLT 147 : 7 Cr LJ 133. An offence under this section is committed by the destruction of a document containing immoral agreements if in connection with that agreement the complainant gains some right. 5 M. 401 : 1 Weir 409. The accused persons were employed to float timber through a bridge ; while doing so, some of the logs struck against the arch of the brigade. The accused were convicted under Section 426. *Held*, the conviction was wrong, as there was no evidence whatever of mischief and still less of the intention and knowledge required by the section. 1 Weir 487 : 5 MHC App 40 ; *see* also 1 Weir 510. Where the accused alleging himself as the owner of a land harvests tenant's crops, he commits an offence under this section. 1 Weir 491. Where there is a custom of bringing an idol once a year underneath a tree for worship, the owner of the land on which the tree stands cannot be convicted under this section for the removal of the tree. 1 Weir 496. Stealing property and then destroying it are but one offence, *viz.*, theft and not two offences, theft and mischief. 37 PR 1866 Cr ; 2 Weir 458. Where three Municipal Councillors permitted a tree within the Municipal limits to be cut for public purpose, against the order of the Municipal Committee as a whole, *held*, that they were not guilty of an offence under Section 425. 9 PR 1878 Cr. Where the accused, who received a registered letter, instead of returning the acknowledgment duly signed to the postman, tore it away, *held*, that the accused was guilty of the offence of mischief. 24 PR 1905 Cr : 71 PR 1905 : 2 Cr LJ 242. Where it has not been shown or found that the utility or value of the trees was diminished by reason of the branch having been cut, conviction under Section 426 could not be sustained. 4 Pat LW 291 : 44 Ind Cas 451 : 19 Cr LJ 339 ; *see* also 2 Pat LT 394 : 23 Cr LJ 534 : 68 Ind Cas 40. Where a tenant in the *bona fide* assertion of a customary right, without intending to cause wrongful loss cuts down an ancient tree standing on his holding, he cannot be convicted of the offence of mischief under Section 426, I.P.C. 58 Ind Cas 828 ; *see* also 62 Ind Cas 311 : 22 Cr LJ 507. To sustain a conviction under Sections 426 and 427, I.P.C., the presence of a criminal intention is necessary. 53 PLR 1922. Where a tenant removed earth in the *bona fide* exercise of his right and his landlord complained the dispute is one of the civil nature between landlord and tenant and is not an offence under Section 426. 73 Ind Cas 805 : 24 Cr LJ 693 ; *see* also 86 Ind Cas 136 : 26 Cr LJ 660 ; 1929 MWN 711 ; 2 PLT 391 : 23 Cr LJ 504 : 68 Ind Cas 40 ; AIR 1924 Cal 736 : 26 Cr LJ 194 : 83 Ind Cas 898. The cutting and removal of dead jackfruit tree standing on the homestead of the tenant, by a servant of the landlord does not constitute the offence of mischief. 28 CWN 736. Demolition of a party wall in a *bona fide* claim of right is not an offence under the section. 26 Bom LR 978. No offence under Section 426 is committed when a person only removes an obstruction from a well which he believes to be his own, by removing a few bricks from the well. AIR 1927 Lah 145 : 28 Cr LJ 1587 : 99 Ind Cas 414 ; *see* also AIR 1932 Mad 676 : 33 Cr LJ 655. Where the accused is charged with offence under Section 430 and Bench Magistrate tried them for lesser offence under Section 426, there proceedings are not void. AIR 1931 Mad 494 : 32 Cr LJ 971 : 1931 MWN 770 : 133 Ind Cas 4. The complainant had to the western boundary of his plot a passage with a *Katcha* drain over it serving as a natural drain for the outlet of the excess water from his home. The accused had right of way over his passage for going to their huts. This construction, however, did not impair the right of way of the accused who even after the construction could exercise their right of way. The accused demolished the *pucca* drain. *Held*, the accused were guilty under Sec. 426. AIR 1938 Cal 669 : ILR (1938) 1 Cal 680.

A complaint of mischief under Section 426 may be filed by a co-owner of joint property against another, if the accused has caused wilful damage, even though the latter may be joint owner and the complainant be not in actual possession of the property in dispute. AIR 1951 VP 1 ; AIR 1960 Ker 74 (wrongful loss or damage to the public and causing damage or destruction of the value or utility of the property to the owner) ; 1983 (2) Crimes 148. One of the essential ingredients of the offence of mischief is that the offender committed the offence with an intent to cause or knowing that it is likely to cause wrongful loss or damage to the public or any person. 1979 CLR 884 ; 1971 All Cr R 47 ; (1961) MLJ (Cr) 273 (existence of civil remedy makes no difference) ; 1974 MLJ (Cr) 626 ; 1967 Cr LJ 1227 (diminution of value or utility). It is no answer to a charge of mischief to plead that the motive of the accused was to benefit himself and not to injure others. AIR 1960 Mad 240. The owner of the land having a right to eject the trespasser had no right to destroy the property of the trespasser. 1964 MLJ (Cr) 617 ; AIR 1969 Ori 250 (removal of trespasser without committing breach of peace). Mischief to property attached by a Court. AIR 1961 SC 803.

Not only cases of wrongful loss but cases of damages by unlawful means are also covered under "mischief." *Gopinath Nayak* v. *Lepa Majhi*, 1996 Cri LJ 3814 (Ori).

The three point which the prosecution has to prove in a case under Section 426 are : (1) the intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any persons ; (2) causing the destruction of some property or any change in it or in its situation ; and (3) such change must destroy or diminish its value or utility or affect incuriously. To constitute an offence under Section 426, it is not necessary that the animal should be destroyed or its value or utility diminished, it is sufficient if it affected injuriously. If permanent injury had been caused to the animal the offence would be under Section 429. AIR 1960 Ker 74 : ILR 1959 Ker 881 : 1960 Cr LJ 228.

Where from the evidence, the intention of necessary knowledge on the part of the accused as to the likelihood of any loss or damage does not appear to have been proved nor is there any evidence as to the exact value of the property which is alleged to have been damaged, the case cannot come either under Section 426 or under Section 427. (1959) 25 Cut. LT 80.

No nexus between Section 427 and Sections 441 and 447. (1977) 3 Cur LJ 761. On the fact of the case rejecting the plea of improper assertion of right of ploughing lands of the complainant, the accused was found guilty of the offence under the section. (1972) 28 Cut. LT 436.

2. Procedure.—Not cognizable—Summons—Bailable—Not compoundable in a case of loss to private persons—Triable by any Magistrate.

3. Charge.—The charge under this and the next section should run thus:

"I (name and *office of the Magistrate, etc.)* hereby charge you (name *of the accused) as* follows :

That on or about the...........day of.........at.......you committed mischief by causing wrongful loss or damage to the property to *AB*, estimated at Rs. ....and that you thereby committed an offence punishable under Section 426 (or Section 427) of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

4. Conviction.—Where there was acquittal of charges under Sections 448 and 323, IPC, and conviction for offence under Section 426, IPC which was confirmed by Sessions Judge—Revision of the petition the challenging of the same was held. The petitioner seems to have decided to take law in his own hands and caused damage to the roof of the complainant. The acquittal of petitioner for offences under Sections 448 and 323, does not mean that he should have also been acquitted of offence under Section 426, IPC. The conviction and sentences was upheld. *Eknath Pandari Tari* v. State *of Goa*, 1994 B Cr C 329.

5. Sentence.—The accused tried to demolish the wall on which complainant started crying inviting the attention of other witnesses who saw the accused committing mischief. There is no previous enmity which may be ground for false implication. But since the evidence took place seventeen years ago, the sentence is reduced to one year R.I. with a fine of Rs. 2,000 out of which Rs. 1,500 shall be paid to the complainant. *Mahabir Singh* v. *State of U.P.*, 1995 UP Cr R 9 (All).

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Sec. 427. Mischief causing damage to the amount of fifty rupees.—Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Synopsis

1. Scope 2748
2. Procedure..........2750
3. Charge 2750
4. Evidence and proof..........2750
5. Acquittal 2750
6. Quashing of proceeding..........2751

1. Scope.—"In estimating the amount of the loss of damage caused, the actual loss only should be taken into consideration and not the damage which, in consequence of such loss, may be occasioned to the sufferer. It is not clear whether to support the charge under the section, the Court must be satisfied not only that the offender intended to cause wrongful loss but also that he intended (or knew himself to be likely) to cause wrongful loss to the amount of fifty rupees or upwards. It will be reasonable to infer such an intention in the absence of satisfactory proof on behalf of the accused person, showing that he did not contemplate or intend to cause mischief to this amount."—*Morgan and Macpherson*, 303. *See* also 16 CWN 263 : 13 Ind Cas 826 ; 21 Bom LR 247 ; 17 ALJ 343 ; 22 ALJ 820. To support a conviction under this section intent or knowledge that he is likely to cause wrongful loss to his neighbour must be proved. 147 Ind Cas 538 : 35 Cr LJ 430 : AIR 1934 Pat 199. In case of encroachment on public road there is no right of private abetment and as such encroachment constitutes mischief. 1933 MWN 905. To support a conviction for an offence under this section it is sufficient to prove that the property was in the possession of the complainant ; it is not necessary to prove his title. 25 ALJ 1010. Grazing cattle on lands rented from Government, without payment of fees is not an offence under this section. 1 Weir 497 : 5 MHC App 29. Where the accused was alleged to have wrongfully permitted the licen*see* to cut one kind of trees in a forest instead of another but there was no allegation that Government had been put to any loss owing to the act. *Held*, that the conviction under Section 427, I.P. Code, could not be supported. 8 Rang 17 : AIR 1930 Rang 158. A person allowing his cattle habitually and intentionally to graze on crops of others is guilty under Section 427. 28 Cr LJ 387 : 21 Bom LR 247 : 50 Ind Cas 995. Where accused was charged under Section 427 and was not acquitted, he cannot subsequently be charged with nothing on the same facts. AIR 1924 Mad 478 : 25 Cr LJ 224 : 76 Ind Cas 708 : 1924 MWN 153. Where there is no intention to cause wrongful loss or wrongful gain, a charge under Section 427 cannot be sustained. AIR 1925 All 311 : 23 ALJ 21 : 26 Cr LJ 748 : 86 Ind Cas 284 ; AIR 1948 Mad 478 : AIR 1950 All 464 ; AIR 1950 Ori 196. A complainant in possession need not prove ownership. 25 ALJ 1010 : AIR 1927 All 724. No order under Section 106, Cr. Pro. Code, can be passed upon conviction of an offence under Section 143 or Section 427, I.P. Code. AIR 1927 All 136 : 28 Cr LJ 140 : 99 Ind Cas 384. The jurisdiction of a Court depends upon the allegation made in the complaint unless such allegations are found at the very outset to be exaggerated for purposes of jurisdiction. AIR 1925 All 290 : 26 Cr LJ 586 : 47 All 64 : 85 Ind. Cas 730. Where a person cuts away the newly created roof of the adjacent house under a *bona fide* claim of right no offence is committed as the requisite criminal intent is wanting. AIR 1932 Mad 676 : 33 Cr LJ 655 : 1932 MWN 648 : 138 Ind Cas 608. Where a mortgagor destroys a portion of the mortgaged property after the sale of the same but before confirmation of sale, he commits an offence under this section. 1937 PWN 106 : AIR 1937 Pat 646. But where a purchaser is put into possession of fields under Order XXI, Rule 95, C.P. Code, he is entitled to cut the crops standing on it and he cannot be convicted under this section. 161 Ind Cas 974 : 37 Cr LJ 524 : 1936 Cr C 302 : AIR 1936 Cal 157.

Where a dedicated bull strays upon private land and is impounded and is latter on sold in auction by the cattle pound authorities a purchaser of that bull can not be convicted of an offence under Section 427, Penal Code, because of his having put that bull in plough. 1951 ALJ 556 : 1952 Cr LJ 168 : AIR 1952 All 26 : 52 AWR (HC) 104.

There was no allegation that the works of the author published in the books, even if it was conceded for a moment that the works still remained his property, had any way destroyed that property or that any change had been brought about in those works which had destroyed or diminished in value. In view of that the charge under Section

427 can not stand. AIR 1955 Pat 228 : 1954 BLJR 433 : 1955 Cr LJ 832 (the removal of the name of the author from the books could not constitute an offence under Sec. 489).

Small deviation in evidence. Witness had stated that the bag was snatched from him and the papers there from were torn and burned. He submitted that this would show that the allegations about tearing of the papers or snatching of the bag are not reliable.

As rightly pointed out by the learned APP, a small deviation in the evidence about the incident, which had taken place about six years before the witnesses were examined, would not reduce the veracity of the testimonies of those witnesses and, therefore, the evidence ought to be believed, particularly since the witnesses are not shown to have any animosity towards the applicant to falsely implicate him in the offence. *Diwakar Maniram Kohale vs. State of Maharashtra,* 2010 (2) CriLJ 1411 (Bom.)

The loss arising out of destruction must be in reference to some other and not to the owner himself. AIR 1968 Ori 18. An owner of land cutting of the branch of trees overhanging on his land cannot be convicted if he has not trespassed on the neighbour land. 1967 Cr LJ 166 (but *see* AIR 1963 Mani 15) ; 1969 BLJR 472. A house owner has a right to demolish his house and also to remove any trespasser therefore without committing breach of peace. AIR 1969 Ori 250. Abetment of mischief was caused to the Government and the accused was convicted under Section 427/109. AIR 1973 SC 1388 : 1973 Cr LJ 1130. Demolition of structure belonging to another is mischief. 1969 Bih LJR 472.

The fact that on the same facts, the accused may be held guilty under a Special Act cannot prevent prosecution under the section. ILR (1972) 1 Cal 72.

The accused had cut away wire of a fence on the land of the complainant and removed a portion of the branches of a mango tree of his grove. The parties held land contiguous to each other. The complainant had not deposed that he had raised the fence on his grove. There was no other evidence to show that the accused had cut the fencing. His conviction was therefore set aside and revision allowed. (1986) 2 Crimes 652 (Ori).

2. Procedure.—Not cognizable—Warrant—Bailable—Compoundable in case of loss to private persons—Triable by any Magistrate.

3. Charge.—I (*name and office of the Magistrate, etc.*) hereby charge you (name *of the accused*) as follows :

That on or about the ....day of ....at ....you, committed mischief by causing wrongful loss or damage to the property of *A.B.* estimated at Rs. .... and that you thereby committed an offence punishable under Section 427 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

4. Evidence and proof.—Where in a case evidence is not fully satisfactory to prove the offence against the accused, acquittal of accused justified. (1988) 1 Cri LC 102 (Ker).

5. Acquittal.—The non-production of Investigating Officer is a serious Infirmity which goes to the root of prosecution case. Certain material witnesses have not been produced and when the possession over land in question has not been proved then order of acquittal does not require any interference. *Sohanti Lal* v. *State of Rajasthan*. 1994 Cr LR (Raj) 540.

6. Quashing of proceeding.—Where there was private complaint—Proceedings was initiated, applicants were summoned—Application for quashing proceedings was filed to applicant No. 1 applying for succession certificate excluded name of complainant who claimed to be also legal heir. Hence, the complaint under I.P.C. such dispute is purely of civil nature. Filing of criminal use being abuse of process of law proceeding quashed. *Yamunabai* v. *State of Maharashtra*, (1994) 2 Crimes 285 : (1994) 2 Bom CR 73 : 1994 Cr LR (Mah) 217 : 1994 B Cr C 456 (Bom).

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Sec. 428. Mischief by killing or maiming animal of the value of ten rupees.—Whoever commits mischief by killing, poisoning, maiming or rendering useless any animal or animals of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Synopsis

1. Scope 2751
2. Maiming 2751
3. Procedure 2751
4. Charge 2751

1. Scope.—"It must be proved that the destruction or damage is that of wilful description which falls within the definition of mischief. But it must, it seems be understood that the animal destroyed is the subject of property. Wild animals which have been captured as bears, tigers, *etc.*, kept in cages, could probably be deemed within the meaning of the section."—*Morgan and Macpherson*, 304 UBR 1905, Penal Code 25.

2. Maiming.—In its primitive meaning of the verb "to maim" involves the notion of mutation of some part of the body useful for fighting. The framers of the Code did not intend this restricted meaning only of this expression. The expression would fairly include the amputation of any member, or the injury, of an animal by which its speed, or endurance or use was permanently diminished. LBR (1872-1892) 404 : UBR 1905 Penal Code 28 ; 1 Weir 500 ; 1 Weir 498 ; 38 PR 1888 Cr ; AWN 1884, 87. The cutting off completely of the ears of an ass is maiming under this section. 22 MLT 68. He is included in the definition of animal. 1972 All Cr R 590.

3. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate.

4. Charge.—The charge should run thus :

"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :

That on or about the ....day of .... at .... you committed mischief by killing (or poisoning or maiming or rendering useless) any animal, to wit .... (describe it) which was the property of *A, B*, then valued at Rs. 10, and that you thereby committed an offence punishable under Section 428 of Indian Penal Code, and within my cognizance.'

And I hereby direct that you be tried on the said charge."

* * * * *

Sec. 429. Mischief by killing or maiming cattle, *etc.*, of any value or any animal of the value of fifty rupees.—Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Synopsis

1. Scope 2752
2. Maiming 2753
3. Intention 2753
4. Mischief by killing 2753
5. Procedure 2754
6. Charge 2754
7. Sentence 2754
8. Conviction 2754

1. Scope.—The words "bull" or "cow" include the young of these animals, and the expression "any other animal" does not mean an animal of the kind already mentioned, but refers to an animal of a different genus altogether. The section specifies the more valuable of the domestic animals without any regard to the age, but in respect of other kinds of animals not so specified, the section would not apply, unless the particular animal in question was shown to be of the value of fifty rupees or upwards. *Gouri Mondal* v. *Jafar*, 22 Cal 467. A bull which was branded at the *Sradh of the* complainant's deceased father and was fed and kept at the complainant's own place even the after does not cease to be property of the complainant. Any person who kills a bull is guilty of the offence under this section. 167 Ind Cas 511 : 38 Cr LJ 407 : 18 Pat LT 329 : AIR 1937 Pat 406. No offence of mischief is committed in killing a bull branded and let loose according to the custom of Hindus on the death of person, since such bull is no one's property. AWN 1884, 87 ; 1 Weir 500 ; but *see* 34 PR 1888 (Cr). Where the accused threw a stone at a buffalo, in order to drive it out of her backyard and the animal after running some distance, fell down and died ; *held*, that the accused was not guilty of an offence under Section 429. 1 Weir 502. A person who kills an animal dedicated to a deity commits an offence under this section. AIR 1945 All 430. Horse includes mare. 49 Cr LJ 112 : AIR 1948 Oudh 113. As regards intention to maim animal, *vide Ibid.* The expression "maiming" in this section refers to injuries permanently affecting the use of a limb or other member of a body. AIR 1947 Sind 66 :

231 1C 107 : 48 Cr LJ 700 ; ILR (1957) 2 Cal 771 (spearing a white milch cow resulting in 3 (*inch*) long (*inch*) thick and 3 (*inch*) deep injury).

The act or omission constituting an offence under Section 118 of the Motor Vehicles Act, 1939 is separate and distinct offence under Section 429 of the Penal Code. (1967) 2 Andh 784 : AIR 1961 All 18 : (1961) 1 Cr LJ 326.

2. Maiming.—The word "maiming" in Section 429 involves the definition of the use of some limb or member involving a permanent and not a mere disfigurement. 17 Cr LJ 253 : 18 Bom LR 289 : 34 Ind Cas 973. The cutting off the ears of a horse amounts to "maiming" within the meaning of this section. 21 MLJ 843. But where a person inflicts a wound on an animal with a spear whereby it is disabled for some days, this offence falls within Section 426 and not within this section. 3 Bom LR 503. The cutting off of nearly one-half of one ear of a mare whereby the animal's sense of hearing is not impaired, is not maiming. 18 Bom LR 289. Killing of an animal by the thief does not merit double conviction for thief and mischief. 26 Cr LJ 277 : 84 Ind Cas 341 : AIR 1925 Pat 34. Where no one has any property or right in animals the killing of that animal does not come within Section 425 and there the provisions of Section 429 will not be attracted. AIR 1961 Assam 18 ; 1960 Cut LT 342 (blows did not render the animal useless or maims it).

3. Intention.—The provision of this section requires that the offence of mischief must have been committed as the result of the acts specified therein and in order to constitute that offence it is necessary that the accused should either intend to cause or know that he is likely to cause wrongful loss or damage. 3 CrLJ 107 ; *see* 14 CPLRCr 159; LBR (1893-1900), 633 ; 7 IndCas 415, where conviction both under this section and Sec. 379 were held to be bad. The section will not apply in those case when there is a deliberate attempt on behalf of the accused to commit a mischief. 1957 AllLJ 123.

Merely an accident has taken place on public highway would not be sufficient to prove the charge for offence under Section 429, IPC unless the evidence has been led that the accused driving the vehicle had any grudge against the complainant or had required intention or knowledge in causing the accident. *State of Maharashtra v. Gajanan D. Jansbhulkar*, 2002 Cri LJ 349 (Bom).

4. Mischief by killing.—So far as offence under Section 429, I.P.C. is concerned, the intention is gist of the offence, Section 429 will only apply in those cases where there is deliberate attempt on behalf of the accused to commit mischief. The commission of mischief involves animus to do something. Where the accused has no intention of either killing or poisoning, maiming or rendering useless any of the animus mentioned in that section. This section will not apply. Since it is accident case and there is nothing on record that the accused respondent had any enmity with P.W.1 Dagla Ram and if the accident has taken place then it cannot be said that any mischief was committed by the accused respondent. It may further be stated here that merely an accident has taken place on public highway would not be sufficient to prove the charge for offence under Section 429, IPC unless the evidence has been led that the accused driving the vehicle had any grudge against the complainant or had required intention or knowledge in causing the accident. Since it is a simple case of accident therefore, measure of causing the accident is absent and in these circumstances, the findings of acquittal for offense under Section 429, IPC recorded by the learned trial Magistrate are liable to be confirmed one. *State of Rajasthan v. Nauratan Mal*, 2002 Cri LJ 348.

5. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by a Magistrate of the first class.

6. Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (name *of the accused*) as follows :—

That on or about the...............day of............at............. you committed mischief by killing (or maiming or rendering useless) the elephant of *A.B.* (or the tame panther of *A.B.* valued at Rs. 50), and you thereby committed an offence punishable under Section 429 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried by the said Court on the said charge.

7. Sentence.—There was complaint under Section 429, I.P.C.—After tieing the legs of buffalo skin was removed by the petitioners—Revision against conviction was filed, he was not a previous convict—Agony of 7-1/2 years in trial entitled to get the benefit of probation, hence, sentence was reduced. *Nakli* v. *State of Haryana.* (1994) 1 CC Cases 287 (P&H).

8. Conviction.—When three were accused of offence under Section 429, I.P.C.—Sentence regarding two of them maintained and one acquitted against the appeal, conviction based on sole testimony of prosecution witness animosity between the parties was accepted which was sufficient to throw doubt on the credibility of prosecution case—Evidence cogent and credible and evidence not to be discarded unless suffers from infirmity. Conviction was held maintainable on such evidence. *Jagan Saha* v. *State,* (1995) 2 CCR 469.

* * * * *

Sec. 430. Mischief by injury to works of irrigation or by wrongfully diverting water.—Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings, or for animals which are property, or for cleanliness or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Synopsis

1. Scope 2754
2. Object 2756
3. Procedure.....................................2756
4. Charge 2756

1. Scope.—To constitute the offence not merely loss should be proved, but also that it was wrongful loss and that accused intended to cause or knew he was likely to cause the loss. AIR 1925 Mad 577 : 26 Cr LJ 1100 : 88 Ind Cas 188 : 1925 MWN 45. Under Section 430, the physical requisite of the act are the doing of an act which causes, or to the doer's knowledge is likely to cause, a diminution of supply. 13 PLT 162 . 33 Cr LJ 313 : 1932 Cr C 407 : AIR 1932 Pat 224. This section is applicable equally to irrigation channels, as to other sources of irrigation such as tanks and ponds. 1 Weir 510 ; *see* also AIR 1940 Mad 144 : 41 Cr LJ 558 ; AIR 1939 Mad 794 : 41 Cr LJ 881 ;

AIR 1940 Mad 306 : 41 Cr LJ 930 ; AIR 1943 Sind 130 : 34 Cr LJ 607. Where an accused is charged under this section, his intention to cause wrongful loss is the essential element to be considered. 29 Ind Cas 670 ; 7 MHC App 39 : 4 LBR 149 : 1 Weir 507 ; 1 M 262. To bring an act under this section, it must be shown to cause or be likely to cause, a diminution of the supply of water for agricultural purpose. UBR (1897-1901) Vol. 1, 349 ; 5 ALJ 159 ; 1 Weir 507 ; 16 Cr LJ 542 ; 34 MLJ 206 : 60 Ind Cas 95 : 23 Cr LJ 655 ; 12 Cr LJ 551 : 12 Ind Cas 527 ; 1 M 262 ; 11 Cr LJ 621 : 25 PLR 1910 ; Rat Un Cr C 217 ; 8 CWN 370 ; 5 ALJ 195 ; 1 Weir 503 ; 41 All 599 ; 51 Ind Cas 201 : 1 Weir 504 ; 1 Weir 505 ; 1 Weir 508 ; 25 WR Cr 69 ; 54 Ind Cas 417 : 24 Cr LJ 830 ; 24 Cr LJ 467 (1) ; 32 Cr LJ 476 ; 22 Cr LJ 270 ; but *see* 167 Ind Cas 560 : 38 PLR 1035 : 38 Cr LJ 430 : AIR 1937 Lah 196. The offence under this section requires as an essential element of it that the accused had the intention to cause or the knowledge that their act was likely to cause wrongful loss to the complainant. 26 Cr LJ 1100. Guilty knowledge is essential to a conviction for the offence of mischief, and, in the absence of any consideration or discussion of the circumstances and the reasonableness or otherwise of the acts of the accused persons it is impossible to uphold a conviction for that offence. 52 Ind Cas 276 : 20 Cr LJ 612. To substantiate an offence under Section 430 the prosecution must prove that there has been unlawful and intentional interference on the part of the accused with admitted or proved rights of the complainant. 32 CLJ 476 : 61 Ind Cas 665 : 22 Cr LJ 415. Where the accused was charged under Section 430, I.P. Code, for having created a fence across a channel flowing through his land with the result that the supply of water to the complainant's land was reduced. *Held*, that in the absence of a claim of easement or contract for the supply of water by the complainant, the accused could not convicted. 69 Ind Cas 95 : 23 Cr LJ 655 : 16 LW 793 ; 44 MLJ 234. Every person has a perfect right to do a particular case upon his own land, and if a person breaks open his *bund* or opens his own sluice, no one can complain of it, until some injurious consequence follows from it. As soon as such a consequence follows, the injury and not the original act, becomes a cause of action. In such a case the mischief consists not in breaking the *bund* or in opening the sluice but in flooding or withering up the complainant's crops. 21 SLR 107 : 98 Ind Cas 49 : 27 Cr LJ 1233. Where a matter is prominently one for the Civil Court to decide, whether a *bund* was put up or not by one of the parties, there ought not to be a conviction for an offence under this section. 98 Ind Cas 474 : 27 Cr LJ 1354 : *see* also 34 CWN 86 : 50 Cr LJ 589 : AIR 1930 Cal 318. The words "diminution of the supply of water for agricultural purposes" in this section cannot be limited to those cases only where the water has been allowed either to go waste or has been diverted for a non-agricultural purpose. The section read as a whole also refers to cases where the water is intended for use may by particular person for purposes of agriculture and is diverted by an accused person for his own purposes though of a like nature. 21 SLR 107 : 98 Ind Cas 49 : 27 Cr LJ 1233. An offence under this section is particularly a grave form of the offence of committing mischief as defined in Section 425. It is necessary to prove in such cases the elements that constituted mischief under Section 425. No doubt a person who takes water from a tank causes loss but it should be shown that he has caused a diminution of the supply of water for agricultural purpose. AIR 1930 Cal 289. Accused knowingly diminishing supply of water without a *bona fide* claim is guilty. AIR 1924 Pat 704 : 26 Cr LJ 258 : 84 Ind Cas 322; *see* also 44 Ind Cas 580 : 34 MLJ 206 : 19 Cr LJ 356 : 23 MLT 248. Persons cutting *bund* and letting out some water is guilty under Section 430. 136 Ind Cas 592 : 13 PLT 162 : 33 Cr LJ 313 : 1931 Cr C 407 : AIR 1932 Pat 224. In order to prove an offence under Section 430, it is necessary to prove mischief as defined in Section 425 and it is also necessary to prove that the act committed is likely to cause a diminution of the supply of water for the various purposes mentioned in the section. AIR 1934 All 687 : 35 Cr LJ 1250 : 50 Ind Cas 1048 ; 1933 MWN 427. The deprivation of water by putting up a *bund* across the water channel and thereby causing diminution of water supply to a person would be an offence under Section 430. 1962 Ker LT 868 : (1962) 2 Ker LR 466 ; 1955 All LT 689 : 1963 MPLJ (Notes) 216.

Where the accused diverted the water, which the complainant and the accused had a right to take by putting up a *mandal*, he will not be guilty under Section 430. 1969 MLW Cr 202.

2. Object.—"Injuries to a river or well or any natural or artificial channel or reservoir of water, or any work for the purpose of irrigation, if such injuries cause or are likely to cause a diminution of the supply by wrongfully drawing off or diverting water are punishable under this section. In some parts of India, disputes about water for irrigation are numerous and are carried on with great violence. When two villages draw their supply from one tank and the scantiness of the supply renders it necessary that they should each be supplied for a regulated number of hours, it is not unusual for the people of one village to attempt undue appropriation during the night, an act which if discovered by the rival village, ends in an affray of a very cerious character. Such an act cusing wrongful loss to individuals or to the public or community of the injured village will, it seems, be punishable under the present section. Misclief committed by drawing water used for domestic and other like purposes and thereby causing or diminution of the supply will likewise be punishable under the section:—*Morgan and Macpherson.*

3. Procedure.—Cognizable—Warrant—Bailable—Compoundable with permission of Court-Triable by a Magistrate of the first class.

4. Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused) as* follows :—

That on or about the ....day of...........you committed mischief by doing an act, to wit.........(*specify it*) which caused (or which you knew to be likely to cause) a diminution of the supply of water of *A.B.* for agricultural purposes (or for food or drink, *etc.*) and that you thereby committed an offence punishable under Section 430 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 431. Mischief by injury to public road, bridge, river or Channel.—Whoever commits mischief by doing any act which renders or which he knows to be likely to render any public road, bridge, navigable river or navigable channel, natural or artificial impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine or with both.

Synopsis

1. Public road.....2757
2. Scope.....2757
3. Procedure.....2757
4. Charge.....2757

1. Public road.—A path through a jungle is not a road in the sense in which that word is used in this section. LBR (1893-1900), 629.

2. Scope.—In the definition of mischief, loss or damage to the public is mentioned. This section applies when the mischief is to a public road, navigable rever *etc.* and is of the kind mentioned. An obstruction or impediment caused not wilfully but by some negligent act or omission is an offence punishable not under this but under a preceding section (*see* Section 283). Mischief caused to a private pathway, bridge *etc.* is punishable unde section 426.—*Morgan and Macpherson*, 395. *See* also UBR (1892-1896) Vol. 1, 260; 1 Weir 511. The word "public" refers to cases by people at large and not ownership. 1973 Cr LJ 1 : (1975) 77 Punj LR 57 (Floating down timber which strokes against and causes injury to bridges across the river may amount to mischief.

3. Procedure.—Cognizable–Warrant–Bailable–Not compoundable-Triable by a Magistrate of the first class.

4. Charge.—I (*Name and Office of Magistrate, etc.)* hereby charge you (*name of* the accused) as follows :—

That on or about the ....day of............. at............ you committed mischief by doing an act, or wit.............. *(specify it)* which rendered (or which you knew to be likely to render) a public road, to wit ....(describe it) (or a bridge, navigable river or a navigable channel) impassable (or less safe for travelling or conveying property), and that you thereby committed an offence punishable under Section 431 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 432. Mischief by causing inundation or obstruction to public drainage attended with damage.—Whoever commits mischief by doing any act which causes or which he knows to be likely to cause an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Synopsis

1. Scope.....2757
2. Procedure.....2758
3. Charge.....2758

1. Scope.—"Works of irrigation are within the protection of Section 430. Wilful injuries to embarkments where such injuries as are not punishable by a special law are punishable under this section. Works or public drainage such as those which exist or are in course of construction. In some of the Presidency towns or other big cities are included in the present section if such works are not constructed under a local or Special Act containing the necessary provisions for their protection."—*Morgan and Macpherson*, 396. In order to constitute an offence under this section, it is not sufficient to prove probable consequential damage to other property. 1 Weir 512 : 4 MHC App 15. Removal of boundary mark after demarcation by competent authority was an offence under the section. 1979 Cr LJ 1435.

Inundation or obstruction to public drainage is only punishable under the section. (1982) 84 Punj LR 55. Merely because some inconvenience has been caused to the complainant of the person living in the vicinity to the stoppage of the flow of water. Section 432 would not be attracted. (1982) 84 Punj LR 55 : 1982 Chand Cr C 86 ; ILR (1980) 2 Cut 598 (removal of boundary stones) ; (1961) 2 Ker LR 248 : 1961 Ker LT 656.

2. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by a Magistrate of the First Class.

3. Charge.—I *(name and office of Magistrate, etc.)* hereby charge you (name *of the accused)* as follows :—

That on or about the...............day of.........at............you committed mischief by doing an act, to wit............. (*mention it*) which caused, (or which you knew to be likely to cause) an inundation (or an obstruction) to a public drainage, to wit .... *(describe it)* attended with injury or damage, and that you thereby committed an offence punishable under Section 432 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 433. Mischief by destroying, moving or rendering less useful, a light-house or sea-mark.—Whoever commits mischief by destroying or moving any light-house or other light used as a sea-mark, or any sea-mark or buoy or other thing placed as a guide for navigators, or by act which renders any such light-house, sea-mark, buoy, or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine or with both.

Synopsis

1. Procedure...2758
2. Charge 2758

1. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

2. Charge.—The charge should run thus :

"I (*name and designation of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :—

'That you on or about .... (date) .... (time) .... (place) .... committed mischief by destroying (or moving) a light-house (or other light) to wit

.... used as a sea mark (or a sea-mark or buoy or other thing placed as guide for navigators or by an act which renders any such light-house, sea-mark, buoy or other such thing aforesaid less useful as guide for navigators) and thereby committed an offence punishable under Section 433, I.P. Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 434. Mischief by destroying or moving, *etc.*, a land-mark fixed by public authority.—Whoever commits mischief by destroying or moving any land-mark fixed by the authority of a public servant, or by any act which renders such land-mark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Synopsis

1. Applicability 2759
2. Cases 2759
3. Procedure....................2759
4. Charge 2759

1. Applicability.—Possession by the accused of the land in which the land-marks were situated will not be a sufficient defence in a case where the ingredients under Section 414 are made out. 1961 Ker LT 666 : (1961) 2 Ker LR 141 : 1962 Mad LJ 23.

2. Cases.—8 ALJ 925 ; 1 ALJ 619 ; 30 Cal 1084.

3. Procedure.—Not cognizable—Warrant—Bailable—Not compou-ndable—Triable by any Magistrate.

4. Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :

That on or about the ....day of ....at ....you committed mischief by destroying (or moving, *etc.*) a land-mark, to wit .... (*describe* it which was fixed by the authority *of A.B.*, a public servant, and that you thereby committed an offence punishable under Section 444 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 435. Mischief by fire or explosive substance with intent to cause damage to the amount of one hundred or (in case of agricultural produce) ten rupees.—Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards "or (where the property is agricultural produce) ten rupees or upwards", shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Synopsis

1. Amendment..2760
2. Scope..2760
3. Procedure..2761
4. Mischief by fire..2761
5. Charge..2761

1. Amendment.—In this section the words quoted have been inserted by th Indian Penal Code (Amendment) Act, 1882 (8 of 1882), Section 10.

2. Scope.—“When mischief is committed by means of fire or any explosiv substance and the evidence enables the Court to conclude that the offender not on intended to cause wrongful loss, which intention is necessary to the committing “mischief but either intended or knew himself to be likely to cause wrongful loss damage to the amount of Rs. 100 there may be conviction under this section. If th evidence falls short of this, but is sufficient to show that mischief to the amount of 5 rupees has been caused, whether by fire or by any means whatsoever, the offender ma be convicted under Section 427. If the offence proved is simple mischief and there is n aggravating circumstance in the case, the offender is punishable under Section 426.”- *Morgan and Macpherson, 397*. But an accused cannot be convicted both under th section as well as under Section 436 because when, in the same penal statute, ther are two clauses applicable to the same act of an accused, cumulative punishment ar not to be awarded unless it is so expressly provided in the statute. The case may b different where different statutes provided separate punishments for this same act, fo the intention of the Legislature is to guard two distinct interests of different species. 1 BHC 13. Where breach of Rule 56(4) of the Defence of India Rules has been committe and such breach forms parts of acts constituting offence under this section and th accused has been convicted under this section, a separate sentence for offence und Rule 56(3) is not necessary. AIR 1943 Pat 446 : 45 Cr LJ 557.

“Damage to any property” contemplated by Section 435 if the Penal Code is of suc a nature as to destroy or diminish in value or utility or otherwise injuriously affect it. DLR 300 : 5 AI Cr D 728 : 1951 ALJ 558.

It is also noticeable that the Magistrate did not feel satisfied to issue the proces based on the allegations made in the complaint and evidence led by th respondent/complainant and, therefore, directed the concerned SHO to investigate th case of the complainant, but surprisingly the process was issued against the petitioner even after the police found the complaint to be false and motivated against the prese petitioners. The learned Magistrate also ignored the report of the fire department, wh in their report clearly observed the cause of fire to be because of 'short circuit'.

The aforesaid factual background of the case would clearly show that th allegations levelled by the complainant against the present petitioners are more base on assumptions besides being patently absurd and improbable. It appears that th respondent/complainant haunted by her action of removal of the illegal encroachme in the premises of these petitioners, perceived and presumed that the car could be on burnt by these very petitioners. No doubt these officers also must be nursing a grudg against the complainant for the upright actions of the respondent complainant, but t ttribute them with such a grave act of putting the vehicle of the complainant to fire ould be totally far-fetched and not expected of such Government officials in the bsence of any direct or corroborative evidence to this effect. *R.K. Mishra vs. State*, 2010 2) CriLJ 1292 (Del.)

The expression is wide enough to include the entire incidental loss suffered by the wner. AIR 1952 All 156. The main distinction between the offence contemplated by ection 435 and that by Section 436, I.P.C., that while the former envisages mischief by etting fire to any property, the latter contemplates mischief by fire to any building hich is ordinarily used as a place of worship or as a human dwelling or as a place for ustody of property. (1972) 13 Guj LJ 684 ; (1972) 7 Bom LR 341 (even if the accused laims possession).

3. Procedure.—Cognizable—Warrant—Bailable—Not compound-able—Triable by a agistrate of the first class.

4. Mischief by Fire.—When the case solely depends upon the oral testimony of a hild witness and when the said witness does not understand the sanctity of oath and hen other independent evidence was available and when such evidence is not brought n record, then it would not be prudent to rely upon the sole testimony of the child itness in order to reverse the acquittal and to convict the present respondent for the aid offence, particularly when there was previous enmity between the respondent and ai Panchu. Bai Panchu was also involved in certain criminal case. In that view of the atter, the approach of the learned Sessions Judge acquitting the present respondent oes not appear to be illegal or erroneous and held that the said judgment also cannot e said to be illegal. Consequently, there is no merit in the present appeal and the same eserves to be dismissed. Even otherwise, when the Appellate Court broadly agrees with he reasoning of the trial court, then, it is not necessary to go into detailed discussion of he evidence on record and to reiterate the findings of the Learned Sessions Judge as bserved in decisions of the Supreme Court in the case of *State of Karnataka v. Hemareddy reported in* AIR 1981 SC 1417; (1981 Cri LJ 1019) in the case of *Girijanandini v. Bijendra Narain, reported in* AIR 1967 SC 1124. The learned APP has ailed to dislodge the findings of fact recorded by the learned Sessions judge for acquitting the respondent and, therefore the acquittal appeal is liable to be dismissed. *State of Gujarat v. Babubhai K. Salat*, 2002 Cri LJ 372.

In a Rajasthan case, the accused was alleged to have taken away standing crop from field of complainant. Revenue record showed that complainant was neither in cultivatory possession nor had any right to possess land in question. It was found that the interest or title over land was relinquished by complainant through a compromise deed. It was held that the complaint was liable to be quashed. *Sogat Singh* v. *State of Rajasthan*, 2004 Cr LJ (NOC) 306 (Raj) : 2003(5) All Ind Cas 357 : 2003(2) Cur Cri R 568.

5. Charge.—I (*name and office of Magistrate, etc.*) hereby charge you (*name of the accused*) as follows :

That on or about the ....day of ....at ....you committed mischief by the fire (or any explosive substance) intending thereby to (or knowing it to be likely that you will thereby) cause damage to a property, to wit ....to the amount of Rs. 100 (or Rs. 10 *if the property was agricultural produce)*, and that you thereby committed an offence punishable under Section 435 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 436. Mischief by fire or explosive substance with intent to destroy house etc.—Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with *imprisonment for life*, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Amendments 2762
2. Scope 2762
3. Person causing loss to his own property 2764
4. Building 2764
5. Abetment 2764
6. Sentence 2764
7. Procedure 2765
8. Charge 2765
9. Conviction 2765
10. Acquittal. 2765
11. Bail 2766
12. Proof of arson 2766
13. Mischief by fire. 2767

1. Amendments.—The words in italics were substituted for the words "transportation for life" by Act 26 of 1955, Section 117, and Sch. (with effect from 1.1.1956).

2. Scope.—"This highly penal provision is for the punishment of the offence mentioned in Section 435, when such offence is attended with the aggravating circumstance that the offender contemplated the destruction of a house, place of worship, or place used for the custody of property. The grass or mat huts of the lowest classes are placed on a level with the substantial, secure and valuable dwellings of the rich : and it is left to the descretion of the Judge to distinguish in awarding punishment between cases of great criminality and those in which the injury done is inconsiderable. The word 'building' must, however, it seems be understood to mean a structure of some permanence, and fixedness, not a mere hut, or temporary erection.—*Morgan and Macpherson*, 338. See also 7 PR 1923 Cr. A thatched wall of an enclosure in which here are several thatched huts is a building. 7 PR 1903 Cr ; 5 AI Cr D 728 : 1951 ALJ 58 : 6 DLR 300. Building includes "grass or mat hut". 1934 MWN 687.

Burning another's home to satisfy grudge is a serious act for which one year's mprisonment is inadequate. 1934 MWN 245. Where no common intention to burn the ouse is proved, all the accused cannot be convicted under Section 436/149. AIR 1941 Rang 324 : 43 Cr LJ 373. In an offence under this section, all the members of the nlawful assembly except those who did not participate in the arson would be liable for ffence under this section. AIR 1942 Oudh 60 : 43 Cr LJ 115. A person whose property s lost by fire soon after he had effected a fire insurance cannot be suspected of arson. AIR 1941 Oudh 487 : 42 Cr LJ 595. But where common intention is proved all that a ucca building court not be destroyed by fire is not sound. AIR 1944 All 167 : 45 Cr LJ 728. If the accused knew that he was likely, by his act, to destroy any neighbouring ouses, an offence under this section would be complete. AIR 1949 All 620 : 50 Cr LJ 44. Section 285 is not applicable where the act of the accused is wilful and not rash or egligent. To such a case, Section 436 may be applicable. Rat Un Cr C 126. A man may commit mischief in certain cases on his own property. In such cases it seems that a person causing mischief by fire to his own house will be punishable under this section. f death or hurt is caused by fire, the offender may be punished under the Chapter of offences against the human body.—Morgan and Macpherson, 398 ; see also 8 Ind Cas 399. Arson does not cease to be arson if the chappar is first pulled down and then set fire to. 1953 Cr LJ 1729 : AIR 1953 All 749 : 1953 All WR (HC) 389. Whipping in addition to sentence under this section is not permissible. AIR 1928 Oudh 111. In a case of mischief by fire, evidence of previous fires, unconnected with the charge under enquiry cannot be admitted. 20 CWN 1267 : 17 Cr LJ 421 : 35 Ind Cas 981.

It is absolutely necessary in order to convict the accused under Section 436, IPC, to prove that the building which he destroyed comes within the category of a building ordinarily used as a place of worship, as a human dwelling or as a place for the custody of property. The words "ordinarily used" in Section 436, IPC, do not mean that other buildings are from time to time used for such purposes, but they mean that the particular building which is the subject of the offence was itself used. 82 Ind Cas 54 : 25 Cr LJ 1190. It must be shown that the accused were from the very beginning actuated by the common motive to set fire to the house before a conviction could be had under Sections 436 and 149. 22 Cr LJ 267 : 60 Ind Cas 667. Arson in Indian villages is very serious crime and must be heavily punished. 131 Ind Cas 336 : 8 OWN 101 : 1931 Cr C 276 : 32 Cr LJ 694 : 6 Luck 539 : AIR 1931 Oudh 116. Persons witnessing arson being committed and not preventing the same or interfering are not participants or abettors without overt act. 1958 Andh LT 856.

Finally it was held that police ought to have attached utencils which were half burnt or which had become black while drawings *Panchanama* of the scene of the offence and that would have given added assurance to prosecution but merely because it was not done, it is not possible to hold that trial has been vitiated. *Subhash Gopal Ralkar* v. *State*, (1995) 2 CCR 610 (Bom).

Room still to be treated as a building despite the fact that its roof has fallen. *Daropadi Devi (Smt.)* v. *Daulat Ram*, (1995) 1 Crimes 617 (P&H).

The complainant's son who use to graze cattles of the accused stopped grazing for non-payment of salary. Accused went to his house and on being told by complainant's wife that her son had not gone for grazing as two months salary had not been paid to him. Accused felt enraged and set fire to thatch of residential premises. *Held*, that counsel's request for reduction of sentence could not be accepted as accused acted in very high handed manner by putting fire to the house. It smelt of a false ago. 1987 Cri LJ 1196 (Raj).

The word 'hut' means a small house made of thatched roof, straw and mud and there is nothing to suggest that it cannot be considered as a building. (1972) 13 Guj LR 684 ; 1977 Cr LJ 837; 1973 Cr LJ 148 ; (1979) 81 PLR 420 *(kutcha structure)*.

In offence of mischief by fire when FIR was lodged late wherein names of eye-witnesses not mentioned accused entitled to benefit of doubt. *Aseekkattu* v. *State of Kerala*, 1996 Cri LJ 1036 (Ker).

3. Person causing loss to his own property.—Mischief by fire was committed with intent to destroy property *i.e.* building which does not included *Chhappar* or *Chhan* (thatched roof). The accused in this case had put his own *chhan* on fire and tried to falsely indicate others. It was held that no mischief is committed if a person causes loss to his own property. However, he could be proceeded against under Section 182 for making false report to the police with the intent to cause public servant to use his lawful power to the injury of another person. *Raj Singh* v. *State*, 2003 Cr LJ 1588 (P&H) : 2003(1) All Cri LR 607 : 2003(2) Rec Cri R 697.

4. Building.—A cabin which is removable which might be made of wood will not be covered under the meaning 'building' which necessarily means the structure of any erection which is of permanent nature and is ecrected on the earth and some portion of it is embedded in earth. When the cabin burnt does not come within the definition of 'building' accused can not be convicted for offence under Section 436, IPC. Its burning might be a lesser offence *i.e.* 435, IPC. *Bherulal* v. *State of Rajasthan*, 1999 Cri LJ 4257 (Raj).

5. Abetment.—The appellant's instigating the offender to commit the offence under Section 436, does not amount to his abetment of the offence under Section 436. AIR 1967 SC 553.

When the case solely depends upon the oral testimony of a child witness and when the said witness does not understand the sanctity of oath and when other independent evidence was available and when such evidence is not brought on record, then it would not be prudent to rely upon the sole testimony of the child witness in order to reverse the acquittal and to convict the present respondent for the aforesaid offence, particularly when there was previous enmity between the accused the action. *State of Gujarat v. Babuhai K. Salat* 2002 Cri LJ 375 (Guj).

6. Sentence.—Setting fire to a residential hut belonging to another is always a serious offence because it is potentially capable of endangering lives of person and destroying property. AIR 1956 Bom 180 : 1956 Cr LJ 386 ; 1933 Crimes 409 (no reliable evidence to suffer the convict).

When Courts accepted evidence of eye-witnesses that it was accused who set fire to the house—There was no allegation of error of record or perversity of order and evidence cannot be reassessed. Conviction was held proper. However, considering age of accused being 75 years and damage caused not excessive, sentence reduced to the period already undergone with fine of Rs. 500. *Bibhishan Kanhar* v. *State of Orissa*, (1994) 3 Crimes 388 (Ori).

7. Procedure.—Cognizable—Warrant—Not compoundable—Triable by Court of Session. AIR 1937 Nag 50 : 38 Cr LJ 340 : ILR 1937 Nag 277.

8. Charge.—"I (*name and office of the Sessions Judge, etc.*), hereby charge you (*name of the accused*) as follows :—

That on or about the......day of....at......you committed mischief by fire or an explosive substance, to wit.... (*describe it*) intending to cause (or knowing it to be likely, that you would thereby cause) the destruction of a building (of *AB*) which was ordinarily used as a place of worship (or as a human dwelling or as a place for the custody of property) and that you thereby committed an offence punishable under Section 436 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

9. Conviction.—The complainant was closely related to accused and though their relations are strained he had no animus or motive to falsely implicate accused. Evidence of independent witness in corroborating complainant was also found to be reliable witness and on his solitary statement, accused can be convicted under Section 436, IPC. Hence, conviction confirmed but sentence reduced in view of old age of accused. *Udai Singh son of Mukhan Singh* v. *State of U.P.*, 1995 All LJ 564 (All).

In the case of assassination of Mrs. Indira Gandhi—Several innocent persons were killed. Conviction was based on solitary evidence of prosecution witness—Witness identifying the culprits for the first time in the court—Prosecution witness giving a vague description of the culprits in his testimony and appellants could not be identified as culprits with confidence. It was held that such conviction based on the identification of appellants in the court for the first time unsustainable in the eye of law. *Sri Ram Sharma* v. *State*, (1995) 3 Crimes 331 (Del).

The FIR was self-contained containing full description and participation of accused proved. Minor contradiction in FIR and statement under Section 161, Cr PC, ignored. Hence, appeal dismissed and conviction and sentence upheld. *Udai Singh* v. *State of U.P.* 1995 JIC 316 (All).

Five persons died in a hut that was set a fire. In the instant case the confession of the accused was corroborated with the prosecution evidence of eye-witness Nos. 4, 5 and 6, but later on he retracted it. presence of the P.Ws. was found doubtful and reasonable doubt was entertained in respect of their complicity in the case. *Held*, it would not be safe to convict the accused in the absence of independent corroboration. 1986 (1) Crimes 599 (SC) : 1986 SCJ 259.

10. Acquittal.—Where there was contradiction in the testimonies of the complainant and another eye-witness as to the number of accused who had actually committed arson and the complainant himself was unable to say about the length and the breadth of the burnt thatched house and due to non-examination of I.O. any objective evidence showing the occurrence of collected from the place of occurrence could not be proved in Court, the accused persons are liable to be acquitted of the charge under Sections 436/34, IPC. *Dinesh Chaudhary* v. *State*, 2004 Cr LJ 4360 (Pat) : 2004(3) BLJ 488.

The informant-complainant himself has not supported the prosecution case in any manner, his son stated in cross-examination that the accused seen fleeing away at a distance of 500/600 yards regard being had to the fact that there was no source of light, it being dark night; none of the independent witnesses identified any of the accused persons and there were contradictory statements of the other witnesses. Thus, the whole prosecution case became very suspicious and as such none could be convicted under assumption or under vague allegation and, therefore, the prosecution had failed miserably to prove the prosecution case. *Sudhir Singh* v. *State*, 2004 Cr LJ 1073 (Jhar) : 2003 AIR Jhar HCR 448 : 2003(4) Cur Cri R 350.

Where the evidence of the informant coupled with the topography of the room negates her to be an ocular evidence and evidence of other witnesses is full of self-inconsistencies and material contradictions and the story of chasing of the informant by two accused introduced for in the course of evidence by the informant for the first time and there is no legal evidence to establish that the accused persons have set fire to the room in the cluster of the rooms of the main house of the informant as well as of removing of her articles from her room by the accused, the conviction of the accused cannot be sustained. *Police Hembram* v. *State*, 2004 Cr LJ 4408 at pp. 4412, 4413 (Jhar) : 2004 AIR Jhar HCR 273 : 2004(2) JC JR 176.

Where the evidence of *R. Chowkidar* that he informed the Judicial Officer that he heard three accused process-servers abusing Judicial Officers and uttering that they had set fire to the files in the Court room and that he saw the files were burning is fully corroborated by other witnesses who saw three accused persons sitting on the benches under the tree, it can be safely said that the three accused persons had set fire to the judicial records and there is evidence that these three accused persons were present on the Court premises even after duty hours and there was no reason for the process-serves to remain on the premises and therefore the conviction of the three accused persons is proper. *Om Prakash* v. *State*, 2004 Cr LJ 1932 (P&H).

The accused destroyed the house by fire and evidence of wife and sister of owner of house that they saw accused throwing lighted bundle of straw on their roof was found consistent. The conviction of accused and fine imposed as well as compensation awarded to the victim were held proper but sentence of imprisonment was reduced to the period already undergone. *Rabindranath Gounda* v. *State*, 2003 Cr LJ 2752 (Orissa).

11. Bail.—The application for bail was moved on ground of delay in' committal. It is thus apparent that Sessions Judge passed the order exercising his jurisdiction on a new ground after a lapse of substantially wrong period of rejection of bail by High Court. Hence, no ground for cancellation of bail is made out. Application rejected. *Mohan Lal* v. *State of U.P*, 1995 (32) ACC 159 (All).

12. Proof of arson.—Sole eye-witness filing FIR after unexplained long delay and also after deliberating with other witnesses and hence his evidence tainted with motive and not reliable. *Public Prosecutor, High Court of A. P.* v. *Chandaram Srinivasa Rao Sreenu*, 1996 Cr LJ 4412 (AP); *See* also *Suresh Marar Tripathi* v. *State of U.P.*, 2005 Cr LJ 3479 : 2005 All LJ 2427 : 2005(52) All Cri C 384 : 2005(3) Crimes 81.

13. Mischief by fire.—The claim of Mustt. Saleha Khatun, who is the main accused, is not supported by the evidence of any other witness. She did not take any step to adduce any other person as her defence witness to support her aforesaid claim. The accused might have rightful claim over the aforesaid plot of land and the dwelling house but it must be established before the appropriate Court and before doing so, she cannot take any action against the other party by setting fire on the dwelling house. The evidence of accused herself amounts to admission of the fact that it was none else but she herself who set fire on the dwelling house of the informant. The corroborated evidence of witnesses who are eye-witnesses to the incident, could not be destroyed/ impeached by the defence while cross-examining them and the same are found to be cogent, reliable and trustworthy. The conviction and sentence can be inflicted on the accused appellants on such evidence on record and in my considered view, the learned trial Court has rightly convicted and sentenced the accused appellants which needs no interference by this Court. *Mustt. Saleha Khatun & Ors. vs. State of Assam*, 2010 (3) CriLJ 3329 (Gauhati).

Voluntarily causing hurt and mischief by fire. Appellants rebuked and assaulted informant's wife with slaps and fists and also have threatening that they will cause fire to his house. Witnesses supported case of informant so far as assault is concerned.

From the evidences available, it appears that although the prosecution has proved the case under Section 323 of the IPC, i.e. the assault caused to the informant's wife on the date of occurrence and as such, the appellants, conviction under Section 323, IPC is confirmed.

However, there is no evidence beyond reasonable doubt to prove that three accused persons had gone to the house of the informant in the night to cause mischief by putting 'gaushala chappar' on fire, since no seizure list has been proved nor any villager who came on hulla, Satan Mahara and Arjun Mahara, named in the FIR were brought by the prosecution in the Court to prove that any fire was put on the roof of the informant's 'gaushala'. In that view of the matter, prosecution has failed to prove the charge u/S. 436 of the I.P.C. beyond reasonable doubt. Accordingly, they are acquitted from the charge u/S. 436 of the I.P.C and their conviction on that count is set aside. *Kalru Rai & Ors. vs. State of Jharkhand*, 2010 (3) CriLJ 3509 (Jhar).

Mischief of fire and causing injury—Accused was one of terrorists, who put fire in informant house and caused injuries. Witnesses have turned hostile and they have not supported the prosecution case. The doctor has only proved the injury on the shoulder of the informant. No doubt that the terrorists fired upon him when crossing the river and he could not identify any of the terrorists, in that view of the matter, there is no evidence to hold the appellant for any of the offence charged. Since, Hiralal Uraon, in whose house, the informant was taking shelter and who was present there, has stated that he was not among the terrorists rather he stated that he was his neighbour, residing in the house just beside his house and he was drunk due to Jitiya festival and he was himself assaulted. Held; There is no evidence to hold appellant guilty of any of offences charged. Charges against appellant have not been proved beyond reasonable doubts. *Lalsahay Uraon vs. State of Jharkhand*, 2010 (3) CriLJ 3351 (Jhar).

* * * * *

Sec. 437. Mischief with intent to destroy or make unsafe a decked vessel or one of 20 tons burden.—Whoever commits mischief to any decked vessel or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Synopsis

1. Scope 2768
2. Procedure 2768
3. Charge 2768

1. Scope.—"Decked vessels of any size, however, small, and such undecked vessels as the large river craft of Bengal and the class of a native vessels engaged in the coasting trate and otherwise on the western coasts of India, appear to be meant. If life is endangered, the offender may be dealt with under the provisions of the preceding Chapter".—*Morgan and Macpherson*, 399.

2. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

3. Charge.—"I (*name and office of Sessions Judge, etc.*), hereby charge you, *(name of the accused)* as follows :—

That on or about the.............day of..............at............you committed mischief (in case of Section 438, *add* by fire or any explosive substance) to a decked vessel of *A, B (name it)* (or to a vessel of *A, B of* a burden of............tons) intending or destroy (or render unsafe) the said vessel (or knowing it likely that you will thereby destroy it, or render it unsafe) and that you thereby committed an offence punishable under Section 437 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge".

* * * * *

Sec. 438. Punishment for mischief described in Section 437, committed by fire or explosive substance.—Whoever commits, or attempts to commit by fire or any substance, such mischief as is described in the last preceding section, shall be punished with *imprisonment for life* or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Amendment 2768
2. Procedure 2769
3. Charge 2769

1. Amendment.—The words in italics were substituted for the words "transportation for life" by Act 26 of 1955, Section 117, and Sch. (with effect from 1.1.1956).

Examples.—"If *A*, having insured his ship, voluntarily causes or attempts to cause it to be set on fire and destroyed with the intention of causing damage to the insurer, he has committed an offence punishable under this section, although the vessel may be his own property".—*Morgan and Macpherson*, 399.

2. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

3. Charge.—*See* charge under Section 437, *ante.*

* * * * *

Sec. 439. Punishment for intentionally running vessel a ground or shore with intent to commit theft, *etc.*—Whoever intentionally runs any vessel a ground or shore, intending to commit theft of any property contained therein or to dishonestly misappropriate any such property, or that intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Scope 2769
2. Procedure....................2769
3. Charge 2769

1. Scope.—"The sense in which the word `Vessel' is here used is explained by Section 48. In the great navigable rivers of Bengal and probably elsewhere, the crews of river craft acting in league with persons on shore, sometimes run their vessels aground or shore, and thus enable their confederates to plunder the cargo".—*Morgan and Macpherson*, 329.

The bail application of petitioner was rejected on two occasions by Sessions Judge and once by High Court. Hence, this is fourth application. The cause of death is very clear from statement of deceased which is rendered admissible as dying declaration. Even with the report of Chemical Examiner there was *prima facie* case. Hence accused is not entitled to bail. *Suresh Kumar* v. *State of Haryana*, (1994) 2 Recent Cr R 663 (P&H).

2. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

3. Charge.—The charge should run thus :

"I, *(name and designation of the Court of Sessions Judge, etc.)*, hereby charge you *(name of the accused)* as follows :—

That on or about..........(date)...........(time)...............(place) intentionally ran a vessel, namely.......aground (or ashore) intending to commit theft of the property contained therein (or to dishonestly misappropriate the property contained therein or with intent that such theft or misappropriation of property contained therein may be committed) and thereby committed an offence punishable under Section 439, Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 440. Mischief committed after preparation made for causing death or hurt.—Whoever commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death, or of hurt or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Synopsis

1. Procedure........2770
2. Charge........2770
3. Criminal Trespass........2770

1. Procedure.—Cognizable—Warrant—Bailable—Not Compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class.

2. Charge.—The charge should run thus :

"I, *(name and designation of the Magistrate, etc.)*, hereby charge you *(name of the accused)* as follows :—

That you on or about....(date).....(time)....(place).....committed mischief having made preparation for causing death of (or hurt or wrongful restraint or fear of death or of hurt of wrongful restraint to) Sri...... (give the name of the victim) and thereby committed an offence punishable under Section 440, Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

3. Criminal Trespass.—The sections which follow Section 441, in Chapter XVII are designed to protect possession as distinguished from title in the sense that the question in whom title to the land or property vests is foreign to the offence. The mere fact that the accused put forward a *bona fide* claim to the property would not save him from the consequences to the entry into the house in possession of the complainant if his intention was to take the property out of the complainant's possession without her consent and to cause wrongful gain to himself and wrongful loss to her. AIR 1950 All 653. But in AIR 1950 Pat 564, the Court observed : "It cannot be disputed that a person who enters upon land in the possession of another in the exercise of a *bona fide* claim of right cannot be convicted of criminal trespass because the entry was not made with any such intent as to continue an offence. But mere assertion of claim of right cannot in itself be a sufficient answer to a charge of criminal trespass. It is the duty of Criminal Court to determine upon the material of each case what was the intention of the alleged offender and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender". The offence under this section is, as compared to the offence under Section 440, no minor. 1961 RLW 191.

* * * * *

OF CRIMINAL TRESPASS

Sec. 441. Criminal trespass.—Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,

is said to commit "criminal trespass".

STATE AMENDMENT

Orissa.—For section 441, the following section shall be substituted namely:—

"441. *Criminal Trespass*.—Whoever enters into or upon property in possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person or with intent to commit an offence,

Synopsis

1. U.P. Amendment Act 2771
2. Of Criminal Trespass 2772
3. Division of the chapter 2772
4. Distinguishing nature of the crime 2773
5. Scope 2773
6. Applicability of the sections as amended in U.P 2775
7. Jurisdiction of criminal court 2776
8. Property 2776
9. Entry into or upon property 2776
10. Intention 2777
11. Intimidate 2779
12. Offence 2779
13. With intent to annoy 2779
14. Knowledge 2780
15. Remains there, *etc*. 2780
16. Possession 2780
17. Cases 2781
18. Any person in possession 2781
19. *Bona fide* 2781
20. Who can complain 2782

1. U.P. Amendment Act.—Section 441 was amended under the Criminal Laws

(U.P. Amendment) Act 1961, (U.P. Act 31 of 1961, Section 2 dated 13.11.1961) as hereunder :—

> "*Section 441. Criminal Trespass.*—Whoever enters into or upon property in possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence or having entered into or upon such property, whether before or after the coming into force of the Criminal Laws (U.P. Amendment) Act, 1961, with the intention of taking unauthorized possession or making unauthorized use of such property fails to withdraw from such property, or its possession or use when called upon to do so by that another person by notice in writing, duly served upon him, by the date specified in the notice is said to commit criminal trespass".

House trespass is an offence against possession and occupation. (1988) 15 Reports 296 (Mad).

2. Of Criminal Trespass.—"The substantive offences which the Code makes punishable under this head of the Chapter of offences against property, considered by themselves, are such as might be visited with a light punishment ; but when they are attended with aggravating circumstances and above all when they are viewed in relation to some other offence, as murder, theft *etc*, the commission of which is the main object of the offender, they become grave offences. The criminal trespass, in whatever form and whether aggravated or not, if it is preparatory to the commission of an offence, against person or property, deserves severe punishment. 'Criminal trespass' the offence which is first defined and punished, enters into almost all the subsequent offences which are contained under this division. Those penal provisions in fact punish this offence with various degrees of punishment when it is attended with certain aggravating circumstances. The trespass may be aggravated by the way in which it is committed or by the end for which it is committed."—*Morgan and Macpherson*, 400.

The act of sealing the premises involved the power to control and intent to control. The moment the premises were sealed by the officers of DMC, in exercise of their lawful duty, they assumed possession and actual control of the premises. Sub-section (3) of Section 345-A of DMC Act clearly provided that no person is entitled to remove seals except by an order of the Commissioner or by the Appellate Tribunal or by the Administrator. Admittedly, no such order was passed by any of these authorities. That being so, the offence of criminal tresspass as defined under Section 441 punishment under Section 448 is made out. Ratio of the judgment relied upon by the learned counsel for the petitioner, are not applicable to the facts of this case. *Kishore Jain v. The State*, 2002 Cri LJ 1154 (Del.) : 2002(3) all Cri LR 229 : 2001(4) Cur Cri R 409 : 2001(4) Cur Cri R 409.

3. Division of the chapter.—The division begins by defining the offences of (1) criminal trespass, (2) house-trespass, (3) lurking house-trespass, (4) lurking house trespass by night, (5) house-breaking, (6) house-breaking by night. The definition of the lower of these offences includes all cases which are within the definitions of the higher offences. The four last named offences are house-trespasses, with different circumstances of aggravation ; and house-trespass is by its definition a species of criminal trespass. When any of these offences, for instance house trespass, is committed in order to the committing of another offence, theft for example, this purpose is treated, as will be seen, not as a distinct offence, but as an aggravation of the trespass. *Ibid*, 401.

4. Distinguishing nature of the crime.—But the offence itself is to be distinguished from those previously noticed, inasmuch as it does not necessarily imply dishonesty fraud or deceit. The criminal trespasser whose object is "to intimidate, insult or annoy", for instance, has not necessarily any design against the property of the sufferer ; perhaps his object is only a frolic. *Ibid*. 400. The difference between a civil and criminal trespass is that in latter one, the criminal intention mentioned in Section 411, should be present. 1952 Cr. LJ 542 : AIR 1952 HP & B 27.

5. Scope.—Section 441, IPC, would show that it is only when a person unlawfully remains in a property of another person "with intent thereby to intimidate, or annoy any such person, or with intent to commit an offence" that an offence of criminal trespass is committed. While there may be evidence in the instant case that the accused/opposite party has unlawfully remained in the property belonging to the petitioner or that of the Mosque Committee to whom the petitioner is said to have donated the property, there is no evidence whatsoever that the accused/opposite party remained there with intent to intimidate, insult or annoy the petitioner or the Mosque Committee or with intent to commit an offence. In the absence of any evidence of any criminal intent on the party of the opposite party/accused, no offence of criminal trespass can be held to have been made out against the opposite party, and in the absence of evidence of criminal trespass no offence of house trespass can be held to have been established against the accused/opposite party as the very language of Section 442, IPC would show that house-trespass is criminal trespass in respect of a building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property. *Shabuddin* v. *Manowar Hussain*, 1999 Cri LJ. 349.

The accused had assaulted the deceased and had caused annoyance to him even after they were asked to go out of the house. Thus, the accused were remaining in the property unlawfully to the annoyance of the deceased and with the intention of committing criminal intimidation and insult and they had even assaulted the deceased within the meaning of Sec. 351 I.P.C. Merely because there is no medical evidence to show that the deceased had external injuries on his person it does not follow that the offence punishable under Sec. 451 has not been committed. A close reading of Sec. 451, I.P.C. does not indicate that a person who commits house trespass can be convicted under the section only if he is found guilty of committing any offence punishable with imprisonment. If criminal trespass into a dwelling house is committed with the intention of committing any offence punishable with imprisonment then the offence punishable under Sec. 451, I.P.C. is complete even if the offender does not succeed in committing the offences which he intended to commit. The last part of Section 451, I.P.C. clearly indicates that if the intended offence is theft then it is considered to be a still more aggravated form of house trespass. If a person commits criminal trespass into a dwelling house with the intention of committing an offence punishable with imprisonment and if he succeeds in accomplishing his intention by committing those offences, then he will not only be committing an offence punishable under Sec. 451, I.P.C. but also the other offence which he has committed. Hence, Sec. 451, I.P.C will be attracted even if the trespasser does not accomplish the committing of the other offences punishable with imprisonment which he intended to commit. I need not consider the correctness or otherwise of the decision reported in *Appukuttan vs Prakasan*, 2006 (4) KLT SN 27 since the evidence already discussed above shows that the accused persons remained in the house even after they were asked to get out and this conduct of the accused had evidently caused insult or annoyance to the deceased who was also intimidated and assaulted. Hence, I do not find any error in the conviction recorded by the Court below for the offence punishable under Sec. 451, I.P.C.

The result of the foregoing discussion is that the conviction entered under Section 323, I.P.C is unsustainable and is accordingly set aside. The appellants are found not guilty of the offence punishable under Sec. 323, I.P.C. and are acquitted of the same. The conviction recorded by the Court below under Sec. 451, I.P.C. is however, confirmed. *Appukuttan and Ors. vs. State of Kerala*, 2010 (3) Cri LJ 3186 (Kerala).

In this definition, the entry and the intention with which a person enters are essential. The latter part of the definition makes unlawful continuance on property equivalent to an unlawful entry, the intention being criminal. *Ibid*, 401. Unlike several sections of the Code where *mens rea* consists in intention or knowledge this section requires that the accused should either unlawfully enter upon property of another or having lawfully entered thereon continue to remain unlawfully with intent thereby to intimidate ; insult, or annoy the person in possession of such property or with intent to commit the offence. 100 Ind Cas 829 : 28 Cr LJ 349 : AIR 1927 Sind 159 ; 27 All 298 ; 18 Cr LJ 402 ; 48 Cr LJ 522 ; 48 Cr LJ 785 ; AIR 1948 Cal 291 : 49 Cr LJ 528 ; AIR 1949 Cal 107 : 53 CWN 402 : 50 Cr LJ 946 : AIR 1949 Cal 558. Where a person under order of his employer enters upon a land of another without doing anything, intents mentioned in Section 441, IPC, cannot be attributed to him and his action cannot amount to criminal trespass. 169 Ind Cas 415 : 10 RR 1 : 38 Cr LJ 776 : AIR 1937 Rang 201. To commit the offence of house-trespass as to commit any other offence, there must be *mens rea* in respect of such remaining. 1936 Cr C 718 : AIR 1936 Nag 176 ; *see* also 161 Ind Cas 705 : 16 Pat LJ 913 : 1936 Cr C 244 : AIR 1936 Pat 170. Court should not accept as complaints of criminal trespass what are at most civil trespass arising out of disputes regarding the right to possession of agricultural land. 161 Ind Cas 993 : 37 Cr LJ 527 : 1936 Cr C 183 : AIR 1936 Rang 116. A trespasser cannot acquire possession by the very act of trespass. A true owner can re-enter but he must not use more force than is necessary. AIR 1928 Pat 124. Unlawfully entering on the property and continuing to remain there is a continuing wrong. AIR 1928 Pat 124. This section does not require the land to be in the actual possession of the complainant. AIR 1928 Bom 221. To constitute an offence under this section, there must be an actual personal entry by the person accused. 3 LBR 278 : 5 Cr LJ 415. Unlawful entry followed by unlawful continuance is offence. AIR 1933 All 816 : 1933 ALJ 1418 : 1933 Cr C 1415. No fresh offence is committed by mere continuing trespass. 139 Ind Cas 609 : 1932 Cr C 500 : 33 Cr LJ 861 : 28 NLR 57 : AIR 1932 Nag 112 ; but *see* AIR 1928 Pat 124 : 6 Pat 794. Wrongful cutting of trees standing on plaintiffs land by defendant amounts to criminal trespass. AIR 1942 Cal 544 : 46 CWN 943. Where the District Magistrate rescinds an order passed under Section 144, Cr. Pro. Code, it is not a license to commit trespass or not. AIR 1939 Pat 314 : 40 Cr LJ 337. Where the order of Civil

Court has determined the rights between the parties, it is not open to the Criminal Court to adjudicate upon them. AIR 1936 Cal 124 : 37 Cr LJ 495. The offence of criminal trespass is complete as soon as there is an lawful entry. It is continuing offence only where the entry is lawful and subsequent possession becomes unlawful. Where the original entry is unlawful, the possession must be presumed to have commenced with the unlawful entry. There is no fresh act of trespass on a subsequent date. AIR 1940 Nag 117 : 41 Cr LJ 315. Second part of this section comes into operation when the entry is lawful, but subsequently the trespasser insists on remaining in possession with intent thereby to intimidate, insult or annoy the person in possession of the property. AIR 1945 All 26 : 46 Cr LJ 211 : ILR 1944 All 754 : 217 IC 170. But no offence under this section is committed when the owner of the land enters upon his land and remains there, where another having no title in the land asks him to vacate. AIR 1945 Pat 492. The offence of criminal trespass is complete as soon as there is unlawful entry and the trespasser cannot be prosecuted again for remaining there after his conviction under Section 441. AIR 1951 Mad 55 ; AIR 1963 Raj 19 : 1962 Raj LW 636 (possession used in most extensive sense). There should be entry into or upon property in possession of another. 1970 AWR 848 (such entry if lawful, then the person should remain unlawfully upon such property) ; Section 442, is an aggravated offence under this section. 1970 Cr LJ 1199 ; 1971 Cr LJ 507 : AIR 1971 Trip 24 ; 1969 All WR (HC) ; AIR 1963 Mani 15 : 1963 (1) Cr LJ 775 ; 1972 Cr LJ 1499 (in the absence of the owner in possession of the property, no offence is committed it is a civil trespass). But if he comes back and asks the trespasser to get out and the accused does not go but threatens the owner with injury, it is a criminal trespass) ; AIR 1983 SC 159 : 1983 Cr LJ 173 (for the ingredients of the offence) ; 1957 Raj LW 50. To constitute an offence under this section, there must be actual personal entry by the accused. Constructive entry upon property by a servant is not entry within the meaning of the section. AIR 1960 Cal 189 ; (1962) 1 Cr LJ 31 ; (1969) 2 SCJ 814 : AIR 1970 SC 20.

The intent to annoy or intimidate must not be with respect to any and every person connected with the property but with respect to any person in actual possession of such property. A person in constructive possession is not contemplated by Section 441. AIR 1960 Cal 189 : 1960 Cr LJ 342 ; AIR 1960 Mani 17 : 1960 CrLJ 631 ; AIR 1956 Cal 118 : 97 Cr LJ 32 : 1956 Cr LJ 524. *See* notes under the heading of "possession". *supra.*

A reading of Section 441 makes it clear that either entry into or continuance to stay in a property in the possession of another would constitute an offence under that section if the same is with an intention to commit an offence or intimidate, insult or annoy any such person in possession of such property. (1988) 15 Reports 296 (Mad).

Where civil proceedings pending regarding validity of adoption prosecution would cause harassment and it would amount to abuse of process of court. 1987 CrLR 84 (MP).

6. Applicability of the section as amended in U.P.—1964 ALJ 166; 1980 ALJ 939 : 1976 Cr LJ 290 : 1977 ALJ 329 : (1977) 14 All Cr C 175 : (1937) 14 All Cr C 137 : 1976 Cr LJ 362 : 1976 Cr LJ 1222 : 1976 Cr LJ 245 : 1977 Cr LJ 903 : 1976 Cr LJ 362 : 1976 Cr LJ 290. Continuance of possession must be with the intent of taking unauthorised possession or making unauthorised user of such property. 1960 ALJ 166. It was held in 1976 Cr LJ 1222 : 1976 All Cr C 80 that if actual physical possession of the property is made on essential ingredient for criminal trespass within the meaning of the amended portion the amendment would be almost superflous.

7. Jurisdiction of criminal Court.—The primary duty of a Court in a criminal trial is to determine whether the offence complained of is made out by the evidence produced before it. The question of civil rights is only ancillary or incidental. The criminal Court may not be competent to adjudicate on the civil rights of title to the property, but to say that the pendency of a civil, suit will automatically oust the jurisdiction of the Criminal Court is too broad a proposition of law to meet with approval. 1963 MLJ (Cr) 526 : 1964 MLJ (Cr) 97 : 1964 Mad LJ (Cr) 97 : 1963 Ker LT 210 (Criminal Courts to attach due weight to render of delivery by civil Court).

8. Property.—The word "property" in Section 441, is sufficiently wide to cover any kind of property, either movable or immovable ; it includes a ferry boat. 35 Cr LJ 948 : AIR 1934 Cal 480 : 38 CWN 665 : 1934 Cr C 688. Where movable property is attached in execution of a decree and property is removed by judgment-debtor by unlawful means resulting in a loss to court, the judgment-debtor is guilty under this section. AIR 1961 SC 803.

9. Entry into or upon property.—"Property" here, must from the nature of the provision, mean corporeal property, either land or a building, tent or vessel ; and possession would seem to mean actual occupation as contra distinguished from a constructive possession or still more a vacant possession. It would seem, a person entitled to a right of way or other incorporeal right is not a person in possession of property within this definition and that there can be no criminal trespass 'into or upon' such property"—*Morgan and Macpherson,* 401. In order to sustain a conviction for criminal trespass, it must be shown that the property was in possession of some person, other than the alleged trespasser. 28 PR 1878 Cr. The complainant in a prosecution for criminal trespass must be in physical as opposed to juridical or constructive possession. 10 Bur LT 77 ; 17 Cr LJ 378 ; 67 Ind Cas 618 ; 74 Ind Cas 856 ; 74 Ind Cas 534 ; 16 ALJ 501 ; 12 ALJ 151. Constructive entry upon property by a servant is not an entry within the meaning of this section. To constitute an offence under this section, there must be an actual personal entry by the person accused. 5 LBR 278 : 5 Cr LJ 415. Person not personally entering, but setting people to built, on another's land commits criminal trespass. 39 All 722 : 19 Cr LJ 46 : 15 ALJ 793 : 42 Ind Cas 1006. Mere assertion by a person of his right to be in possession is not offence. 19 Cr LJ 629 : 45 Ind Cas 677. Entering the cattle pound with intent to commit an offence under Section 24. Cattle Trespass Act, amounts to criminal trespass. AIR 1927 Lah 495 : 8 Lah 331 : 28 Cr LJ 615 : 103 Ind Cas 201. An entry by a tenant to whom the landlord had merely given the right of possession but had not ordered him to take it on his own behalf cannot be constructive entry by the master. 1937 Rang LR 246 : 169 Ind Cas 293 : 9 RR 393 : 38 Cr LJ 764 : AIR 1937 Rang 117.

The plain meaning of the words of Section 441, rules out the application of the second part to cases when the entry was unlawful. Neither a case of unlawful entry *without* the necessary intent followed by unlawful remaining with one of the intents prescribed, nor a case of unlawful entry with the necessary intent followed by unlawful remaining also with the necessary intent, is covered by the plain words of the section plainly interpreted. AIR 1951 Cal 297 : 1970 AWR 848 (*Ibid).* In order to establish that the entry into the property was with the intention to annoy intimidate or insult it is not sufficient to show that it was the natural consequence of the entry. (1966) 2 MLJ 99 : 1983 Cr LJ 173 ; AIR 1960 Cal 189 ; AIR 1964 Bom 82 (continuance with the intention of annoying insulting the teacher) ; AIR 1965 J & K 90. *See* also AIR 1964 SC 986 (for the proof, the presence of knowledge that the natural consequence of the entry would be such annoyance, intimidation or insult and including also the probability of something else than the causing of such intimidation insult or annoyance, being the dominant intention which prompted the entry).

10. Intention.—The word "intention" constitutes the entry criminal. Merely to trespass is not ordinarily such an offence ; but when the trespass is in order to the commission of an offence (*see* Section 40), or when it is to intimidate, to insult, or to annoy, it is punished.—*Morgan and Macpherson*, 401. 145 Ind Cas 625 : 10 OWN 166 : AIR 1933 Oudh 179 : 34 Cr LJ 1014 : 1933 Cr C 390 ; 1933 ALJ 1418 : 1933 Cr C 1415 : AIR 1933 All 816 ; 87 Ind Cas 106 : 26 Cr LJ 954 ; AIR 1940 Pat 14 : 40 Cr LJ 833 ; 1946 A Cr C 142. Intention may be proved by circumstances. 1934 ALJ 1061 : AIR 1934 All 1025 ; 100 Ind Cas 829 : 28 Cr LJ 349 ; AIR 1959 Pat 329 : 1957 BLJR 546 : ILR 36 Pat 786 ; AIR 1959 Ker 146 : ILR 1958 Kerala 1249 : 1959 Cr LJ 588. Intention is the main deciding factor to constitute criminal trespass. AIR 1931 Cal 264 : 1931 Cr C 296 ; 139 Ind Cas 500 ; *see* also AIR 1933 All 816 : 1933 ALJ 1418 : 1933 Cr C 1415. "With intent" does not mean "with knowledge". AIR 1933 All 816 ; 1933 Cr C 1415 : 1933 ALJ 1418. Knowledge that the act likely to intimidate or annoy, *etc.* is not sufficient nor is the rule that a person is to be presumed to intend the natural consequence of his action is applicable. AIR 1934 Pat 158 : 15 PLT 392 : 35 Cr LJ 142 : 13 Pat 268 ; AIR 1957 Cal 385 : 61 CWN 404 : 1957 Cr LJ 719 (distinction between knowledge and intention). Mere knowledge on the part of the accused that the result of their act is likely to cause annoyance or insult or intimidation to the complainant is wholly insufficient to sustain a charge under Section 447. AIR 1957 Cal 385 : 61 CWN 404 : 1957 Cr LJ 719. In order to establish a charge of criminal trespass under Section 441, IPC, it is essential for the prosecution to prove the intention laid down in the section i.e., intent to annoy *etc.* Intention must always be gathered from the circumstances of the case. 37 Bom LR 880 : AIR 1944 Mad 473 : 1944 MWN 436 : 1939 AWR 58. An unlawful entry upon property does not amount to criminal trespass unless one of the intents mentioned in this section is made out by the prosecution or found by the Magistrate. 54 Ind Cas 620 : Rat Un Cr C 390 : 28 PR 1905 Cr ; 14 PR 1901 : 38 Ind Cas 962 : 25 Cr LJ 751 ; 65 Ind Cas 446 ; 74 Ind Cas 534 ; AIR 1923 Pat 56 : 69 Ind Cas 379. Where the intention of the accused in convening a public meeting in a municipal park is to pass a resolution of condolence, his action does not amount to the offence of criminal trespass, as there is no criminal intent or *mens rea*. 166 Ind Cas 291 : 38 Cr LJ 188 : 1937 OWN 32 : AIR 1937 Oudh 272 *see* also 166 Ind Cas 291 : 38 Cr LJ 117 : 1937 A Cr C 8 : 1937 OWN 34 : AIR 1937 Oudh 207. An alternative finding that a trespass was committed with one or other of two intents either of which would make it criminal trespass as defined in Section 441, IPC, is sufficient for a conviction under Section 367, Cr. Pro. Code. 5 PR 1886 Cr. Entry as a practical joke is an offence under this section. 18 PR 1888. The placing of hay stacks and manure on another's land may be a civil trespass. It may cause annoyance in fact, but the act cannot be treated as criminal trespass, unless it is found that it was intended by the accused to be annoyance. 16 CWN 1007 : 13 Cr LJ 783 : 17 Ind Cas 415. This section defining criminal trespass, is so worded as to show that the act must be done with intent and does not as other sections do, embrace the case of an act done with the knowledge of the likelihood of a given consequence. 19 M 240 : 1 Weir 537 : 33 MLJ 729. Building on another man's land is an offence under this section. 39 All 722. For a legal conviction under Section 441 of the Penal Code, there must be an intention to intimidate, insult or annoy a person in actual possession. 8 Bom LR 62 : 4 LBR 276 ; 4 LBR 242 ; 2 LBR 319 ; 12 PR 1906 Cr (FB) ; 17 WR Cr 47 : 9 WR Cr 1 ; 14 WR Cr 25 ; 15 Cal 390 N ; Rat Un Cr C 10 ; 1 LBR 95 ; 2 M 30 ; 6 Cal 529 ; 9 Bom LR App 19 ; 7 WR Cr 21 : 1 Weir 512 ; 5 MHC App 17. A person's entry upon another's property for killing deer is an offence under this section. 4 Cal 837 ; *see* also 16 Cal 715. A secret entry into Exhibition building without ticket does not constitute an offence under this section. 6 BH Cr C 6. Plying boat for hire, three miles from a public ferry does not constitute an offence under this section. 1 All 527. Encroachment of public road or entry into the compound of a house, *etc*, with the intention mentioned in this section, constitute an offence under this section. Rat Un Cr C 122 ; Rat Un Cr C 393 ; 22 Cal 123. Intention is the deciding factor to constitute offence of trespass. AIR 1930 Cal 264. It must depend on the facts of each case as to whether an intent to annoy the person in possession of the property entered upon, can, in the circumstances be reasonably inferred. AIR 1938 Lah 534 : 39 Cr LJ 756 ; AIR 1938 Lah 214 : 39 Cr LJ 713 ; AIR 1937 Pesh 92 : 171 IC 341 ; AIR 1950 All 157 ; AIR 1950 Pat 295. Co-owners cannot be held to have committed trespass, unless they have ousted the other co-owners from possession, or have committed some destruction or waste of common property, as by putting down a common wall, or by carrying away a portion of the common property, as by digging and carrying away turf *etc.* 3 M 178 : 1 Weir 289 ; *see* also 4 M 243 ; 6 Bom LR App 89 : 15 WR Cr 6. Member of joint family does not commit criminal trespass by entry on joint property unless such property or part ordinarily is exclusively occupied by another member of the family. AIR 1933 Sind 395 : 1933 Cr C 1436. Where the accused enclosed and commenced to cultivate a portion of a burial ground, *held*, that the accused was guilty of an offence under this section. 6 MHC App 25. Entry into the sleeping apartment of women constitutes an offence under this section. 15 Cal 657 ; 22 Cal 994. A person entering another's house after having taken all precautions to avoid discovery cannot be said to have entered with intent to cause annoyance to the person in possession. 27 PLR 385 : 96 Ind Cas 871 : 27 Cr LJ 1015. Intention cannot b inferred from the actual or probable results. It is necessary to show the actual intention to insult or annoy before the acts were complete, to constitute the offence under Section 441. 116 Ind Cas 783 : AIR 1929 Pat 111. A mere knowledge that the trespass is likel to cause insult of annoyance to the owner of the property does not amount to an inten to insult or annoy within the meaning of this section but where the trespasser know that his trespass is practically certain in the natural course of events to cause insult o annoyance to the owner of the property, it is open to the Court to infer an intent t insult or annoy. It is a question of fact whether this presumption of intent is displace by proof of any independent object of the trespass. 33 MLJ 729 (FB) ; 82 Ind Cas 149 47 All 855 : 26 Cr LJ 1273 ; AIR 1925 Nag 36 ; 12 PR 1909 ; 13 PR 1905 Cr. Th essence of an offence under this section is the intent in committing the trespass an merely to trespass is not ordinarily an offence. It must be proved that some crimina intent was present in the mind of the accused and it does not at all follow that becaus an act is unlawful and is one that the civil law will restrain or for which it wi compensate the injured party in damages, it is necessarily criminal. 81 Ind Cas 351 75 Ind Cas 292 ; *see* also 41 M 156 ; 47 Ind Cas 77 ; 13 CLR 212 ; 82 PR 1906 Cr ; 1 PR 1908 Cr.

Section 441, makes the trespass criminal if the entry was with the intent to commit an offence and for that it is not necessary that the offence must be against the person in possession. AIR 1959 Trip 49 : 1959 Cr LJ 1487.

11. Intimidate.—The word "intimidate" in this section must be understood in its ordinary sense to override, to put in fear, by a show of force or threats or violence and it may include use of actual force being accompanied by threat. 13 Pat 268 : 151 Ind Cas 894 : 25 CLJ 142 : 15 Pat LT 392 : AIR 1934 Pat 158 : 1934 Cr C 355 ; (1957) 23 Cut LT 157.

12. Offence.—An unlawful act is not necessarily an offence. 26 All 193 : AWN 1903, 230. Where the accused trespassed upon the land intending to prevent the respondent by force from harvesting the crops which had been grown by the accused, it does not amount to an offence of criminal trespass or criminal force. 16 CLJ 271 ; AWN 1882, 228. Where the object of a trespass is to commit an offence, such offence must be possible on the part of the person to be convicted of the trespass. 47 Ind Cas 77 : 19 Cr LJ 881. Where a person one night passes stealthily through the courtyard of one house with the intent of committing adultery in another adjoining house, such person is not guilty of trespass in respect of the former house under the second alternative of Section 441. ILR 1938 Lah 462 : 176 Ind Cas 410 : 39 Cr LJ 734 : 40 PLR 413 : AIR 1938 Lah 514 (FB). Mere squatting on *verandah* of a building by accused who claimed an easementary right of passage will not constitute an offence under Section 447. To constitute the offence, the accused must display a readiness to use force of criminal intimidation and then scare away the victim of the offence. AIR 1960 Ker 348 : 1960 MLJ (Cr) 380 : 1960 Kar LT 556 : ILR 1960 Ker 1097 : 1960 Cr LJ 1464.

No offence is made out when complainant was not present at the time of occurrence. *Gopinath Nayak* v. *Lepa Majhi*, 1996 Cri LJ 3814 (Ori).

13. With intent to annoy.—A person entering another's house after having taken all precautions to avoid discovery cannot be said to have entered with intent to cause annoyance to the persons in possession. 27 PLR 385. *Ibid.* The word "annoy" in this section must be taken to mean "annoyance" that would generally and reasonably affect an ordinary person. 2 All 465. Mere knowledge of the possibility of annoyance resulting from an act of trespass is not sufficient. 26 Bom 559 ; 24 WR Cr 58. The annoyance must be in respect of the person in actual possession. 17 Cr LJ 378 ; 47 All 855. Where insult or annoyance was the inevitable consequence of the trespass committed by an accused, then he, must be presumed to have intend to insult or annoy, but when the insult or annoyance was only a remote consequence of the trespass and the accused had done everything in his power to avoid his presence being known to the person in possession, it could not be said that he had an intention to insult or annoy the person in possession. 171 Ind Cas 346 : AIR 1937 Pesh 92. The annoyance which is spoken of in Section 441, IPC, is not one intended to be instantaneous, that at the moment of entry, it may happen subsequently. 1953 All LJ 514 : 1954 Cr LJ 77 : AIR 1954 All 67. When the accused visited the complainant's house at night in response to an invitation from the latter's daughter and in view of the strained relations between the complainant and the accused, the latter had not the slightest intention of annoying the former and was keenly desirous of not having his visit discovered by him. *Held*, that the charge under Section 456 could not be sustained. 1953 Nag LJ 475 : 1954 Cr LJ 9 : AIR 1954 Nag 18 ; *see also* AIR 1954 All 87 : 1953 Cr LJ 1882. The annoyance which is spoken in

Section 441, is not intended to be spontaneous, that is, at the moment of entry. AIR 1954 All 67 : 1954 Cr LJ 77.

In a case where the accused having committed criminal trespass by entering the room of the complainant with the intention of having sexual intercourse with her but the prosecution has not proved beyond reasonable doubt that the sexual intercourse was without the consent or against the will of the complainant, the intention to annoy the complainant cannot be inferred. (1961) 2 Guj LR 256. Entry into tenant's house to demand rent is lawful but if accused remains on house after refusal to pay rent and throws out effects of tenant, the accused commits criminal trespass. Madh BLJ 1954 HCR 1467 ; *see* also Cut LT 408 : ILR (1958) 24 Cut 624 (removal of meter under Electricity Act, entry not unlawful).

The ultimate question for decision being whether an act was done with a particular intention, all the circumstances including the natural consequence of the action have to be taken into consideration. It is legitimate to think also that when Section 441 speaks of entering on property with intent to commit an offence or to intimidate, insult or annoy any person in possession of the property, it speaks of the main intention in the action and not any subsidiary intention that may also be present. In order to establish that the entry on the property was with the intent to annoy, intimidate or insult, it is necessary for the Court to be satisfied that causing such annoyance, intimidation or insult was the aim of the entry ; that it is not sufficient for the purpose to show merely that the natural consequence of the entry was likely to be annoyance, intimidation or insult and that this likely consequence was known to the person entering ; that in deciding whether the aim of the entry was the causing of such annoyance, intimidation or insult, the Court has to consider all the relevant circumstances including the presence of the knowledge of the natural consequence would be such annoyance, intimidation or insult and including also the probability of something else than the causing of such intimidation, insult or annoyance being the dominant intention which prompted the entry. AIR 1964 SC 986 : 1964 SCD 557 : 1964 (2) Cr LJ 57 ; (ILR) 1965 Cut 71.

14. Knowledge.—Knowledge that annoyance will be caused by the act is sufficient. 10 OWN 1078 : AIR 1913 Oudh 469 : 1934 Cr C 1993 ; *see* also 145 Ind Cas 626 : 1933 Cr C 1321 : 10 OWN 1075 : 34 Cr LJ 1055 : AIR 1933 Oudh 436 ; 41 M 156 : 43 Ind Cas 578 ; 43 Ind Cas 405. Mere knowledge that this act is likely to annoy or insult is not sufficient. AIR 1935 Sind 20 : 154 Ind Cas 552 : 36 Cr LJ 577 : 1935 Cr C 131.

15. Remains there, etc.—If a person enters into property in the possession of another or remains there with an intent other than to intimidate, insult or annoy him or to commit any offence but with the knowledge that his act is likely or certain to cause annoyance or insult to the person in possession, he is not guilty of criminal trespass. 33 MLJ 729 (FB) ; *see* also AIR 1932 Nag 114 (2) : AIR 1932 Nag 112 : 28 NLR 57 ; 139 Ind Cas 609 ; AIR 1950 Cal 410 ; AIR 1963 Raj 19 ; 1953 BLJR 700.

16. Possession.—Possession must be actual possession. 14 Cr LJ 633 : 21 Ind Cas 681 : 12 ALJ 151 : 10 Bur LT 77; AIR 1960 Cal 189 : 1960 Cr LJ 352 ; AIR 1956 Cal 118 : 97 Cr LJ 32 : 1956 Cr LJ 524 ; but *see* AIR 1931 Mad 560. Possession must be physical possession and not merely constructive. 1933 Cr C 1436 : AIR 1933 Sind 396 ; AIR 1960 Mani 17 : 1960 Cr LJ 631. In order to constitute possession dominion and consciousness of the person necessary. 145 Ind Cas 130 : 1933 Cr C 743 : 1933 ALJ 1338 : 34 Cr LJ 930 : AIR 1933 All 437 ; *see* also AIR 1928 Bom 221 : 30 Bom LR 631 : 29 Cr LJ 977 : 112 Ind Cas 97. Possession at the date trespass must be found as a fact. 18 Cr LJ 761 : 41 Ind Cas 1307. To constitute the offence of criminal trespass what is important to consider is possession of, and not title to law. There may be cases in which immediate possession and the ultimate title may be in different persons. The offence can only be committed against a person who is in actual possession of the land in question. 14 Mys LJ 81 ; *see* also ILR 1936 Nag 205 : 1936 Cr C 805 : AIR 1936 Nag 192. If a tenant who is in possession of law under colour of a title enters it for the purpose of cutting the crop which he himself has sown, his action does not amount to a criminal trespass, and therefore, no question of private defence arises in favour of a rival claimant to that law. 156 Ind Cas 961 : 36 Cr LJ 1052 : 1935 AWR 509 : 1935 A Cr C 109. An auction purchaser at a Court sale who gets delivery of possession through the Civil Court is lawfully in possession of the property as also the lawful owner thereof ; and such possession is not lost merely because trespasser come on the property and plough it. 18 NLJ 307.

The question whether the complainant was in possession of the premises in suit or not is a question of fact. Possession of a house delivered to the complainant execution of a decree is sufficient to show that it was he who was in peaceful possession of it and that possession he has by keeping the house locked is sufficient to attract the provisions of Sec. 441. AIR 1954 All 193 : 1953 All LJ 673 : 1954 Cr LJ 413 ; *see* also 1954 RajLW 110 : ILR (1935) 3 Raj 691 (Question relates to possession and not to title).

A Government officer who holds his office in a particular building allotted to him by the Government for the purpose is in possession of it be a member of the public who may have a right of access to it in connection with his official business. 1962 Raj LW 636 : AIR 1963 Raj 19 : 1963 (1) Cr LJ 223. For ingredients of criminal trespass. AIR 1962 HP 1 : 1962 (1) Cr LJ 31.

17. Cases.—In a charge under Section 454, conviction can be under Section 441. AIR 1935 Pat 129 ; (1961) 2 Guj LR 256.

18. Any person in possession.—The words "any person in possession" do not mean only a complainant in possession, there "being no authority for taking the offences of mischief and criminal trespass out of the general rule which allows any person to complain of a criminal act. 25 CWN 425 ; *see* also 49 Ind Cas 99 ; UBR (1899-1901) Vol I, 352. To constitute an offence of house trespass physical presence of the person in lawful possession of the house *is*. not necessary, at the time of the accused's entry into such house if the evidence justifies the presence of other ingredients of the offence. 1964 Mad LJ (Cr) 115 : 1964 (1) Cr LJ 52 : AIR 1964 Mys 11.

The use of words "such person" in the second limb of Section 441, clearly indicates that the intention to intimidate, insult or annoy must be with reference to the person in actual possession. (1988) 15 Reports 296 (Mad).

19. *Bona fide*.—Where the accused have acted *bona fide*, there is no question of criminal trespass. 1924 Mad 862 ; 20 Ind Cas 219 ; 15 Ind Cas 317 ; 12 ALJ 790 : 27 All 296 ; 13 CLR 212 ; AWN 1882, 236 ; AIR 1936 Bom 15 ; 1 LBR 358 ; 9 Cr LJ 566 : AIR 1925 Pat 167 : 81 Ind Cas 823 : 25 Cr LJ 1047 : 81 Ind Cas 888 : 25 Cr LJ 106 ; 19 Cr LJ 504 : 46 Ind Cas 160 ; 43 Cal 1143 : 35 Ind Cas 515 ; 169 Ind Cas 250 : 9 RR

391 : 38 Cr LJ 759 : AIR 1937 Rang 132 : AIR 1939 Rang 116 : 161 Ind Cas 993 : 37 Cr LJ 527 ; AIR 1936 All 146 : 1936 ALJ 203 : 27 Cr LJ 244 : 1936 A Cr C 36 : 160 Ind Cas 167 ; 1937 MWN 398, 883. But *see* AIR 1950 All 653. An entry upon land made under a *bona fide* claim of right however, ill, founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant. 4 OJD 222 : 28 Cut LT 375. In case of unauthorised occupation of the complainant's house by the applicants, the applicants not vacating the house in spite of notice does not commit the offence of house trespass. 1964 All LJ 166.

If the intention is found to be merely to make an entry peacefully no offence could be held to have been made out. The mere fact that after making an entry or during its course the accused committed an offence would not result in the conviction of the accused for criminal trespass when it was not so from the very beginning. AIR 1958 Raj 214 : ILR (1958) 8 Raj 904 : 1958 Cr LJ 1099 ; AIR 1954 Bhopal 6 : 1954 Cr LJ 394 (question as to who was in possession and whether the accused claimed a *bona fide* right on his own behalf).

But if that claims could reasonably and *bona fide* rest upon some right, even if that basis is not legally sound or is temporary, it could operate as a shield against criminal prosecution 1971 ALJ 4 : 1977 Cr LJ 303 *(bona fide* claim only arises when trespass is not an aggravated kind) ; 70 Bom LR 399 : AIR 1969 Bom 30 : 1974 Cr LJ 216 (law is well settled that if the claim is a mere pretence the accused is not entitled to claim a *bona fide* right). If A person enter upon another's law under a *bona fide* claim a right, there is no intention to intimidate, insult or annoy the other person than the former claim be unfounded, he cannot be convicted of criminal trespass. 1980 SC Cr R 304 : 1974 WLN (UC) 141 ; 1981 Cr LJ 68 ; 1972 Cr LJ 1093 ; 1971 Cr C 1401 ; (1980) 1 APLJ 74 (must not be a mere cloak to cover the real criminal intent. (1980) 1 APLJ 74 : 1974 Cr LJ 216 ; 1957 AC 83 ; 1977 Cr LJ 903 *(bona fide* claim is not established when it is a mere cloak).

20. Who can complain.—A proprietor may be in possession through his licence or tenant. Where trespass is committed with a claim to the land, the intention is to cause annoyance to the proprietor. AIR 1942 Oudh 104 : 43 Cr LJ 162 : *see* also AIR 1934 All 1025 : 36 Cr LJ 328 ; so, however, AIR 1957 Kut 76 : 52 Cr LJ 1477.

* * * * *

Sec. 442. House trespass.—Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship or as a place for the custody of property, is said to commit "house trespass".

Explanation.—The introduction of any part of criminal trespasser's body is entering sufficient to constitute house-trespass.

Synopsis

1. Building 2783
2. Vessel 2783
3. Entry 2784

4. Possession 2784
5. Custody of property....2784
6. Injury annoyance, *etc*....2784
7. *Bona fide* claim 2784

1. Building.—House-trespass is only an aggravated form of criminal trespass. AIR 1945 All 81 : ILR 1945 All 588. The ordinary and usual meaning of a building is a block of brick or stone work covered by a roof. *Ibid.* The shed was held not to be building. 1964 Raj LW 524. A *dalan or* entrance which was surrounded by a wall in which there are two door-ways, but without doors, which was used for custody of property, was held to be a building. 10 PR 1879 Cr. *A where* used for custody of property is a building within the meaning of this section. AIR 1925 Lah 117 : 6 Lah LJ 385 ; *see* also AIR 1926 Lah 28 : 6 Lah 463 : 27 Cr LJ 38 : 91 Ind Cas 70. A court-yard partly surrounded on the front by a mud wall with no roof over it nor any door or gate-way, is not a building or house within the purview of this section. 49 Ind Cas 364 : 4 LBR 24 ; AIR 1925 Lah 279 : 6 LLJ 578 : 26 Cr LJ 383 : 84 Ind Cas 863 ; but *see* 55 PR 1879 Cr ; AIR 1956 Punj 122 : ILR 1956 Punj 119 : 1956 Cr LJ 654 (where it was held that the courtyard of the house where the complainant lived, gathered his cattle, is a building within the meaning of the sections of 442 and 452. *Gharan* which was enclosed by brick walls and it had two exists both of which led into the *Zenani Kila i.e., a* part of the building. AIR 1961 Pat 409 : 1961 Pat LR 86 : 1961 (2) Cr LJ 540. Both thatched hut is such a building. 36 Ind Cas 584 ; *see* also 9 PR 1887 Cr. Entry into a cattle pen is not an offence under this section. 28 PC 1905 Cr. Entry in the enclosure is not house-trespass. AIR 1928 All 607 ; AIR 1929 Mad 135. A courtyard bounded by walls on all the sides without a door opening out any where, is not a building for the purposes of Section 442, IPC. 77 Ind Cas 809 : 9 Lah 623 : 25 Cr LJ 457. The expression "building" includes in structure whether covered or not and made of any materials whatever. 111 Ind Cas 459 : 29 Cr LJ 875 ; 131 Ind Cas 427 : 31 Cr LJ 268 : AIR 1930 Lah 414. The erection of an awning does not constitute a shop, building within the meaning of Section 442. IPC, when the shop in question had neither a wooden mud or one brick wall. 177 Ind Cas 616 : 39 Cr LJ 937 : 1938 OWN 960 : A1R 1938 Oudh 263. Intention to use as a dwelling is a question of fact and depends on the facts of each case. AIR 1929 Sind 17 : 22 SLR 466 : 29 Cr LJ 875 : 111 Ind Cas 459. A thatched hut built for residence. is a building used as a human dwelling within the meaning of Section 442. 17 Cr LJ 536 : 3 OLJ 493 : 36 Ind Cas 584. In an offence under Section 442 ; it is not within the province of the Magistrate to decide whether the complainant has title to the land in question or not ; he is only concerned with the question of possession of the complainant as far as the offence of criminal trespass is concerned. (1963) 1 Cr LJ 775 : AIR 1963 Mani 15 ; 1970 Cr LJ 1199. For meaning of the word "building" is a block of bricks or stones covered by a roof. If an open space is merely surrounded by wall. but not attached to any house for use as a part of that house, it cannot be called a part of following. AIR 1961 Pat 409 : 1961 Pat LR 86 : 1961 Cr LJ 540.

2. Vessel.—A ferry boat cannot be held to be a vessel in the absence of evidence that the boat was ever used as a human dwelling. 149 Ind Cas 431 : 35 Cr LJ 949 : 38 CWN 665 : 1934 Cr C 688 : AIR 1934 Cal 480 ; *see* also AIR 1934 Cal 480 : 1935 Cr C 688 : 38 CWN 665 : AIR 1934 Cal 560 : 35 Cr LJ 949 : 149 Ind Cas 431.

3. Entry.—The mere putting of a hand into a hole in the wall without putting it through the hole is not entry into the house within the meaning of Section 442, IPC 4 Lah 399 : AIR 1923 Lah 509. For a case to be covered by Section 442, the entry must be into the building or remaining in the building. 1951 ALJ 461.

4. Possession.—There cannot be any conviction under this section where the property is not in the possession of the complainant and where the accused had no intention of annoying him. 17 ALJ 334.

5. Custody of property.—5 NWP 307.

6. Injury, annoyance, etc.—An accused who had intention of causing annoyance to any one and took measure to avoid it cannot be convicted of an offence under this section even though a feeling of an annoyance be the inevitable consequence of being found out. 52 Ind Cas 274. In order to constitute an offence, there must be an intention to intimidate, insult or annoy any person in possession. 81 Ind Cas 716 ; 2 Bur LJ 17 ; AWN 1882, 224 ; 20 Cal 65. Intention as to use of a particular structure depends upon particular facts. AIR 1929 Sind 17.

7. Bona fide claim.—An entry into a house in assertion of a *bona fide* claim of right can not constitute criminal trespass which requires an intent to commit an offence or to intimidate, insult or annoy any person in possession. AIR 1925 Pat 167 ; *see* also 75 Ind Cas 353 (2) : 15 ALJ 808 ; 18 PR 1888 Cr ; 16 CWN 1007 ; Rat Un Cr C 390.

* * * * *

Sec. 443. Lurking house-trespass.—Whoever commits house-trespass having taken precautions to conceal such house trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit "lurking house-trespass".

Notes.—The fact that a trespass was committed by night does not make the offence one of lurking house-trespass unless offender takes some active means to conceal his presence. 1953 Raj LW 243.

* * * * *

Sec. 444. Lurking house-trespass by night.—Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night".

Notes.—Vide 4 WR Cr 19.

* * * * *

Sec. 445. House-breaking.—A person is said to commit "house-breaking" who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described ; or if, being in the house or any part of it for the purpose of committing an offence, or, having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say :—

First.—If he enters or quits through any passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly.—If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance ; or through any passage which he has obtained access by scaling or climbing over any wall or building.

Thirdly.—If he enters or quits through any passage which he or any abettor the house-trespass has opened, in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly.—If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly.—If he effects his entrance or departure by using criminal force or committing an assault, or by threating any person with assault.

Sixthly.—If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-tresspass.

Explanation.—Any out house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

Illustrations

(a) *A* commits house-trespass by making a hole through the wall of *Z's* house, and putting his hand through the aperture. This is house breaking.

(b) *A* commits house-trespass by creeping into a ship at a port hole between decks. This is house-breaking.

(c) *A* commits house-trespass by entering *Z's* house through a window. This is house-breaking.

(d) *A* commits house-trespass by entering *Z's* house through the door, having opened a door which was fastened. This is house-breaking.

(e) *A* commits house-trespass by entering *Z's* house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking.

(f) *A* finds the key of *Z's* house door which *Z* had lost, and commits house-trespass by entering *Z's* house having opened the door with that key. This is house-breaking.

(g) *Z* is standing in his doorway. *A* forces a passage by knocking *Z* down and commits house-trespass by entering the house. This is house-breaking.

(h) *Z*, the door-keeper of *Y*, is standing in *Y*'s doorway. *A* commits house-trespass by entering the house, having deterred *Z* from opposing him by threatening to beat him. This is house-breaking.

Synopsis

1. Notes 2786
2. Illustration (a) 2786

1. Notes.—This offence of outraging a woman's modesty not being punishable with whipping, house-breaking in order to commit that offence cannot be punished. 23 ALJ 894 : 89 Ind Cas 146 : 26 Cr LJ 1282. House-breaking cannot be committed without entrance into the house. 106 Ind Cas 422 ; 23 Cr LJ 340 : 29 Cr LJ 4 : 29 PLR 54. A door cannot be said to be fastened when its shutters were merely closed. 66 Ind Cas 422 ; 23 Cr LJ 728. Where the accused got admission into a house under the pretext that he was calling from the British Broadcasting Corporation to locate disturbances caused on the wireless and there stole a hand bed. *Held*, that the accused was guilty of constructive house-breaking. (1954) 2 All ER 721.

2. Illustration (a.).—*Vide* 4 Lah 309.

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Sec. 446. House-breaking by night.—Whoever commits house breaking after sunset and before sunrise, is said to commit "house breaking by night".

Notes.—Effecting an entrance into a house at night by scaling a wall constitutes house breaking by night. 2 WR Cr 65. When the door of a house "was found broken, an offence under this section was committed, 4 WR Cr 19.

* * * * *

Sec. 447. Punishment for criminal trespass.—Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees or with fine.

Synopsis

1. Possession 2787
2. Intention 2787
3. Cases 2788
4. Sentence 2792
5. Procedure 2792
6. Charge 2792
7. Quashing of proceedings 2792
8. Jurisdiction 2793
9. Right of Private defence against property 2793
10. Appeal against conviction 2794

1. Possession.—For a conviction under this section the finding on the point as to who was in possession of the land in dispute is necessary. 45 Ind Cas 677. *Lessee* of a District Board road for collection of tools is not in possession of the road. 55 Ind Cas 721. Where possession is permissive at its inception subsequent refusal to move does not amount to criminal trespass. 26 PLR 247. Where a person was restrained from doing a particular act on a particular land by an order under Section 144, Cr. Pro. Code, although that order may not be taken into consideration for establishing the possession of the complainant in a trial for an offence under Section 447, Penal Code, alleged to have been committed by that person, it is relevant for the purpose of testing *bona fide of* the person against whom the order was made. 173 Ind Cas 747 : 39 Cr LJ 361 : AIR 1938 Pat 131.

In order to establish that the entry on the property was with this intent to annoy, intimidate or insult, it is necessary for the court to be satisfied that causing such annoyance intimidation or insult was the aim of entry. (1969) 2 SCJ 664. When the offence under Section 427, IPC, is made out conviction under Section 447, IPC, cannot stand. 1969 Bih LR 472.

Where land in question was allotted to the complainant and the accused was found in possession earlier to that, no case of criminal trespass was held to have been made out. Mere occupation even if illegal cannot amount to criminal trespass as held by the Apex court in. *Smt. Kanwal Sood v. Nawal Kishore*, AIR 1983 SC 159 : 1983 Cri LJ 173.

When accused was charged and convicted under Section 447, IPC.—Confirmed by lower appellate court—Revision petition challenging of the same was filed.—The question of possession is relevant ingredient and ingredient is about intimidation result or annoyance of person in possession. There is no satisfactory evidence in case to hold the ingredients as required under Section 441, IPC, as proved. Accused is entitled to acquittal. *Manohardas* v. *State of M.P.*, 1994 Cr LR (MP) 146 (N).

2. Intention.—It is necessary that intimidation, insult, or annoyance should be the primary intent with which the entry is made. It is sufficient if the intent to commit one or other is involved in the action. The presumption is against a person entering on property in possession of another without that other's consent except in strict accordance with law. UBR (1892-1896) Vol 1, 264. The words of the Section 447, Penal Code, must be closely adhered to and there must in all cases be found an intent to cause intimidation insult or annoyance. A conviction cannot follow merely because one can pronounce with certainty that the accused must have known that his act would as one of its inevitable incidents cause annoyance. Each case must be dealt with on its own facts and on its merits. AIR 1935 Sind 203 : 159 Ind Cas 466 : 1935 Cr C 1122. There must be an express finding that the accused intended to cause annoyance for a conviction under Section 448. 101 Ind Cas 457 : 28 Cr LJ 425 : 8 AICR 50. Where a decree-holder tries to get possession of land by arbitrary means he commits criminal trespass. AIR 1928 Nag 79. Intention must be proved before recording a conviction under this section. AIR 1928 All 671 ; 10 Cr LJ 384 ; 2 All 101 ; 1 Weir 518 ; 128 PLR 1905. Where the intent to annoy or insult the *zamindar is* present the mere fact that the *zamindar is* not present would not indicate that there could have been no intent to annoy or insult. AIR 1944 Mad 473 : (1944) 2 MLJ 380.

Landlord entering the premises of the tenant with intent to ventilate grievance about non-payment of rent commits no criminal trespass. 65 Punj LJ 953. But *see* AIR 1964 Tripura 69, where accused entered the complainant's house for demanding their dues and on refusal to pay abused the complainant in filthy language and continues to do so in spite of the restraint show by the complaint. *Held*, that the intention to insult intimidate or annoy or provoke complainant to break peace could be presumed and the accused was held guilty under Sections 448 and 504 ; *see* also 1965 Raj LR 157 : ILR (1965) 15 Raj 522 : AIR 1965 Raj 191 (where though the complainant was absent when the accused entered complainant's house at midnight with intent to commit adultery with his wife and although the intention to insult intimidation or annoy was absent, the offence under Section 448, or 451, is committed) ; AIR 1958 Pat 329 ; AIR 1961 SC 803 ; AIR 1964 SC 986 ; AIR 1965 Pat 507 ; AIR 1968 Manipur 26 (dominant intention can only be inferred from the facts).

3. Cases.—The accused who had mounted upon the roof of the complainant's house armed with a stick and a *sandheva*, was convicted of an attempt at house breaking by night under Sections 457 and 511 of the Indian Penal Code. *Held*, that he may not be guilty of the offence charged as the mere presence on the roof of the house could not be construed into an attempt to commit an offence under Section 511, but that he was guilty of criminal trespass punishable under Section 447 of the Penal Code. 15 PR 1907 Cr : 44 PW 1907 Cr : 6 Cr LJ 444 : 56 PLR 1908. In criminal trespass, criminal may be used as a matter of fact, but the use of criminal force is not essential of the offence. 8 Ind Cas 219 : 11 Cr LJ 594. Entering into another's land in *bona fide* exercise of claim of right is not an offence. 5 SLR 135 : 13 Ind Cas 219 : 15 Cr LJ 27 ; 15 Ind Cas 317 : 13 Cr LJ 477 ; 12 ALJ 790 : 25 Ind Cas 336 : 15 Cr LJ 584 ; 16 CWN 1245 : 15 Cr LJ 725 ; 11 CWN 171 ; 7 CLJ 238 ; Rat Un Cr C 4 ; 1 Weir 514 ; 1 Weir 516 ; 1 Weir 515 ; 1 Weir 520 ; 2 NWP 82, ; 1 Weir 517 ; 19 Cr LJ 701 : 47 MLJ 437. Complainant entering upon the land of the accused to effect repairs to fence serving as boundary between lands of both parties without intent to annoy intimidate or insult accused, does not commit criminal trespass so as to entitle the accused to inflict injury to the accused. ILR 1964 Cut 706.

Voluntarily causing grievous hurt and criminal tresspass—The proved facts of the case in the instant case clearly disclose that the act committed by the accused falls within the category's defined under Section 320(7), IPC. Weapon used in the instant case is a dao but blunt side of the dao was used and not the edging side. Considering all these aspects of the matter, I hold that the prosecution has been able to prove the case against the accused Safian Ali and that the provisions of Section 325 of the IPC would be attracted. As regards the other accused person, the prosecution could not establish the case against them by clear, cogent and unimpeachable evidence so as to take a different view from what have been arrived at by the learned trial Judge and their acquittal stands confirmed.

In view of the above discussions, the accused Safian is convicted under Section 305. IPC. It is further proved that the accused Safian Ali trespassed into the house of the informant with intent to assault P.W. 2 and/or to annoy the informant and her family members and ultimately attacked P.W. 2 and caused grievous injury and as such the accused has also committed offence punishable under Section 447, Cr.P.C. *State of Assam vs. Md. Azad Ali & Ors.*, 2010 (2) CriLJ 1584 (Gau).

In a Supreme Court case, disputed land belonged to the accused but complainant wanted to plough it and there was verbal aggression in which accused started an assault on complainant party. Since land was in name of accused they were acquitted under Section 447 as they had every right to defend their title. It was held that right of defence was available to accused and the fact of acquittal of accused was not determinative of question whether right of private defence had been exceeded. *Laxman Singh* v. *Poonam Singh*, 2003 Cr LJ 4478 (SC) : AIR 2003 SC 3204 : 2003 AIR SCW 4566 : 2003(4) Crimes 1 : 2003(6) Scale 334.

Where a man enters a forest and cuts down reserved trees, he cannot be convicted both under Section 32 of the Forest Act for cutting down reserved trees, and Section 447, Penal Code, for criminal trespass, the latter offence being included in the former. 11 ALJ 340 : 14 Cr LJ 424 : 20 Ind Cas 408. Where the servant of a landlord illegally takes possession of the tenant's land with the main object of illegally ejecting the tenant, an intention to annoy cannot be presumed, unless there are other circumstances from which such an inference can be drawn. 9 O & ALR 638. The prosecution should establish that the accused, intended in assisting in the removal of the things to cause wrongful loss to the person in possession. AIR 1951 Kut 49 : 52 Cr LJ 672. Where a tenant is holding over it is open to the landlord to re-enter the land without determining the tenancy in accordance with law and if he does by force he will be guilty of an offence under Section 447 of the IPC. 2 Bur LJ 37 : AIR 1923 Rang 245 : 69 Ind Cas 379 : 23 Cr LJ 699. Possession given for a few minutes by the act of a Civil Court peon does not constitute possession contemplated by Section 447, IPC. 28 NLR 298. No offence is committed by landlord if he enters the land after abandonment of the holding by the tenant. AIR 1933 Lah 734 : 34 PLR 953 : 146 Ind Cas 559. But forcible entry during the temporary absence of the owner constitutes trespass. AIR 1934 Oudh 281 : 1934 Cr C 676 : 11 OWN 733 : 35 Cr LJ 964 : 149 Ind Cas 368. Before a conviction can be based under Section 447, IPC, it must be shown that the trespass was one mentioned in Section 441. AIR 1942 Pat 150 : 43 Cr LJ 537 : 199 IC 218. A Criminal Court is not entitled to disregard the decree Civil Court adjudicating the rights of the parties. AIR 1948 Mad 49 : 48 Cr LJ 1002.

In a case where a fight took place between accused and victims over grazing of cattle in the field, revenue documents showed that the injured was *Thekadar* of field at the time of alleged incident and evidence showed that accused person had entered into field for grazing the cattles with intention to annoy the complainant party and thereafter remained there for causing injuries to complainant party, it was held that the accused persons were guilty of offence of criminal trespass and being aggressors right of private defence was not available to them. Since injuries caused to the complainant were not at all likely to cause the death, the accused were entitled to the acquittal under Section 307/34. *Sujya* v. *State*, 2003 Cr LJ 1612 (Raj) : 2002(3) Raj LR 822 : 2003(3) WLC 144.

To amount to an offence under Section 447, IPC, the property trespassed upon must be proved to belong to the complainant and there must be intention to commit an offence or to intimidate, insult or annoy any person. 74 Ind Cas 534 : 24 Cr LJ 790 : AIR 1923 Pat 56 : 24 Ind Cas 856 : 24 Cr LJ 824 : 75 Ind Cas 292 : 24 Cr LJ 916 : AIR 1924 Oudh 297 : AIR 1925 Nag 36 : 40 PLR 757 : AIR 1938 Lah 848. A conviction under this section cannot stand where the facts constituting the very foundation of the prosecution case has not been proved. 6 Pat LT 786. Where Dakhalnama gives formal possession of a house to the complainant and no actual physical possession any complaint by such a person is not maintainable. 88 Ind Cas 357 : 26 Cr LJ 1125 : AIR 1925 All 592. A person trespassing upon a land under attachment under Section 146. Cr. Pro. Code, is liable to be punished under Section 447, but not under Section 118. 8 MLJ 253 : 2 Weir 112. The accused a peadah, acting solely in the interest of his master R. removed or damaged certain bamboos belonging to R, which were in the possession of the Court of Wards. He was convicted of criminal trespass and mischief. Held, that the conviction of criminal trespass was wrong as the accused entered upon property in the possession of his master without intending to commit an offence or to intimidate, insult, or annoy the Court of Wards. 7 Ind Cas 812 : 15 CWN 224 : 11 Cr LJ 532. In order to constitute the offence of criminal trespass, it must be proved that some criminal intent was present in the mind of the accused, and it does not follow that, because an act is unlawful and is one that the civil law will restrain, or for which it will compensate the injured party in damages it is necessarily criminal. 29 PR 1882 Cr : 1 PR 1882 Cr. Where the accused was on the complainant's premises with intent to peep into apartments occupied by the ladies of the household, held, that the accused was not guilty of criminal trespass. 6 PR 1892 Cr. An entry upon the roof of a house may be criminal trespass, but cannot be the subject of a conviction for lurking house-trespass or house-breaking. 9 PR 1887 Cr. Where the complainant is given possession by a Civil Court, a forcible entry on such land by a sub-tenant claiming under a lease of an antecedent date from the judgment-debtor, constitutes criminal trespass. 1 CLJ 104. Infringement of fishery right under this section constitutes an offence under this section. 2 Cal 354. But where the fishery right does not belong to anybody in particular no such offence is committed. 1 Weir 519 ; 1 Weir 520. Encroachment of Government land or public way does not constitute an offence under this section. 1 Weir 521 ; 1 Weir 514 ; UBR 1909, 2nd Qr. Penal Code, 235 : 11 CLJ 57. Where possession is permissive at its inception subsequent refusal to move does not amount to criminal trespass. 26 PLR 247. Possessor's possession is not necessary for annoyance being caused by the trespasser. AIR 1931 Mad 231. Where a person is occupying a land, being so permitted by the owner thereof, than the possession of the land lies with the owner. and servant of the owner does not commit the offence of criminal trespass by entry upon the land. 1 Weir 521. Purchased land in question which was in possession of deceased. In execution of eviction order actual possession was handed over to the accused. On the basis of evidence of land records trial Court while dealing with charge under Section 447 held that accused were in possession of land. On appeal it was held that setting aside the order of trial Court by High Court was not proper. *Vajrapu Sambayya Naidu* v. *State of UP*, 2003 Cr LJ 4433 (SC) : AIR 2003 SC 3706 : 2003 AIR SCW 4212. Superior title in the accused would not by itself, cover the complaint into a mere trespasser so as to justify him in ejecting the complainant, if he was in possession otherwise than as a mere trespasser. 1 Weir 522. A lawful entry but unlawful remaining constitutes an offence under this section. 1 Weir 528. The accused's entry into the complainant's house with the object of having illicit intercourse with the complainant's sister, amounts to criminal trespass, as the house was not sister's but her brother's and such intercourse was bound to cause great annoyance to the brother. 17 PR 1908 Cr : 32 PWR 1908 Cr : 8 Cr LJ 488. A person who after having been ejected by due process of law from certain agricultural lands, wilfully persists in trespassing upon such lands is liable to be convicted under this section. AWN 1902. 6. An ouster of a mortgagee in possession by a third person constitutes an offence under this section.

AWN 1902, 24. In trying offences under Section 447, IPC, it is necessary that the Criminal Courts should be their duty in protecting against trespass, person who are in peaceful possession of property, whether they be rightful owners or not. UBR (1892-1896) Vol 1, 261 ; UBR (1892-1896) Vol I, 264. An accused who did not enter the complainant's house, but was found lurking under it for the purpose of stealing or committing some other offence, was held to have committed only ordinary trespass and nothing more. UBR (1892-1896) Vol I, 272. The Amin executing a delivery warrant issued to him cannot be charged and convicted of criminal trespass, even though the delivery warrant was in excess of the decree in the suit and the Amin was shown the decree. 10 LW 12 : 51 Ind Cas 847 : 20 Cr LJ 559.

The exposure of goods for sale on a public road belonging to a District Board, the collection of tolls leviable on which, is leased to another is not an offence under Section 447, IPC. 55 Ind Cas 721 : 21 Cr LJ 353. For a conviction under this section, the finding on the point as to who was in possession of the land in dispute is necessary. 45 Ind Cas 677 : 19 Cr LJ 629. Section 447 requires it to be affirmatively and positively proved that the complainant was in possession of the land in dispute with respect to which criminal trespass is said to have been committed. 3 Pat LT 347 : 67 Ind Cas 618 : 23 Cr LJ 440. The main ingredients of Section 447, IPC, are that the trespass must be with the intention of annoying or insulting some one or must be with the intention of committing an offence. Where there is nothing in the record to show any such intention the conviction of a criminal trespass is impossible. 65 Ind Cas 446 : 3 Pat LT 490 : 23 Cr LJ 95. Where a servant acting under the instruction of his master and in the course of his employment trespass on the property of another this section does not apply. AIR 1923 Rang 135. Forcible removal of cattle from pound constitutes an offence under this section. 8 Lah 831 : 103 Ind Cas 201 : 28 Cr LJ 665. Where a person who has unlawfully entered upon property continues to remain unlawfully upon the same by resisting the claim of the true owner to re-enter he commits a fresh offence and can be convicted even though he was convicted originally for the unlawful entry. 6 Pat 794 : 106 Ind Cas 692 : 29 Cr LJ 99. The offence of criminal trespass can only be committed against a person who is in actual physical possession of the land in question. A person who is in joint possession, if he wishes to have actual possession has got his remedy by bringing a suit for actual partition, he cannot forcibly take possession alleging criminal trespass on the part of the person who is in possession of one of the co-owners. 29 CLJ 745. There is no authority for the proposition that the mere absence of the accused at the time of giving possession affects the validity of such possession, nor of course does prior possession of the land by the accused and his predecessors in title matter. 30 Bom LR 631 : 112 Ind Cas 97. If a person is ejected from certain lands and formal possession is given to the rightful owner, the maintenance or the attempted maintenance of physical possession of the land by the ejected person is wholly illegal until such time as such person may get himself resord by process of law. AIR 1939 Oudh 45 : 1938 OWN 1361 : 1939 OLR 19. Labourers going fields at instance of trespasser cannot be convicted under Section 447, in absence of proof of their knowledge as to actual state of facts and their conspiracy with trespasser. 1934 ALJ 1061 : 1934 Cr C 1335 : AIR 1934 All 1025. A complainant at the instance of a mortgagee in possession is maintainable when his tenants are ousted. AIR 1934 All 1025 : 1934 Cr C 1335 : 1934 ALJ 1061.

In a case of criminal trespass into land mere assertion of a claim of right is not a sufficient defence. (1962) 4 Orissa JD 210 ; 28 Cut LT 382. No element of force or show or force is used in the act of trespass and hence no conviction under Section 447, (1961) 1 CLJ 627. The question of possession of the land is to be found on the date of occurrence and not at all with the question of title in a case under Section 447. AIR 1960 Tripura 4. The essential requirement of the offence that the accused must display a readings to use force and scare away the victim. 1960 MLJ (Cr) 280 : AIR 1960 Ker 348 ; 1974 Cr LJ 434 (necessary to demarcate strip of land acquired by the State) 1982 RLW 557 (no conviction under the section).

(*See* cases under Section 441 (*infra*).

The prosecution is to prove the intent with which the accused is alleged to have committed the trespass. 1966 All WR (HC) 395 : 1982 All Cr R 462 ; 1981 Raj Cr C 60 : 1970 Cr LJ 1199 ; (1972) 1 Cut WR 982. It is necessary to prove that the property entered upon was in the possession of any person other than the accused. (1961) 27 Cut LT 1110 ; 1982 WLN (UC) 397 : 1983 WLN (UC) 369.

When accused was charged of trespassing in field and harvesting paddy crop of complainant—Conviction of applicant which was challenged in revision petition. In *Khasra*, the said field was jointly recorded in name of two ladies and applicant being the maternal nephew of one of them and there being no other relative of the lady the accused was managing her affair. He had harvested crop in exercise of *bona fide* claim of right. His conviction under Sections 447 and 379, was therefore, bad in law. *Sant Ram* alias *Santu Samaru Gond* v. *State of M.P*, 1995 MPLJ 823 (MP).

When subsequently criminal proceedings was initiated—Stay order passed against criminal proceedings—Criminal proceedings may not be quashed—Stay order was held to be vacated. *Dharam Jeet Khera* v. *State*, (1994) 2 CC Cases 292 : (1994) 3 Crimes 22 (Del).

4. Sentence.—The accused were found to have been actuated by *mala fide* and have abused the powers vested in him in discharge of public functions. Sentence should not be interfered with. (1969) 2 SCWR 432.

5. Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate, summarily.

6. Charge.—The charge when necessary should run thus :—

"I *(name and office of Magistrate, etc.)*, hereby charge you (*name of the accused)* as follows :—

'That on or about the..... day of.... at......you committed criminal trespass by entering into (or upon) (or by illegally remaining on) the land *(describe it)* then in the possession of *AB*, and thereby committed an offence punishable under Section 447 of the IPC and within my cognizance."

"And I hereby direct that you be tried on the said charge."

7. Quashing of proceedings.—Under Criminal Law, making vague statement in a complaint is totally insufficient unless specific facts and details are set out and secondly having regard to the background of the case, it is more than clear to the Court that complaint was lodged with the police only as a counterblast. One of the tests which that Court will apply is as to whether the complaint lodged with the police only as a counterblast. One of the tests which the Court will apply is to whether the complaint even assuming it is sustained, could even result in a conviction. On the material before the Court even assuming the complainant is able to elaborate on what is stated in the complaint. There is no possibility of a conviction. The Court also needs to take into account the fact that the petitioners are Forest Officers acting in discharge of their duties and that it is more than clear, that the sole purpose of lodging the counter complaint was in order to dilute or get away from the offences with which the complainant was charged. *H.N. Venaktesh & Ors. v. State of Karnataka*, 2002 CriLJ 328.

8. Jurisdiction.—When respondent took forcible possession from helpless lady in collusion and connivance with police—Application submitted by lady not attended—High Court can restore the possession under writ jurisdiction. But in exceptional cases, High Court would direct delivery of possession in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. *Anju Devi* v. *Commissioner of Police*, (1994) 3 Recent Cr R 71.

9. Right of Private defence against property.—The accused admittedly did not purchase any specific portion of the property. They purchased undivided share. By reason thereof, in law, they did not acquire any right to obtain possession of the lands. Harda Ram and his family being the co-sharers did not give any consent for handing over their possession in their favour. In law, therefore, the accused persons being purchasers of an undivided share merely acquired a right to sue for partition.

It has been amply proved that the scuffle lasted for only two minutes to two and half minutes. PW8-Rajbir was not armed with any weapon, so was not Harda Ram (the deceased). It was Lal Singh alone who had in his hand a small twig (Kamari). According to him, the same is used to drive camels. Kamari was said to be used by Lal Singh in his sole defence as a result whereof Sheo Ram and Raja Ram were injured. We have noticed hereinbefore that the injuries on the persons of the said two accused were simple in nature. It is true that the fact that two of the accused person had suffered injuries had not been disclosed in the FIR or in their Statement before the Investigating Officer, but the same, in our opinion, was not necessary inasmuch as they got themselves medically examined by Dr. Goel almost at the same time when the other prosecution witnesses got themselves examined. By that time they had already been arrested. It was the police authorities who had submitted an application along with the injuries chart. They Had been brought by Constable Satbir Singh. Thus, the fact that two of them had suffered injuries in the same incident was known to the Investigating Officer.

The FIR might have been recorded at a later stage. But the information about the occurrence must have been given by P.W.8 to the officer in-charge of Ateli Police Station prior thereto. Even a copy of the FIR was received by the Magistrate concerned at about 10.30 p.m. on the same day. Furthermore, the Investigating Officers were not cross examined on that point. In any event, it is wholly unlikely that the FIR was anti-timed and anti-dated. Even assuming that the same was anti-timed or anti-dated, the fact that an incident had occurred was not disputed. At least two of the accused persons accepted their presence. The defence story is that two accused persons had sustained injuries at the hands of the prosecution witness Lal Singh. (P.W. 12).

We have noticed hereinbefore that the appellants cannot be said to have been in 'settled possession' of the land in question. Furthermore, they came wholly armed, whereas except Lal Singh was having a small twig (Kamari), deceased party were not armed with any weapon. It was not a dangerous weapon. No grievous injuries could have been caused by use thereof and in fact no grievous injuries have been suffered by the accused Sheo Ram and Raja Ram.

Appellants herein did not raise any plea of self defence. According to them, they were not present at the spot at all. Learned Senior Counsel would contend that Accused No.1 and Accused No.6 raised the plea of self defence. The learned trial Judge although accepted the said plea but the same was accepted not with particular reference to the said accused. All the accused persons did not raise the defence of exercise of right to private defence. In regard to claim of right of self defence, the matter may have to be considered from somewhat a different angle. Accused Nos. 6, 7 and 8 were attributed with assault of Lal Singh and two ladies, namely, Mamli and Dhankauri.

We have been taken through the depositions of P.W. 8 and P.W. 12. P.W. 12's presence stands admitted. P.W. 8's presence has been doubted by the learned Sessions Judge only on the ground that he got his father admitted at 2.30 p.m. The presence of P.W.8-Rajbir, in our opinion, could not have been doubted on such slender evidence. He was driving the tractor. Accused persons came prepared to assault the deceased. By the time the first informant could come and intervene, the entire incident must have occurred as it is stated that the same took place only for two to two and half minutes. No suggestion had been given to any of the prosecution witnesses by the defence that no tractor was found at the place or it was the deceased who himself was driving the tractor. P.W. 8 in his evidence categorically stated that he left the tractor. P.W.8 in his evidence categorically stated that he left the tractor at that place. Furthermore, his evidence, taking a holistic view of the matter, in our opinion, appears to be trustworthy. He vividly described the entire incident. He was cross examined on all material points. He had also explained as to why he did not suffer any injury categorically stating and that too in cross-examination that by the time he reached all the accused had started running with their weapons towards their respective houses. *Ram Pat vs. State of Haryana*, AIR 2009 SC 2847 : 2009 (7) SCC 614 : 2009(8) Scale 145 : 2009(7) JT 579.

10. Appeal against conviction.—Around midnight both the accused went to house of prosecutrix, called out her husband and compelled prosecutrix to follow them to the jungle. She was forcibly taken away and accused forcibly committed rape on her. Trial Court convicted accused relying on evidence of prosecutrix and her husband. In appeal, High Court upheld conviction without discussing evidence.

Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind. The absence of reasons has rendered the High Court's judgment not sustainable.

We are dismayed at the casual manner in which the criminal appeal has been disposed of. In the circumstances, we set aside the impugned judgment and remit the matter to the High Court for fresh consideration in accordance with law. As the matter is pending since long we request the High Court to explore the possibility of early disposal of Criminal Appeal. *Prasad vs. State of Karnataka*, AIR 2009 SC 1911 : 2009 CrLJ 1761 : 2009 (1) Crimes 359 : 2009 (3) SCC 174 : 2009 (2) Scale 524 : 2009 (1) Supreme 815.

* * * * *

Sec. 448. Punishment for house-trespass.—Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Synopsis

1. Scope 2795
2. Intention 2795
3. House trespass....................2795
4. Sentence 2798
5. FIR....................2798
6. Procedure....................2798
7. Charge 2798

1. Scope.—Where husband's property let out wife to her brother, it was held that wife has same rights in property and no offence of criminal trespass is committed. 1987 Cr LR (Guj) 84.

When there was acquittal by trial Court—Petition under Section 401, Cr PC, was filed. It was finally held that PW 1 is not an eye-witness and his evidence is only hearsay. The avertments made in the complaint belief the evidence of PW 1. Hence, it is not a fit case for retrial of the respondents. *Chander Kanta* v. *Krishan Lal*, (1994) 2 CC Cases 343 (P&H).

2. Intention.—In order to sustain a conviction under Section 448, I.P. Code, it must be found that the intention of the accused was to commit an offence : or to intimidate, insult or annoy the complainant. 14 Mys LJ 506 ; *see* also 37 Bom LR 880 : AIR 1935 Pat 523 : 1935 Cr C 1281 : 36 Cr LJ 1351 : 158 Ind Cas 279. To establish a charge under Section 448, Penal Code, there must be an unlawful entry and there must be proof of one or other of the intention mentioned in Section 441 of the Code. AIR 1956 Cal 118 : 97 Cr LJ 32 : 1956 Cr LJ 524. When a landlord broke open the lock of the house in the possession of the tenant in his absence and took possession of the same, it must have been obvious to the landlord that his act in breaking open the lock of the property in possession of the tenant must cause annoyance to him, and as a man is presumed to intent the consequences of his act it follows that the petitioner must have intended to cause annoyance to the tenant. The landlord would be guilty of an offence under this section. 1963 Cr LJ 384 : ILR (1963) 2 Punj 893 : 1964 (1) Cr LJ 427 : AIR 1964 Punj 145 : *see* also 65 Bom LR 477 : ILR 1963 Bom 627 : 1964 (1) Cr LJ 395 : AIR 1964 Bom 82 (accused, an office bearer of school committee, going to school beating two boys in absence of Head master and subsequently abusing Head master on his return).

3. House-trespass.—To constitute the offence of house-trespass it is necessary that an entry should have been effected into the house or building. Mounting the roof of a house with intent to enter the house is not house-trespass nor even an attempt to commit house-trespass but merely a preparation for the offence of house-trespass. 12 Bur LT 222. Entry on a *verandah* does not amount to house-trespass. 26 Ind Cas 306 : *see* also 15 PR 1907 Cr ; *see* 1 Weir 524 : Rat Un Cr C 188. Entry into a *varandah* may not amount to house-trespass, but such entry coupled with an attempt to push open the door does amount to any attempt to commit the offence. 16 Cr LJ 2 : 26 Ind Cas 306. But entering into a room by breaking open the lock is an offence under this section. AIR 1945 All 26. An entry into a shop to *see* whether the trades had correct measures is not an offence under this section. AIR 1944 Mad 445 : 45 Cr LJ 805. No offence is committed under this section by the re-entry of landlord in tenant's premises, when the tenant left the holding without intimidation and did not pay any rent. 49 Cr LJ 120 : AIR 1948 Cal 130. Considering the mode of life among the common people of this country, it is straining the language of Section 441, to hold that a man entering the compound of an uninhabited house merely to commit nuisance, intends to annoy the owner and that he is guilty under Section 448 of the Penal Code. AWN 1812, 324.

A judgment-creditor commits an offence under this section if he enters into other house than that mentioned in the warrant of attachment issued by a Civil Court. 2 OC 65. The accused caused the roof of his house belonging to him, which the complaint, occupied as his tenant to be removed while the complainant's wife a *pardanashin* woman was in it, and without giving any notice before hand. The woman had to leave the house to be out of the way of the fragments of the roof falling upon her, and was thus exposed to public view. *Held*. that an offence under this section has been committed. UBR (1897-1901) Vol I, 350. Where in execution of a decree of Court, certain property was attached and taken out of the house in which it was, the decree-holder would not be guilty of criminal trespass in doing the act. 15 ALJ 808.

A school was built by public subscription and put in charge of a teacher. He went away having locked the building. The accused were some of the managers of the school took possession of the building and started certain classes in it. They were convicted of criminal trespass. *Held*, that this conviction was improper as the building was not in the possession of the complainant and the accused had no intention of annoying him. 17 ALJ 334 : 54 Ind Cas 350 : 20 Cr LJ 463 ; *see* also 52 Ind Cas 274. During the temporary absence of the complainant, the accused who wanted to get possession of the house as mortgagee, put a lock on the house. *Held*, that he was not guilty of criminal trespass and the matter was one for the Civil Courts to deal with. 50 Ind Cas 834 : 20 Cr LJ 354.

Where the accused were proved to have gone to house with Civil Court officers and entered the same in order to execute a Civil Court decree which they had obtained against one of the inmates of the house, *held*, that they were not liable to be convicted for criminal trespass. 34 CWN 583 : 127 Ind Cas 551 : 31 Cr LJ 1223 : AIR 1930 Cal 720.

Where a person enters a house with intention of carrying out his amours with married woman, owner has right to arrest him or to pursue him for arrest and to use all means for effecting it. AIR 1935 Pesh 83.

For an offence under Section 448, intention is one of the most important ingredients and in order to determine the intent it is not necessary to consider the circumstances under which the act was done by the accused as also the *bona fide* nature or otherwise of the claim which the accused may have in respect of the property itself. AIR 1928 Cal 263.

An entry to a house in assertion of a *bona fide* claim of right cannot constitute criminal trespass, which requires an intent to commit an offence or to intimidate, insult or annoy any person in possession. 1925 Pat 167 : 81 Ind Cas 823 : 25 Cr LJ 1047 : 88 Ind Cas 725 : 26 Cr LJ 1205 : AIR 1925 Oudh 505. *See* in this connection 1963 ALJ 501 : 1963 All WR (HC) 408 : 1963 All Cr R 215 ; 1964 (1) Cr LJ 324 : AIR 1964 All 103 (where Receiver was appointed of suit property including shop in possession of the accused and wrongfully put his own lock on the shop to which he was not entitled, it was held that the accused was not guilty of an offence under Section 448).

House trespass and rape. Brother-in-law entered house of victim lady and committed rape on her. There was some dispute with appellant and prosecutrix with regard to partition of family properties. Medical evidence does not support her version that appellant raped her. Further no sign of any injury of any kind was found on her person. Prosecution tried to exaggerate and develop story from one stage to other and further delay of 11 days in lodging FIR was not explained. Held, therefore appellant is entitled to be acquitted. *Elbish Guriya vs State of Jharkhand*, 2010 (4) CriLJ 4014 (Jhar).

In an Orissa case, it was alleged that the accused Sarpanch had trespassed into house of complainant and abused him calling him lower caste man untouchable, SALE *etc*. There was a case against wife of complainant before panchayat regarding dereliction of her duties as midwife and accused *sarpanch* was authorized to move higher authorities against her. There was two months delay in filing of FIR. It was held that case of complainant was doubtful and acquittal of accused was proper. *Chintamani Seth* v. *Raghunath Mohanty*, 2003 Cr LJ 2866 (Orissa) : 2003 (25) OCR 700.

Where an advocate enters the house of a Magistrate in his absence, taking along with him the books wanted by the Magistrate and finding on the table the file of a case in which he has appeared, inspects it, it cannot be said that the advocate in entering the house surreptiously commits the offence of criminal trespass punishable under Section 448, Cr. P. Code. AIR 1961 All 637 : 1962 All Cr R 27 : 1961 (2) Cr LJ 756.

To hold that the person in possession must be present when the accused enters into or upon the property is to introduce as element which is not found in Section 441, or Section 442 of the IPC. 1964 MLJ (Cr) 115 : 1964 (1) CrLJ 52 : AIR 1964 Mys 11.

The complainant must be in actual possession of the building in an offence under this section. ILR 1976 Cut 823 : 1977 Cr LJ (NOC) 771 ; AIR 1964 All 103. Question of title of the property is not at all relevant in a case under this section. AIR 1963 Manipur 15. A criminal trespass into the building tent or vessel with the intention to commit the offence. (1963) 2 Cr LJ 543 ; AIR 1964 Mysore 11 ; 1983 Cr LJ 173 : AIR 1983 SC 159 : 1983 Crimes 244 ; 1964 SCR 716 *see* also 1978 All LJ 1210 : 1978 All Cr C 404 (merely causing damage to the building is no offence under this section) ; *see* 1973 Cr LJ 1681 : 1972 Cr LJ 1627 (for intention).

Where the intention of the accused in making the entry is not to commit any offence or to intimidate insult or annoy the inmate but under a *bona fide* claim of right to the premises the accused is not guilty of criminal trespass and therefore of house-trespass. 1975 ChandLR (Cr) 421 : 1972 CrLJ 1093; 1971 CrLJ 1401; 1981 BomLR 136.

A public servant not liable under this section when he enters a building ; for the purpose of executing a lawful warrant against the accused. (1970) 36 Cut LT 873. Civil remedy was held proper in a case like this. AIR 1983 SC 159 : 1983 Cr LJ 173.

4. Sentence.—Where in the trial under Sections 448, 426 and 186, the allegations were that during the elections, the accused led a procession to the office of the Sub-divisional officer and committed acts of mischief, and the accused frankly admitted the guilt, a sentence of 15 day's simple imprisonment was adequate. *See* (1963) 4 Ori JD 367 ; 1979 Cr LJ 1297.

5. FIR.—*Non-naming* of one or few of accused persons in FIR or in dying declaration, when not fatal. Prosecution case that the accused persons committed criminal trespass into the school and tried to give lesion in the classes and some outsider accused persons being armed with iron rod, spear etc. started assaulting the clerk of the school.

Eighteen persons faced trial out of which were acquitted by the trial Court and the High Court. Names of some of the appellants were not mentioned in the FIR or the dying declarations.

The law is fairly well settled that FIR is not supposed to be an encyclopaedia of the entire events and cannot contain the minutes details of the events. When essentially material facts are disclosed in the FIR that is sufficient. FIR is not substantive evidence and cannot be used for contradicting testimony of the eye witnesses except that may be used for the purpose of contradicting maker of the report. Though the importance of naming the accused persons in the FIR cannot be ignored, but names of the accused persons have to be named at the earliest possible opportunity. The question is whether a person was impleaded by way of afterthought or not must be judged having regard to the entire factual scenario in each case. Therefore, non naming of one or few of the accused persons in the FIR is no reason to dis-believe the testimony of crucial witnesses. The evidence of witness is clear and cogent. *Kirender Sarkar vs. State of Assam*, AIR 2009 SC 2513 : 2009 CrLJ 3727 : 2009 (12) SCC 342 : 2009 (6) JT 114 : 2009 (6) SCR 1133 : 2009 (6) Scale 589.

6. Procedure.—Cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate and summarily.

7. Charge.—In a charge under Section 448, Penal Code, the Magistrate should state the intention with which the accused person trespassed into the house of the complainant as contemplated under Sections 441 and 442, Penal Code. AIR 1957 Orissa 190 : 1957 MLJ 988.

The charge should run thus :

"I *(name and office of the Magistrate, etc.)* hereby charge you (*name of the accused) as* follows :—

'That on or about the....day of......at.....you committed house-trespass by entering into (or unlawfully remaining on) the house in possession of *AB*, with intent to commit the offence of (or to intimidate, insult or annoy the said *AB*) and thereby committed an offence punishable under Section 448, of, Indian Penal Code, and within my cognizance."

"And I hereby direct that you be tried on the said charge."

* * * * *

Sec. 449. House-trespass in order to commit offence punishable with death.—Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with *imprisonment for life*, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

Synopsis

1. Amendment....................2799
2. Sections 449 and 460....................2799
3. In order to the committing....................2799
4. Evidence and Proof....................2801
5. Procedure....................2803
6. Charge....................2803
7. Presumption....................2803

1. Amendment.—The words in italics were substituted for the words "transportation for life" by Act 26 of 1955, Section 117, and Sch. (with effect from 1.1.1956).

2. Sections 449 and 460.—These sections deal with the offence of criminal trespass when it is aggravated by the end for which it is committed. Hence trespass may be committed for no other purpose than the purpose of playing some idle trick on the inmates of a dwelling, or it may be committed in order to the perpetration of murder or other atrocious crime. These sections regard the ulterior offence which the house-trespasser has in view and visit his crime with a proportionate punishment".—*Morgan and Macpherson*, 404.

3. In order to the committing.—"The intention and design is the commission of an offence. To bring the offender within these severe penal provisions, it is not necessary that he shaved do any further act than the house-trespass towards the commission of the offence punishable with death. But to justify a conviction there should be clear proof of the design to commit a murder or other like offences. In the absence of proof of some further act done, in addition to the criminal trespass, in the prosecution of the murderous intention it can rarely happen that the evidence will suffice for a conviction under this section".—*Morgan and Macpherson*. 405. An act can be said to be committed in order to the committing of an offence even though the offence may not be completed. Thus if a person commits a house-trespass with the purpose of the committing of theft but has failed to accomplish the purpose, it will be proper to say that he committed the house-trespass in order to the committing of theft. (1964) 1 SCWR 501 : 1964 SCD 766 : 1965 (1) Cr LJ 126 : AIR 1965 SC 132.

Common intention. In the present case, the question is whether the appellant shared any common intention and if so, with whom? Neither there is any charge nor evidence against A-4 that he committed the murder of the deceased in furtherance of common intention shared with A-4. The trial Court as well as the appellate Court found A-4 guilty for the offence punishable under Sec. 302 IPC only. There is no third person involved with whom the appellant could have shared common intention. PW 1 and 2 in their evidence did not attribute any overt or covert act as against the appellant. No circumstances were brought on record from which it could be reasonably inferred that the appellant shared common intention with A-4 and in turn, A-4 committed the murder of the deceased in furtherance of such common intention. There is no evidence that there was a prior meeting of mind developed at the spur of moment and A-4 shot the deceased in furtherance of such common intention resulting in death.

According to the evidence of PW-1 the appellant did not indulge in any overt or covert act except be present at the scene of occurrence. It is true that both of them ran away from the scene of occurrence after A-4 shot the deceased with a pistol in his hand. Even if it be accepted that he was armed with a pistol no reasonable inference could be drawn on the proven facts that he shared common intention with A-4 to commit the offence of murder.

In the present case, there is no evidence of any prior meeting of minds. We know nothing of what they said or did before the attack. It is in the evidence that on being asked by the deceased as to why they entered the house and as to what they wanted; A-4 immediately shot the deceased with the pistol in his hand. Obviously, this was an impulsive act of A-4 and both the Courts rightly found that he was guilty for the offence of committing murder of the deceased punishable under Sec. 302 IPC but the High Court committed a serious error in holding the appellant vicariously liable for the criminal act of A-4.

It is nowhere suggested that appellant indulged in any overt or covert act as such based on which any inference of common intention could be drawn. There is no dispute with the proposition that the common intention can develop and manifest itself at the spur of moment. But the question for consideration is, whether there is any evidence in the present case to indicate that in fact such a common intention was developed between appellant and A-4 and in furtherance of such shared common intention A-4 committed the murder of the deceased. The evidence of PW-1 and PW-2 does not suggest that any such common intention developed on the spur of moment leading to the murder of deceased by A-4. In the circumstances, it would be unsafe to convict the appellant for the offence punishable under Sec. 302 with the aid of Sec. 34 IPC.

In the present case, the FIR shows that at about 9.15 P.M. the appellant and A-4 entered the house and stood there; on seeing them, the deceased got up from his chair and moved towards them "asking them who are they" whereupon A-4 shot the deceased causing bleeding injury due to which deceased fell down, the appellant and A-4 ran away towards the street. The contents of the FIR and the evidence of PW-1 and PW-2 read together make it clear that the appellant was not armed as erroneously held by the High Court. In the circumstances, it would be impossible to draw any inference that A-4 committed murder in furtherance of common intention shared by the appellant. In fact, neither there is any charge nor any evidence even as against A-4 that he shared common intention along with the appellant to commit murder of the deceased. There must be more than one person to share common intention to commit criminal act for attracting the applicability of Sec. 34 IPC. It is clear from the evidence that A-4 did not act conjointly with the appellant in committing the murder. If he did not act conjointly with the appellant, the appellant could not have acted conjointly with A-4.

On consideration of the evidence and the material available on record and in the light of the legal principles referred to hereinabove, it is clear that the accusations made against the appellant making him constructively liable for the criminal act of murder committed by A-4 with the aid of Sec. 34 IPC were not established. So far as the present appellant is concerned, there is no evidence whatsoever available on record to show sharing of any common intention.

We accordingly affirm the judgment of the trial Court acquitting the appellant of the offence punishable under Sec. 302 read with Sec. 34 IPC. Consequently, the judgment of the High Court convicting the appellant under Sec. 302 read with Sec. 34 IPC is set aside. We however, affirm the conviction of the appellant under Sec. 457(1) IPC. The trial Court as well as the High Court convicted the appellant for the offence punishable under Sec. 457(1) IPC and sentenced to undergo rigorous imprisonment for a period of 2 years and to pay a fine of Rs. 500/-, in default, to further undergo rigorous imprisonment for a period of 6 months. No effort has been made before us challenging the conviction of the appellant under Sec. 457(1) IPC. We, accordingly, confirm the conviction and sentence of the appellant under Sec. 457(1) IPC imposed by the Courts below. The appellant however, had already undergone the sentence. Since there is no appeal preferred by the State as against the judgment of the High Court acquitting the appellant of other charges the same is not interfered with. *Arun vs. State*, AIR 2009 SC 1256 : 2008 (15) SCC 501 : 2008 (12) JT 571 : 2008 (17) SCR 279 : 2008 (16) Scale 361 : 2009 (1) Supreme 355 : 2009 (1) SLT 492.

4. Evidence and Proof .—*See Kunduru Vinaya Reddy v. State of A.P.*, 2005 Cr LJ 3896 (AP) : 2003(1) ALD (CRL) 125 : 2006(1) Andh LT (Cri) AP 294.

Sufficient evidence. Rape and murder of a girl aged 2 years. The evidence of PW-5 and PW-6 reveals that appellant had been seen around the complainant's house on the previous day and as he was not a resident of this area, he had been quickly singled out. These witnesses further stated the appellant had been seen in the vicinity again after the rape and murder and he had accordingly been apprehended and handed over to the police and two chains worn by deceased had been taken from his pockets. PW-13 also identified the chains in Court. It is true that in the cross-examination of these two witnesses, several improvements *vis-a-vis* their statements under Sec. 161 of Criminal Procedure Code had been pointed out by the defence Counsel, but the fact that the appellant had been present in the vicinity of the house and had been arrested, soon after the incident has been admitted even by the defence.

Another significant piece of evidence is the statement of PW-7 who testified to the fact that about 2:30 a.m. on the night of the murder he had gone out of the house to urinate and had seen the appellant outside and on being questioned, the appellant had threatened him with dire consequences with the result that he had not informed anybody till the third day after the police had come to the village to verify the facts. He too stated to the fact that two chains had been recovered from the pocket of the appellant. It is true that several improvements have been made by the three primary witnesses but there is absolutely no reason as to why they would involve the appellant in a false case as admittedly he was a stranger to the locality and they bore him no ill will.

We have also gone through the evidence of PW-12 relating to the recovery of the frock pursuant to a disclosure statement made by the appellant under Sec. 27 of the Evidence Act. Nothing could be spelt out from the cross-examination of this witness except that the recovery had not been made from a closed place, though he explained that there was very little movement of human beings in that area as no one was residing close by. This witness also identified the frock that had been recovered. It is equally significant that the strands of fibre recovered from the place of incident had been matched with the material of the frock and were found to be from the same source.

It is true that in a criminal matter the onus of proof lies almost exclusively on the prosecution. As already mentioned above, however, the appellant has not been able to give any explanation in his statement under Sec. 313 of Criminal Procedure Code as to what he had been doing in that locality. On the contrary he admitted his presence by stating that he had been caught by the neighbours on suspicion of the murder and beaten up, and had suffered several injuries in the process. The medical evidence on the contrary reveals that these injuries could also have been sustained while raping and killing the young child.

The evidence that the appellant was a paedophile with extremely violent propensities also stands proved on record in that he had been convicted and sentenced for an offence punishable under Sec. 354 in the year 1998 and later for offences punishable under Secs. 363, 376, 379, 302 and 201 of the IPC for the rape and murder of a young child and had been awarded a sentence of imprisonment for life under Sec. 302, and several other terms of imprisonment with respect to the other Secs., though, an appeal in this connection was pending as on date. It is also extremely relevant that the appellant, had, in addition, been tried for the murders of several other children but had been acquitted on the 28.07.2005 with the benefit of doubt. The present incident happened three days later. We accordingly dismiss the appeals but modify the sentence of death to one for the rest of his life in terms of the judgment in *Shraddananda's* case. *Sebastian vs. State of Kerala*, 2010 (1) SCC 58 : 2009 (4) Crimes 121 (SC) : 2009 (13) JT 136 : 2009 (13) Scale 210 : 2009 (7) Supreme 8 : 2009 (8) SLT 96.

Insufficient Circumstantial evidence. Trial Court convicted the accused on the four types of circumstantial evidences : (i) accused was examining the palm by way of palmistry of deceased and there the deceased went towards the field (ii) accused also went towards the field (iii) accused washed his hands after committing the offence and blood of the deceased was found at the field (iv) accused returned from the field smeared with mud alongwith a "Potli" in his hand, he was seen going away from the village, and upon identification of accused, jewellery of the deceased, which had been removed and taken away by amputating feet from her body, the same were seized and that identification proceedings of these jewellery-items were carried out. There could be some suspicion regarding the conduct of the accused at the time of occurrence but the same cannot in any manner conclusively prove and establish that the accused has committed the murder of the deceased. Unless and until we are satisfied that the evidence adduced clearly and pointedly establish the guilt of the accused we cannot pass an order of conviction by setting aside the order of acquittal. *State of Rajasthan vs. Naresh*, 2009 (9) SCC 368 : 2009 (11) Scale 699 : 2009 (11) JT 109 : 2009 (8) SLT 137 : 2009 (13) SCR 589.

Plea of Alibi—When not reliable. The theatrical explanation given by the accused/ appellant that he was going Perumbavoor and at Thottuva, nearly 35 kms away, the auto driver tried to snatch his money and he ran and stayed at a dilapidated house for the whole night has been rightly rejected by the Courts below. And if he was at Thottuva which is admittedly 35 kms away from the place of occurrence, he could not have been seen on the early hours, at the place of occurrence. *M.A. Antony vs. State of Kerala*, AIR 2009 SC 2549 : 2009 (6) SCC 220 : 2009 (7) JT 372 : 2009 (6) Scale 36 : 2009 (6) SCR 829.

Sufficient proof of Motive.—The appellant was in dire need of money as established. The Accused/appellant knew that his visa had come on and that a large amount of money was required. He had also tried to arrange for loan.

According to accused in the house of the deceased, a large amount of cash and jewellery was available which could have been taken away by the accused/appellant and that he, as a conscientious man, had taken so that he could repay before his departure. The contention is devoid of any merit and has been found to be incorrect by the Courts below. It would be pertinent to mention here that the trial Court has adverted to the fact that the jewellery and cash were lying in hidden condition and thus knowledge of its existence cannot be attributed to the accused/appellant.

At the stage of recording of statement under Sec. 313 of the Code, the accused had come with another explanation that the deceased Augustine had paid him amount. No evidence at all has been adduced to show that he was present in the shop of Augustine and had been given the said amount. Furthermore, even wife of the accused/appellant has not stated that she was told at any stage by her husband that he had received amount from the deceased Augustine. The trial Court and the High Court both have disbelieved it.

The analysis of the evidence shows that the accused/appellant was in dire and urgent need of more and he had a motive for getting the said amount of money. *M.A. Antony vs. State of Kerala*, AIR 2009 SC 2549 : 2009 (6) SCC 220 : 2009 (7) JT 372 : 2009 (6) SCR 829 : 2009 (6) Scale 36 : 2009 (8) SLT 255.

5. Procedure.—Cognizable—Warrant—Not bailable—Not compound-able—Triable by Court of Session.

6. Charge.—I *(name and office of Sessions Judge, etc.)*, hereby charge you (name *of the accused) as* follows :—

That on or about the............day of...........at..................you committed house-trespass by entering into (or unlawfully remaining in) the building (or tent or vessel) of *A, B* used as a human dwelling (or for the custody of property) in order to the committing of the offence of........which is punishable with death, and that you thereby committed an offence punishable under Section 448 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said Court on the said charge."

7. Presumption.—In the case of robbery and murder committed in one same transaction prompt recovery of articles may give rise to presumption of involvement in robbery and murder. *Mukund @ Kundu Mishra and another* v. *State of Madhya Pradesh*, 1997 (2) East Cr C 166 (SC) : 1997 Cr LJ 3182 : 1997(2) Crimes 69 : AIR 1997 (SC) 2622 : 1997 SCC (Cr) 799.

* * * * *

Sec. 450. House-trespass in order to commit offence punishable with transportation for life.—Whoever commits house trespass in order to the committing of any offence punishable with *imprisonment for life*, shall be punished with imprisonment or either description for a term not exceeding ten years, and shall also be liable to fine.

Synopsis

1. Amendment....2804
2. *Mens rea* 2804
3. Trespass....2804
4. Procedure....2804
5. Charge 2804

1. Amendment.—*See* notes under Section 449.

2. Mens rea—*Mens rea* must be present in the mind of the accused, when he entered the property. 1980 Cr LR 187.

3. Trespass—When accused entered into his parental house and inflicted injuries on head of deceased and said house was not inaccessible to accused and his family members, no offence of criminal *trespass* is made out. *Har Chand* v. *State of Rajasthan*, 1997 Cri LJ 345 (Raj).

In an Orissa case, the accused persons entered the house of prosecutrix while she was alone in the house one of the accused stood in verandah but the other accused entered the room and raped her. It was found that accused who entered the room and raped the prosecutrix had already expired and accused who had not taken active part in commission of rape and ingredients of offence under Section 450 were also not proved by the prosecution. It was held that acquittal of accused for charges under Section 376/450 was justified. *State* v. *Nirakar Panigrahi*, 2003 CR LJ 4399 (Orissa).

4. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable—Triable by Court of Session.

5. Charge.—Same as in Section 449, *ante*, with alteration as to the sentence.

* * * * *

Sec. 451. House-trespass in order to commit offence punishable with imprisonment.—Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine ; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

Synopsis

1. Scope 2805
2. Sentence 2807
3. Procedure....2807
4. Charge 2807

1. Scope.—If the entry in a house made with the consent of the owner and possessor of the house, no offence under this section can be deemed to have been committed. 15 Cr LJ 351. Where the accused was found in the complainant's house at night, having gone there with the intention of visiting the complaint's daughter-in-law, a woman of loose character, and probably with her connivance, *held*, that he was not guilty of an offence under Section 456 ; *see* also 19 All 74 : 20 Ind Cas 622 ; 1 Weir 534. In order to constitute an offence under this section all the facts necessary to constitute the offence of simple house-trespass must first be established and it must be further shown that the house-trespass was committed for the purpose mentioned in this section. 41 All 587 ; 1 Weir 535 : 1 Weir 537 ; 10 Cr LJ 410. A conviction under this section is bad where the house-trespass for an offence was committed with the connivance of the owner. 1 Weir 534 ; Colm Dig Cr 58 of 1876. Where during the absence of the complainant, the accused entered his house with his wife's consent in order to commit adultery with her, *held*, that the accused was guilty of the offence under Section 451, IPC. 8 PWR Cr 1921 : 22 Cr LJ 118 : 59 Ind Cas 550 ; 22 Cr LJ 266 : 60 Ind Cas 666 : 89 Ind Cas 319 : 26 Cr LJ 1343 ; 3 UPLR 18 : 60 Ind Cas 666 : 22 Cr LJ 226. To constitute an offence under Section 461, an offence under Section 448 must be proved first. The offence contemplated must be found. 20 Cr LJ 347 : 17 ALJ 800 : 50 Ind Cas 827. "Offence" means any offence punishable under the Indian Penal Code. AIR 1931 Lah 405 : 1931 Cr C 645 : 32 Cr LJ 732 : 131 Ind Cas 381.

Where the accused was proved to have stepped into an open courtyard in front of a house and it appeared that some thorny bushes were placed round the courtyard which are put down more to indicate its extent rather than to prevent entry. *Held*, that the place was not a building, and that consequently a conviction under Section 452, I.P. Code, was not sustainable. 26 ALJ 855 : 110 Ind Cas 798 : 29 Cr LJ 766. A man who enters the house of another at night with intent to commit adultery with his wife is guilty of an offence under Section 451, and if in such a case it is shown that the husband was at the time of the occurrence absent from the house in the legitimate pursuit of his occupation, it may safely be presumed that he neither consented to nor connived at any adultery or immorality on the part of his wife. 89 Ind Cas 319 : 26 Cr LJ 1343 : AIR 1925 Lah 635.

Accused entering house of a person with the common intention of abducting his wife and the woman was abducted by the accused. *Held*, that the accused was guilty under Section 451, and not under Section 454. 1954 All LJ 237 : 1954 Cr LJ 507. It is clear from the wording of Section 451 that the very entry must be with a view to commit an offence punishable with imprisonment. If, at first there is lawful and innocent entry and then an offence is committed after the entry it can not fall under Section 451. Madh BL 1954 Cr 301 : Madh LR 1954 HCR 1636.

The accused had assaulted the deceased and had caused annoyance to him even after they were asked to go out of the house. Thus, the accused were remaining in the property unlawfully to the annoyance of the deceased and with the intention of committing criminal intimidation and insult and they had even assaulted the deceased within the meaning of Sec. 351 I.P.C. Merely because there is no medical evidence to show that the deceased had external injuries on his person it does not follow that the offence punishable under Sec. 451 has not been committed. A close reading of Sec. 451, I.P.C. does not indicate that a person who commits house trespass can be convicted under the section only if he is found guilty of committing any offence punishable with imprisonment. If criminal trespass into a dwelling house is committed with the intention of committing any offence punishable with imprisonment then the offence punishable under Sec. 451, I.P.C. is complete even if the offender does not succeed in committing the offences which he intended to commit. The last part of Section 451, I.P.C. clearly indicates that if the intended offence is theft then it is considered to be a still more aggravated form of house trespass. If a person commits criminal trespass into a dwelling house with the intention of committing an offence punishable with imprisonment and if he succeeds in accomplishing his intention by committing those offences, then he will not only be committing an offence punishable under Sec. 451, I.P.C. but also the other offence which he has committed. Hence, Sec. 451, I.P.C will be attracted even if the trespasser does not accomplish the committing of the other offences punishable with imprisonment which he intended to commit. I need not consider the correctness or otherwise of the decision reported in *Appukuttan vs Prakasan*, 2006 (4) KLT SN 27 since the evidence already discussed above shows that the accused persons remained in the house even after they were asked to get out and this conduct of the accused had evidently caused insult or annoyance to the deceased who was also intimidated and assaulted. Hence, I do not find any error in the conviction recorded by the Court below for the offence punishable under Sec. 451, I.P.C.

The result of the foregoing discussion is that the conviction entered under Section 323, I.P.C is unsustainable and is accordingly set aside. The appellants are found not guilty of the offence punishable under Sec. 323, I.P.C. and are acquitted of the same. The conviction recorded by the Court below under Sec. 451, I.P.C. is however, confirmed. *Appukuttan and Ors. vs. State of Kerala*, 2010 (3) Cri LJ 3186 (Kerala).

Landlord merely going to premises let over and demanding arrears of rent from tenant after asking him to vacate premises without entering the premises. There is no offence under Section 451. 1963 All Cr R 119 : 1963 (2) Cr LJ 543 ; *see* 1971 Cr LJ 1234 (for intention to commit the offence). Where the intention of the accused in making the entry is to do an act which is not an offence, this section will not apply. 1966 Raj LW 460 ; AIR 1968 Ker 21 : 1968 Cr LJ 62. What is house-trespass ? 1974 WLN (UC) 22. No connivance or consent to the act of the accused is to be proved. AIR 1956 Madh B 69 ; 1971 Mah LJ 33 (consent or connivance cannot be proved). 1970 All CR 10 ; 1981 Raj Cr Cas 15 (proof of) ; 1969 AWR (HC) 54 (what constitutes an offence under the section) ; 1969 AWR (HC) 65.

FIR which was filed by complainant disclosing committment of some offence by petitioner to be investigated by police. It was held that FIR cannot *be* quashed at this stage. *Shiv Ram* v. *State*, (1995) 1 RCD 117 (Raj).

The criminal Court is not to decide the rights of parties and has to determine if the accused committed an offence. The truthfulness or falsity of allegations are to be determinated by the trial court after the appreciation of evidence. The power to quash FIR cannot be exercised when *prima facie* ingredients of the offence alleged may justify the framing of charge. Hence petition is dismissed. *Tarlochan Singh* v. *State of Haryana*, (1994) 3 CC Cases 268 (P&H).

Conviction under Section 451, IPC, and under Section 392, IPC, and sentences to run concurrently—Revision petition challenging of the same was filed. It was finally held that where according to MM, the appellants test identification parade was to take place on the specified date. On previous day the accused was taken at the residence of complainant and other witnesses had also seen him. The conducting of test identification parade one after was total out of force and appellant did not rightly participate in such test identification parade. His conduct was fully justified in the circumstances. *Anoop Singh* v. *State*, 1994 (3) CC Cases 141 (Delhi).

2. Sentence.—*Vide* 1978 BLJR 719.

3. Procedure.—Cognizable—Warrant—Bailable—Compoundable with Court's permission—Triable by any Magistrate, if the intended offence is theft—Cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate.

4. Charge.—I *(name and office of the Magistrate, etc.)*, hereby charge you *(name of the accused)* as follows :—

That on or about the...... day of....... at.....you committed house-trespass by entering into (or remaining in) the building of *AB* used as a human dwelling (or for the custody of property) in order to commit the offence (or theft), and that you thereby committed an offence punishable under Section 451 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 452. House-trespass after preparation for hurt, assault or wrongful restraint.—Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Cases 2807
2. Procedure......2808
3. Charge 2808
4. Conviction......2808
5. Evidence and proof......2808
6. Proof of house trespass and attempt to rape 2811
7. Delay in lodging—When not fatal 2811

1. Cases.—Collection of *lathis* and brickbats on the property unlawfully entered is sufficient proof of threatening behaviour. AIR 1928 Pat 124. Where no further fact is proved than house-trespass a conviction under this section is bad. 38 CLJ 161 : 25 Cr LJ 168 : 76 Ind Cas 292. Criminal trespass were committed with object of interfering with religion is not to be lightly treated. AIR 1935 All 647.

For a conviction under Section 452 ; it is necessary to prove that the dominant intent of the accused was to cause hurt or to assault or to wrongfully restrain any person. AIR 1960 MP 24 : 1959 Jab LJ 570 : 1960 Cr LJ 88.

The sentence of two year's rigorous imprisonment cannot be considered to be excessive when one of the offenders was armed with a pistol and two of them were armed with spears. AIR 1956 Punj 122 : ILR 1956 Punj 119 : 1956 Cr LJ 654.

There must be clear evidence of preparation for causing hurt to sustain a conviction under Section 452 of the Penal Code. The fact that a person enters another man's house and commits an assault does not necessarily presuppose such preparation for it may be a case post *ergo propter hoc*. 1964 Raj LW 524 ; AIR 1960 MP 24 : 1959 Jab LJ 570 (for ingredient of the offence). About sentence *see* AIR 1981 SC 2008 : 1981 Cr LJ 1689 ; AIR 1982 SC 145 : 1982 Cr LJ 1965 ; AIR 1983 SC 654 : 1983 Cr LJ 1043 ; (1980) 21 Guj LR 443 ; AIR 1972 Pat 50.

Where accused was tried unrepresented, it was held that there is violation of fundamental right and trial is vitiated. 1987 Cr LR (MP) 96.

2. Procedure.—Cognizable—Warrant—Not bailable—Triable by any Magistrate.

3. Charge.—I *(name and office of Magistrate, etc.)*, hereby charge you *(name of the accused)*, as follows :—

That on or about.........day of.......at..........you committed house-trespass by entering into (or unlawfully remaining in) the building of AB used as a human dwelling, having made preparation for causing hurt to the said *AB* (or for assaulting or wrongfully restraining the said AB or for putting the said *AB* in fear of hurt or assault, or wrongful restraint) and that you thereby committed an offence punishable under Section 452 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

4. Conviction.—When complaint was lodged with police and complainant was medically examined, case investigated, challanged and tried—Accused who was respondents were convicted under Section 452, read with Section 34, and Sections 323/24, IPC, by Addl Sessions Judge—State not filed any appeal but complainant filed present revision petition against inadequate sentence awarded by trial court. It was finally held that there is no reliable evidence on record that there was any fracture underneath the head injury of the complainant. In view of the circumstances of the present case, the trial Court has rightly held that no offence under Sections 307. or 307/34, IPC. was made out against accused. Hence, conviction under Sections 452 and 323, read with Section 34, IPC, was right and no interference is warranted. *Dhan Raj* v. *Rajesh*, (1994) 2 SLJ 996 (P&H).

5. Evidence and Proof.—Evidence implicating accused is doubtful. The absence on light of the spot of occurrence and existence of bad blood between accused and one principal witness creates doubt about petitioner involvement in crime. Hence, conviction is set aside. *Adikanda Muni* v. *State of Orissa*, (1995) 8 OCR 536 (Ori).

Grievous injuries caused by sharp-edged weapon. It was held that there was no need of corroboration by independent witnesses. *Bihari Lal* v. *U.T. Chandigarh*, (1994) 2 CC Cases 331 (P&H).

Acquittal—Doubtful evidence. On the date of occurrence, according to the prosecution witnesses, it was raining and the dead body was kept under the Chappar. The prosecution failed to obtain an explanation from the Autopsy Surgeon as to how he had opined that death had taken place 3-4 days prior to his post-mortem examination although he examined the dead body within 41 hours from the time of occurrence.

It is furthermore evident that all the prosecution witnesses stated that all the accused persons had fired from the respective firearms. According to them at least 7 shots were fired; 3 shots had hit the person of the deceased. If that be so, more than one gun must have been used. Appellant, as noticed hereinbefore, is said to have been fired a shot from his licensed gun. Its use, however, has not been established by the prosecution as the report of the ballistic expert is silent in that regard. The empties which were found at the spot had not been examined by any ballistic expert. The empties which were recovered from the dead body were not matched with the gun allegedly used.

We may notice that two metallic pellets were recovered from the dead body. Empties had not been shown to the expert; even the attention of the Autopsy Surgeon was not drawn thereto. Although shots were said to have been fired from a distance of 2-3 paces, no blackening or charring was found to be present. If the shots were fired from a close range, it was expected that blackening and charring would have been noticed by the Autopsy Surgeon at the entry point.

Learned Sessions Judge and the High Court, with respect, failed to apply their mind as regards the time of lodging of the FIR. The Head Constable attached with Police Station who was examined as PW-3 before the learned trial Judge stated that the FIR was lodged at 4.45 a.m. and he had recorded the same immediately. According to him, the special reports were sent by 6.00 a.m. through a constable. However, the Investigating Officer did not say so. As we have noticed hereinbefore, he, in his evidence, categorically stated that he had recorded the FIR at 9.30 p.m. No evidence had been brought on records to show that investigation had started on 16.08.1979. A site plan was prepared but it does not bear any date. The prosecution has not explained as to why the FIR was sent to the Court of Chief Judicial Magistrate on 17.08.1979 and why the dead body was not sent for post-mortem on 16.08.1979 itself.

The High Court, in our opinion, committed a serious error insofar as it proceeded on the basis that shots fired by the appellant caused the fatal injury. The High Court did not analyze the evidence on record as to who caused the other firearm injuries. If the prosecution witnesses, who were said to be the eye-witnesses, were to be believed, 6 out of 7 accused could not have been acquitted and particularly those who had direct enmity with Mewa Ram and his sons. Although Suraj Pal (PW-2) son of Ganga Singh denied the suggestion that scribe of the FIR who was admittedly a resident of different village (said to be at a distance of 10 kilometers) from the place of occurrence, the prosecution had not explained as to why he was not examined. If he was present in the village it was expected that he also had witnessed the occurrence, as his son was said to be an eye-witness. It is difficult to believe that in case of this nature the investigation did not start immediately. Inquest report, preparation of seizure memo etc., which were to be carried routinely, and as such there was no reason as to why they were not brought on record.

While examining the original records of the case, we have noticed that some interpolations have made in the records maintained at the Police Station. The High Court, in our opinion, committed a serious error in drawing an inference that appellant had rightly been held guilty for commission of offence of murder of Ram Rakshpal as animosity between the parties was proved. It failed to notice that there is nothing on record to show that the appellant had been bearing any animosity against the deceased. On the other hand, other accused were having animosity towards the deceased. Mewa Ram and his family.

Furthermore, the High Court did not pose unto itself the correct question, namely, the time of lodging the FIR, *i.e.*, whether it had in fact been lodged at 4.45 a.m. or 4.45 p.m. If it was lodged at 4.45 p.m. the entire edifice of the prosecution case would fall to the ground.

Delay in lodging the First Information Report has a great importance in a case of this nature. Enmity between the parties stands admitted. The prosecution case proceeded on the basis that immediately after occurrence and after shifting the dead body under a shed, the informant got the First Information Report scribed by Ganga Sahai and immediately thereafter proceeded on foot to the Police Station. If this part of the story is correct, the prosecution's case would not be subject to much doubt. But if the scribe of the First Information Report was residing in a separate village which is 10 kms. away from the place of occurrence, and it was at that place the FIR was scribed whereafter PW-1 arrived at the Police Station, it would impossible for him to reach by 4.30 in the morning. The prosecution did not examine the scribe of the First Information Report although his son has been examined as an eye-witness. If he was residing at the relevant time in the village where the incident had taken place, it was expected that either he had witnessed the occurrence or had reached the place of occurrence immediately after the accused fled away. The prosecution, therefore, should have made attempts to clarify this anomaly.

Indisputably, there exists a discrepancy as regards timing of the lodging of the First Information Report PW-3, Head Constable, testified that it was lodged at 4.45 a.m. Records, however, show otherwise. In the FIR, it is shown to have been lodged at 4.45 p.m. As noticed hereinbefore, there are some interpolations but according to the Investigating Officer, he recorded the First Information Report at 9.30 p.m. on 16.08.1979.

Moreover, if the Fist Information Report was lodged early in the morning, there was absolutely no reason as to why the investigation did not start immediately thereafter. If Head Constable is correct that the copies of the First Information Report had been sent to all concerned including the Court, there was absolutely no reason as to why the same would reach the Court on the next date. We also fail to comprehend as to why the dead body was sent for post mortem only on 17th instead of 15th itself. The seizure memo does not contain any date. The original inquest report is not on record.

Furthermore, except the appellant all other accused have been acquitted. The High Court, therefore, did not rely upon the prosecution case in its entirety. While doing so, unfortunately, the High Court did not consider these vital aspects of the matter which were crucial for determination of the issue. *Om Prakash vs. State of U.P.*, AIR 2009 SC 944 : 2009 (1) Crimes 183 (SC) : 2008 (17) SCR 475 : 2008 (13) JT 466 : 2008 (16) Scale 158 : 2009 Cr LJ 782.

It is true that witness/PW. 6 admitted in her cross examination that she was residing in Gorakhpur in connection with the education of her minor daughter. But she also stated that she very often comes to her village to look after cultivation of lands and household affairs. It is in her evidence that she came to the village about 4-5 days prior to the occurrence. It is an admitted fact that deceased, husband of are real brothers and residing in the same house in the village, but in separate portions. Bichari Singh has interest in the lands possessed by the family in the village. There is nothing improbable in witness frequently visiting the village and staying in the house at her own convenience. It is relevant to note that the Investigating Officer stated that he visited the spot and examined witness/PW. 6 along with other witnesses. Therefore, there is no reason to disbelieve her statement that she was very much present on that fateful night at the scene of occurrence.

Learned Senior Counsel further contended that absence of injuries on the person of witness makes her presence at the scene of occurrence doubtful. This aspect of the matter has been clearly explained by PW. 6 who was subjected to very rigorous cross examination that when she came out of her room to see as to what was happening, the appellants Moti Lal and Virendra Singh after spotting her, chased her and she ran away and re-entered into her room and bolted the doors from inside. Two shots were fired aiming at her out of which one hit the door and the other went through the window hitting the inner wall of the room. She saved herself from those two shots aimed at her. We do not find any reason to disbelieve her evidence in this regard as to how she escaped from getting injured in the melee. *Moti Lal vs. State of Uttar Pradesh*, AIR 2010 SC 281 : 2010 (1) SCC 581 : 2009 (4) Crimes 276 (SC) : 2009 (14) JT 569 : 2009 (14) Scale 323 : 2009 (7) Supreme 632 : 2009 (8) SLT 668.

6. Proof of house trespass and attempt to rape.—Where the statement of the prosecutrix is self contradictory, self-destroying and non-confidence inspiring and there is delay in lodging the FIR and the finding of the semen in vaginal swab of the prosecutrix or blood traces or semen on her clothes is of no help to the prosecution because of the fact that at the relevant time she was admittedly sleeping with her husband and as the accused are married persons the finding of semen in their pants is also of no help to the prosecution, the charges against the accused are unsustainable. *Shobha Ram* v. *State*, (2004) 4 Crimes 165 (HP).

7. Delay in lodging—When not fatal.—No doubt lodging of a First Informing Report at the earliest possible opportunity is desirable. But, the Courts cannot also ignore the ground realities that the relatives of the deceased would give priority to the treatment of a severely injured person. All attempts would first be made to save his life. The action on the part of the prosecution witnesses, in our considered opinion, in giving priority to the treatment to the injured was wholly justifiable. *Padmanaban vs. State*, AIR 2010 (SC) 47 : 2009 (10) JT 172 : 2009 (12) SCR 252 : 2009 (10) Scale 526 : 2009 (6) SLT 751 : 2009 (5) Supreme 763.

* * * * *

Sec. 453. Punishment for lurking house-trespass or house-breaking. —Whoever commits lurking house-trespass or house-breaking, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

Synopsis

1. Notes 2812
2. Sentence 2812
3. Procedure 2812
4. Charge 2812

1. Notes.—Cumulative sentence under Sections 453 and 379. is illegal. 6 WR C 62. Mere trespass by night is not enough. But active step taken by the accused t conceal himself must be proved to sustain a conviction for lurking house-trespass. 2 PR 1916 Cr : 44 PWR 1916 Cr : 17 Cr LJ 304 : 123 PLR 1916 : 35 Ind Cas 176 ; (197 82 CWN 341 : 1978 Cr LJ (NOC) 130 (spitting up of an aggravated offence into separat in minor offences is prohibited) ; 1971 ALJ 4 (for proof of breaking house-trespass).

2. Sentence.—1980 Raj Cr C 144 (first offender).

The accused alongwith others allegedly entered into house to commit dacoity. H was convicted and awarded sentence of three years but accused appealed for reductio of sentence. It was held that sentence imposed was lenient and could not be reduce because the manner in which accused and his associate had attacked the polic constable showed their indifference towards the law and their unruly behaviour tendin to hooliganism. *Mohd. Ali Mohd. Siddique* v. *State*, 2003 Cr LJ 4422 (Bom).

3. Procedure.—Cognizable—Warrant—Notbailable—Not compoun-dable—Triabl by any Magistrate.

4. Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of th accused*), as follows :—

That on or about the.......day of....at......you committed lurking house trespass (o house-breaking) by entering into a building belonging to *AB* and used as a huma dwelling, and that you thereby committed an offence punishable under Section 453 c the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 454. Lurking house-trespass or house-breaking in order t commit offence punishable with imprisonment.—Whoever commit lurking house-trespass or house-breaking, in order to the committing of an offence punishable with imprisonment, shall be punished wit imprisonment of either description for a term which may extend to thre years, and shall also be liable to fine ; and if the offence intended to b committed is theft, the term of the imprisonment may be extended to te years.

STATE AMENDMENT

Tamil Nadu.—(Amended by Tamil Nadu Act No. 28 of 1993, Section 4).

Section 454 of the principal Act, shall be renumbered as sub-section (1) of tha section and after sub-section (1) as so renumbered, the following sub-section shall b added, namely:—

"(2) Whoever commits lurking house-trespass or house-breaking in' any building used as a place of worship in order to the committing of the offence of theft of any idol or icon from such building, shall notwithstanding anything contained in sub-section (1), be punished with rigorous imprisonment which shall not be less than three years but which may extend to ten years and with fine which shall not be less than five thousand rupees :

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than three years."

Synopsis

1. Notes..2813
2. Private defence..2813
2. Procedure..2813
3. Charge..2813

1. Notes.—"Any such trespass, in order to the committing of any offence punishable with death or with transportation for life is punishable by Sections 448 and 459."—*Morgan and Macpherson, see* also 8 MHCR App 6 ; .100 Ind Cas 120 : 28 Cr LJ 248 : AIR 1927 Mad 343 ; 10 All 146. Offences under Sections 454 and 455, aggravated form of criminal trespass, (1983) 23 Del LT 121. The charge under Section 454, could not be established in 1981 Cr LR (SC) 218 : 1981 Cr App R (SC) 278 ; AIR 1964 SC 986 (meaning of the section) ; AIR 1965 Orissa 212 (proof required).

2. Private defence.—Accused entered office room of deceased, threw chilly powder into his eyes, picked up an iron hammer as well as a brick lying there and assaulted deceased in presence of complainant, a worker engaged by deceased. Trial Court finding evidence cogent, credible, recorded conviction of appellant. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

When the factual scenario is examined in the background of the principles set out above, the inevitable conclusion is that the appeal is without merit, deserves dismissal which we direct. *Arun vs. State of Maharashtra,* 2009 CrLJ 2065 : 2009(2) Crimes 6(SC) : 2009(4) SCC 615 : 2009(3) Scale 803 : 2009(4) JT 78 : 2009(3) SLT 220.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable—Triable by any Magistrate.

4. Charge.—*See* Section 451, *ante,* with necessary alteration.

* * * * *

Sec. 455. Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint.—Whoever commits lurking house-trespass, or house-breaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Notes 2814
2. Procedure 2814
3. Charge 2814

1. Notes.—The offence of house-breaking is complete when entry into the house is effected. 28 Cr LJ 554 : 102 Ind Cas 490 : AIR 1927 All 586. Original intent could be gathered from the acts of the accused. 1962 MPLJ (Notes) ; 337 AIR 1952 Hyd 38. Common object of committing lurking house-trespass is punishable under Section 455. AIR 1978 SC 1761 : 1979 Cr LJ 133 : (1979) 4 SCC 312.

2. Procedure.—Cognizable—Warrant—Not bailable—Not compound-able—Triable by Court of Session. Presidency Magistrate or Magistrate of the first class.

3. Charge.—*See* Section 452, *ante*, with necessary alteration.

* * * * *

Sec. 456. Punishment for lurking house-trespass or house-breaking by night.—Whoever commits lurking house trespass by night or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Synopsis

1. Intention 2814
2. Procedure 2816
3. Charge 2816
4. Conviction 2816

1. Intention.—In a prosecution for lurking house-trespass by night under this section, the burden of proving what his intent was lies upon the accused. 29 All 49 ; 42 PR 1881. The presence of an accused in house at night shows his guilty intention and it is for him to rebut the presumption. 13 ALJ 625 ; 16 ALJ 153. *See* also 14 PR 1883 Cr ; 50 PLR 1919, 49 Ind Cas 103. To sustain a conviction under this section it is necessary to specify the intention in the charge. 4 Mys LJ 190, 50 PLR 1919. Where the accused was found in the complainant's house at night having gone there with the intention of visiting the complainant's daughter-in-law, a woman of loose character, and probably with her connivance, *held*, that he was not guilty of an offence under Section 456, IPC. 12 PR 1898 Cr ; 14 ALJ 719 : 38 All 517. A Magistrate should not convict under Section 453, when an offence punishable under Section 459, IPC, is established. UBR (1897-1901), Vol 1, 130. An accused, who having been convicted of an offence under Section

456 is again convicted of an offence under Section 457 of the Penal Code, is not liable to imprisonment and whipping. 14 CPLR 16. House-trespass or house-breaking is punishable with whipping, only when committed in order to commit an offence punishable with whipping. UBR (1897-1901), Vol I, 354. An accused person who was being tried on a charge under Section 457, for house-breaking with intent to commit theft, could not be convicted under Section 456, IPC, without the amendment of the original charge. 17 CWN 696 : 13 Cr LJ 224 : 14 Ind Cas 320. Where an accused was charged and convicted under Section 457, the Appellate Court cannot alter the conviction under Section 455. 1 Pat LT 221 : 21 Cr LJ 493 ; 2 Pat LT 140. The mere non-production of the owner or person in actual possession of house does not vitiate conviction under Section 456. AIR 1924 All 764 : LR 5 All 127 Cr. It is not an inflexible rule that a person charged under Section 457, can never be convicted under Section 456. 20 CWN 1075 : 17 Cr LJ 424 : 44 Cal 358 : 35 Ind Cas 984. To enter the house of a widow for the purpose of carrying on an intrigue with her is not an offence. 50 PLR 191 ; *see* also 38 All 517 : 17 Cr LJ 419 : 14 ALJ 619 : 35 Ind Cas 979. Where one is found lurking at night inside another's house, a perfect stranger to him, without any apparent business, the Court can infer a guilty intention under Section 441, IPC. 19 Cr LJ 243 : 16 ALJ 157 : 44 Ind Cas 35. Where a person enters the house of a widow who is in possession of it by invitation to commit adultery with her and actually committed adultery, he cannot be punished under this section. AIR 1941 Pesh 79 : 43 Cr LJ 96 : 119 IC 870.

The accused opened the door of a room and peeped in, his intention being to force an illicit intrigue on one of the women sleeping in the room. *Held*, he was guilty under Section 456, IPC. 6 Pat LT 588 : 26 Cr LJ 954 : 87 Ind Cas 106 : AIR 1925 Pat 713. A Court under relevant circumstances, come to the necessary conclusion that the entry of an accused in a house was effected with an intent such as is provided by Section 441. Penal Code. The intention may be determined as well as from direct-evidence as from the conduct of the accused and the attendent circumstances. AIR 1962 Ker 81 : 1961 Ker LJ 844 : 1962 (1) Cr LJ 433. To sustain a charge under Section 456, a Court must come to a definite inference as to what was the particular intention with which the entry was effected. ILR 1956 Cut 502 : 22 Cut LT 475 : 1975 Cr LJ 286.

For a conviction for the offence of house-trespass under Section 456 with intent to commit adultery, it is necessary to establish the ingredients of Section 497, in regard to the intended act of sexual intercourse. AIR 1956 Madh BLR 1955 Cr 318 : Madh BLJ 1955 HCR 1515 : ILR 1956 Madh B 153 : 1956 Cr LJ 231.

Where the accused did not take any precaution to conceal his presence from one who might be said to have right to exclude the accused from house, the accused can not be convicted of offence of lurking trespass. Madh BLR 1954 Cr 301.

Where the entry was with the intent to commit an offence under Section 441, conviction under this section will be proper provided that no prejudice is caused to the accused. AIR 1962 Ker 81 : (1962) 1 Cr LJ 433 : 1962 MPLJ Note 337 (conviction under Sections 445 and 456, will not be vitiated by any failure to specify intention in the charge). Even if the accused knows that his presence would cause annoyance to inmates, he can not held guilty of having entered another man's house with the intention of causing annoyance. 1982 Cut LT 595.

2. Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate.

3. Charge.—Same as in Section 453, with necessary alterations. And I hereby direct that you be tried on the said charge.

4. Conviction.—Where the offence was under Section 456, IPC.—Conviction was held which was challenged in revision petition. It was held that the decision arrived at by both the courts below on the basis of evidence adduced in the case is correct. No case for interference in order of conviction is made out. *Sundara* v. *State of U.P.*, 1995 JIC 580 (Alld).

* * * * *

Sec. 457. Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment.—Whoever commits lurking house-trespass by night, or house-breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine ; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

STATE AMENDMENT

Tamil Nadu.—(Amended by Tamil Nadu Act No. 28 of 1993, Section 5).

Section 457 of the principal Act, shall be renumbered as sub-section (1) of that section and after sub-section (1) as so renumbered, the following sub-section shall be added namely, :—

> "(2) Whoever commits lurking house-trespass by night or house-breaking by night in any building used as a place of worship in order to the committing of the offence of theft of any idol of icon from such building, shall notwithstanding anything contained in sub-section (1), be punished with rigorous imprisonment which shall not be less than three years but which may extend to ten years and with fine which shall not be less than five thousand rupees :
>
> Provided that the court may, for adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment for a term of less than three years."

Synopsis

1. Adultery 2817
2. Scope 2817
3. Proof of offence of lurking house trespass. 2819
4. Sentence 2820
5. Procedure 2820
6. Charge 2820
7. Appeal 2820
8. Acquittal 2820
9. Conviction 2821

1. Adultery.—Where it was proved to the satisfaction of the Court that the accused entered the complainant's house in order to have sexual intercourse with the complainant's wife, and it was further proved that he did so without the complainant's consent, *held*, that he was properly convicted under this section. 22 All 82 ; *see* also 2 Weir 235 ; UBR (1897-1901) Vol 1, 335 ; Rat Un Cr C 689 ; *see* AIR 1956 MB 69 : 1956 Cr LJ 231 (the prosecution must prove that the accused had the knowledge or had reason to believe that the woman was the wife of another man, with whom he intended intercourse without the consent or connivance of the husband.

2. Scope.—To sustain a conviction under this section, it is necessary that the Court should be in a position to say which specific offence the accused intended to commit. 1 Weir 533. Where the accused broke open into a house during the owner's absence, assaulted his servants and took forcible possession of it with the object of establishing their title to the house. *Held*, that the accused must be deemed to have intended that their act was likely to annoy the complainant and that they were rightly convicted under Section 457, Penal Code. 9 Ind Cas 152 : 21 MLJ 161 ; 9 MLT 283 : 12 Cr LJ 30. Where soon after a house breaking by night had been committed and property stolen from the house the property was found in the possession of the accused and his explanation as to the same if found untrue, the presumption that Section 114 of the Evidence Act raises therefrom is sufficient to warrant a conviction under Section 457 of the Penal Code. AWN 1882, 224. Burglary is serious offence and deserves deterrent punishment. 137 Ind Cas 716 : 33 Cr LJ 500 : 33 PLR 215 : 1932 Cr C 323 : AIR 1932 Lah 258 ; AIR 1933 Oudh 117 : 34 Cr LJ 649 ; 12 Mys LJ 286. Separate consecutive sentences under Sections 457 and 380, cannot be passed. AIR 1930 Pat 385 : 31 Cr LJ 492 : 1930 Cr C 767 : 123 Ind Cas 393 ; *see* also AIR 1926 Pat 367 : 5 Pat 864 : 27 Cr LJ 976 : 7 PLT 794 : 96 Ind Cas 528 : AIR 1929 Mad 846 : 57 MLJ 548 : 1929 Cr C 614. Where the accused puts his hand at the top of the railing the offence of house-trespass is complete. AIR 1934 All 833 : 1934 Cr C 1027. Where grievous hurt is inflicted by the accused at the courtyard, an offence under this section is complete. AIR 1934 Cal 557 : 38 CWN 446 : AIR 1934 Cal 193. Accused found in possession of stolen property soon after burglary is guilty under this section. AIR 1933 Oudh 117 : 34 Cr LJ 649 : 1933 Cr C 238 : 10 OWN 47.

An offence under the latter part of the above section of the Penal Code is more serious and is punishable with very severe sentence especially when committed by an old offender. UBR (1892-1896) Vol I, 274. A conviction under this section on inconclusive evidence should be set aside. 79 PLR 1915 ; 28 PWR 1915 Cr. When a person who has been previously convicted of an offence punishable under Chapter XXII, Penal Code, is convicted subsequently under Section 457, Penal Code. The sentence which can be passed by a Magistrate, should not exceed more than two years. 6 MHC App 2. Accused was charged with having committed lurking house-trespass by night by entering into the cattle enclosure of the complainant with the intent to commit theft of his cattle and he was convicted for the same under Section 457, IPC. 24 PR 1914 Cr. When the charge is that the accused committed an offence under Section 457, IPC, with a view to commit an offence under Section 457, IPC, it is only fair to him that the offence with which he is charge, should be fairly stated, in order that he may meet it. 32 PLR 1902 : 31 PR 1901 Cr. The accused was convicted of house-breaking by night and of house trespass in respect of the same acts *Held*, that the second head of the charge was superfluous inasmuch as it involved the same intention substantively as the first, which intention ought not to be applied to support two different charges. Rat Un Cr C 302 : Cr Rag 50 of 1886. Burglars digging a hole in a wall but not digging it through owing to interruption by third parties, are guilty of an attempt to commit an offence under this section. 15 Bom LR 554 : 14 Cr LJ 451 : 20 Ind Cas 611 : 37 Bom 553. The word "house" or "building" used as "human dwelling" in this section do not compounds. An entry into a compound with intent to commit theft is punishable only as trespass and attempt to commit house breaking with the intent above mentioned. Rat Un Cr C 484. The entry of an ASI attached to *thana* is a legalised act only for the purpose of carrying out official duties and not for perpetration of an illegal act. Therefore, where if the prosecution case is true and the accused attached to the *thana* as an ASI, entered into the office room of the *thana* at night taking precaution to conceal his entry and participated in the commission of the offence of the theft of the money deposited in a safe in the *thana* by post office, it would nearly come within the scope of Section 457, Indian Penal Code. AIR 1957 Assam 168 : 1957 Cr LJ 1291. An offence under this section is ordinarily more serious than one under Section 380, and it is expedient that a person who commits an offence under the former should be correctly convicted and adequately punished. UBR (1892-1896) Vol I, 273. Where a cattle shed that was used for the custody of agricultural implements was broken open, *held*, that a conviction under Section 457, Penal Code, is not illegal. 18 Cr LJ 469 : 39 Ind Cas 309. Where a police man whose duty it was to protect the lives and property of the subjects of the Crown was convicted of a serious offence of burglary, sentence of five years' rigorous imprisonment was held not excessive. AIR 1930 Lah 667 : 1930 Cr C 811. Before convicting a person of an offence under Section 457, when the offence charged is house-trespass with intent to commit adultery, the Court has to be satisfied that there is no consent or connivance by the husband. 25 Cr LJ 1186 : 82 Ind Cas 50. Unless there is actual entry there cannot be house-breaking. So if the accused was prevented from entering the house, he should be convicted under Sections 511 and 457, IPC. 29 PLR 54 : 106 Ind Cas 340. Going on roof of the house is not entering the building. 34 PLR 906. As regards when evidence is not sufficient *vide* 16 NLJ 236 ; 143 Ind Cas 73 : 13 OWN 107 : 1933 Cr C 318 : 34 Cr LJ 496 : AIR 1933 Oudh 163. Release after admonition for offence of house-breaking is illegal. AIR 1935 Mad 157. The offence of house-trespass will be completed by the accused putting his hand across the top of the railings of a house. AIR 1934 All 833 : 36 Cr LJ 180. The accused committed lurking house-trespass and also caused grievous hurt in a courtyard but it was not proved that the courtyard was a part of the house, *held*. that he could be convicted only under Section 451, and not under Section 459. AIR 1934 Cal 552 : 38 CWN 446 : 36 Cr LJ 619. The evidence of a very weak nature even in a case under Section 110, Cr. Pro. Code. 38 Cr LJ 889. Theft frequently follows an offence under Section 457, but it cannot be said that it is an essential ingredient of that offence. All that is required to complete the offence under this section is that the burglar or house breaker by night should have an intention to commit theft. AIR 1936 All 337 : 58 A 695 : 163 IC 253. The mere recovery of a shirt alleged to belong to one of the complainants from the person of the accused charged under this section is not sufficient for his conviction under this section. AIR 1938 Lah 253 : 39 Cr LJ 252. To convict an accused under this section the accused must have taken precaution to conceal presence. AIR 1940 All 259 : 41 Cr LJ 628 : AIR 1940 Pat 14 : 40 Cr LJ 833. Where the temples were broken into and the idols were removed by the accused for celebrating a festival and the taking was not dishonest, no offence under this section has been committed. AIR 1941 Mad 71 : 42 CrLJ 263. The offence of lurking house-trespass or house-breaking is committed whether subsequent offence is committed or not. This section looks merely to the object with which the house-trespass or house-breaking is committed: it does not take into consideration the offence, if any, committed thereafter. AIR 1942 Oudh 214 : 43 CrLJ 252.

Where the accused had already effected his entry into the house after making a hole through the wall of the house, the offence of house-breaking and trespass was completed and any grievous hurt subsequently caused by the accused could not be said to be a grievous hurt caused while he was committing lurking house-trespass within the meaning of Section 459, IPC. He would be guilty under Section 457. 1963 All Cr R 30 : 65 Punj LR 17.

Consent or connivance by husband negatives offence of house-trespass for committing adultery. AIR 1925 Cal 160. Where the accused was a young man of 21 years of age and was subjected to severe beating by the complainant, the High Court reduced the sentence. 26 PLR 777. Entering house by invitation or connivance of a woman living in the house with whom the accused was carrying an intrigue is no offence if he desired his presence not to be known to person in possession. AIR 1925 Lah 23. A conviction under Section 457 cannot be laid when it is proved that the accused had on his body valuable properties of his own, and the entrance or the house remained closed and unbroken, and he sets up a story he went to house to negotiate marriage and the same is corroborated by an inmate of the house. 25 Cr LJ 716 : 86 Ind Cas 156 : 26 PLR 31 : AIR 1925 Lah 459. Where certain accused were convicted under Section 457 on the mere ground that certain articles not capable of identification. were in their possession shortly after a burglary was committed. *Held*, the articles were beyond identification, and unless it is established beyond doubt that the articles in possession of the accused were the same as the stolen ones the conviction should be quashed. 7 Lah LJ 277 : 26 PLR 583 : AIR 1925 Lah 495.

For evidence and proof, *see* 1957 Cr LJ 1231 ; 1956 AMLJ 12 ; ILR 1955 Mys 265 ; (1981) 52 Cut LT 393 ; AIR 1964 SC 286 ; AIR 1964 SC 986; 1983 Cr LJ 130 ; AIR 1960 Punj 286; AIR 1972 SC 1250; Presumption or recovery of recent stolen property ; AIR 1972 SC 2501; 1972 Cr LJ 1696 (presumption under Sec. 114, Il (a) of Evidence Act).

To sustain a charge it must be proved that the petitioner committed either lurking house-trespass or house-breaking. 1979 BLJR 11; 1979 Cr LJ (NOC) 110 ; AIR 1971 SC 1254 : 1971 Cr LJ 1173 (for essential of the offence) ; AIR 1971 SC 1254 : 1971 Cr LJ 1173 (intention to commit criminal assault or abduction is enough for the purpose). For distinction between Sections 457 and 380, *see* AIR 1962 SC 1116 : (1962) 2 Cr LJ 251 : 1981 Cr LJ (NOC) 209 ; 1984 Cr LJ 828 : (1984) 1 Crimes 781.

3. Proof of offence of lurking house trespass.—Where the evidence of the complainant that the accused was caught hold by the members of family of the complainant after he caused injury to the complainant is corroborated by the evidence of the wife of the complainant and other witnesses and by medical evidence, the conviction of the accused under Section 459, IPC is proper since he was arrested from the house of the complainant. *Lalji* alias *Lal Babu* v. *State*. 2004 Cr LJ 2640 (MP) : 2004(18) All Ind Cas 428 : 2004(2) MPLJ 138.

4. Sentence.—*Vide* AIR 1961 Pat 409 : (1961) 2 Cr LJ 540 ; ILR 1966 Cut 363 ; 1979 BLJR 11 : 1979 Cr LJ (NOC) 169 : 1969 Cr LJ 555 ; 1972 All Cr R 98 ; 1975 Cr LJ 1379 ; AIR 1962 SC 1166 ; AIR 1979 SC 493 : 1979 Cr LJ (NOC) 169.

Quantum of sentence may be reduced in revision and was hence reduced to 15 days. *Kundan* v. *State of Rajasthan*, 1994 Cr LR (Raj) 164 : 1994 R Cr C 213.

5. Procedure.—Cognizable—Warrant—Not bailable—Not compound-able—Triable by a Magistrate.

6. Charge.—Same as in Section 451, with necessary alterations.

7. Appeal.—Where there was appeal to Sessions Judge dismissed for want of prosecution maintaining conviction and sentence—Revision petition was filed on sole ground that order was passed without any jurisdiction as there was no provision in Cr PC. It was held that there is absolutely no provision in the Code of Criminal Procedure, to decide the criminal appeal in the manner in which it has been disposed of by the Sessions Judge (Forest). In a case of the present nature the lower appellate court was required to dispose of the appeal on merit and not in a summary manner as has been done in the present case. The order under reference, as such, requires to be set aside as the same has been passed by not properly exercising the jurisdiction vested in the Court of appeal. In view of the foregoing reasons, the present revision petition is accepted and the order under reference passed by the Sessions Judge (Forest) is quashed. The appeal is sent back for disposal to the lower appellate Court on merit, as referred to above. *Rajinder Singh* v. *State of H.P.*, (1994) 2 SLJ 1669 at p. 1670.

8. Acquittal.—Prosecution version was that petitioner arrested from the house of the informant allegedly kept for the whole night after apprehension by informant—Same was belied by informant's statement that petitioner was present in house and FIR was substituted by another one which vitiates the prosecution case as well as the conviction based thereon. It was finally held that prosecution case has not been proved beyond all reasonable doubts hence, entitled to be acquitted. *Hunuman Kanhar* v. *State of Bihar*, (1995) 1 East Cr C 676 (Pat).

The prosecution has failed to prove that the accused respondent entered the house of P.W. 3 Charan Das with an intention to commit theft or any other offence are liable to be confirmed and thus, point No 3 has not been proved by the prosecution and therefore, the findings of acquittal recorded by the learned trial Magistrate are liable to be confirmed and the present State appeal is liable to be dismissed. The judgment of the learned Magistrate is based on correct appreciation of evidence and the reasons which have been assigned by the learned Magistrate are reasonable and plausible and cannot be entirely and effectively disloged or demolished and the Court sitting and hearing appeal against acquittal would not like to disturb the order of acquittal merely on flimsy ground. *State of Rajasthan v. Vinod*, 2002 Cri LJ 1308 (Raj.).

In FIR it was alleged that accused armed with axe broke open door and entered inside living room and caused injuries to the complainant on his leg. The witnesses did not corroborate FIR. It was held that there was no justification to believe that accused entered the room at midnight only to commit an offence under Section 323 and his conviction was not proper. *Mohd. Siddique Hussain* v. *State*, 2003 Cr LJ 1487 (Gau).

The accused allegedly broke open the lock of shop and gave the possession to other accused persons for running a betel shop but evidence on record was in favour of the accused persons. It was held that the accused was entitled to the benefits of doubt. *Raghabachiran Panda* v. *State*, 2003 Cr LJ 1397 (Orissa) : 2003 (2) Crimes 366 : 2003 OCR 109 (Ori).

9. Conviction.—Conviction of offence is not permissible without recording it proper finding that the accused tried to conceal himself. *Janardan Samal* v. *State of Orissa*, 1995 (11) OLR 520 (Ori).

In absence of any evidence on record that accused caused grievous hurt to complainant while committing lurking house trespass, accused was liable to be convicted under Section 457, IPC and under Section 459, IPC. *Hasmal Ullah Khan* v. *State of Uttaranchal*, 2005 Cr LJ 2266 (Uttar) : 2005 (53) All Cri C 920 : 2005(3) East Cri C 244.

Common intention. In the present case, the question is whether the appellant shared any common intention and if so, with whom? Neither there is any charge nor evidence against A-4 that he committed the murder of the deceased in furtherance of common intention shared with A-4. The trial Court as well as the appellate Court found A-4 guilty for the offence punishable under Sec. 302 IPC only. There is no third person involved with whom the appellant could have shared common intention. PW-1 and 2 in their evidence did not attribute any overt or covert act as against the appellant. No circumstances were brought on record from which it could be reasonably inferred that the appellant shared common intention with A-4 and in turn, A-4 committed the murder of the deceased in furtherance of such common intention. There is no evidence that there was a prior meeting of mind developed at the spur of moment and A-4 shot the deceased in furtherance of such common intention resulting in death.

According to the evidence of PW-1 the appellant did not indulge in any overt or covert act except be present at the scene of occurrence. It is true that both of them ran away from the scene of occurrence after A-4 shot the deceased with a pistol in his hand. Even if it be accepted that he was armed with a pistol no reasonable inference could be drawn on the proven facts that he shared common intention with A-4 to commit the offence of murder.

In the present case, there is no evidence of any prior meeting of minds. We know nothing of what they said or did before the attack. It is in the evidence that on being asked by the deceased as to why they entered the house and as to what they wanted: A-4 immediately shot the deceased with the pistol in his hand. Obviously, this was an impulsive act of A-4 and both the Courts rightly found that he was guilty for the offence of committing murder of the deceased punishable under Sec. 302 IPC but the High Court committed a serious error in holding the appellant vicariously liable for the criminal act of A-4.

It is nowhere suggested that appellant indulged in any overt or covert act as such based on which any inference of common intention could be drawn. There is no dispute with the proposition that the common intention can develop and manifest itself at the spur of moment. But the question for consideration is, whether there is any evidence in the present case to indicate that in fact such a common intention was developed between appellant and A-4 and in furtherance of such shared common intention A-4 committed the murder of the deceased. The evidence of PW-1 and PW-2 does not suggest that any such common intention developed on the spur of moment leading to the murder of deceased by A-4. In the circumstances, it would be unsafe to convict the appellant for the offence punishable under Sec. 302 with the aid of Sec. 34 IPC.

In the present case, the FIR shows that at about 9.15 P.M. the appellant and A-4 entered the house and stood there; on seeing them, the deceased got up from his chair and moved towards them "asking them who are they" whereupon A-4 shot the deceased causing bleeding injury due to which deceased fell down, the appellant and A-4 ran away towards the street. The contents of the FIR and the evidence of PW-1 and PW-2 read together make it clear that the appellant was not armed as erroneously held by the High Court. In the circumstances, it would be impossible to draw any inference that A-4 committed murder in furtherance of common intention shared by the appellant. In fact, neither there is any charge nor any evidence even as against A-4 that he shared common intention along with the appellant to commit murder of the deceased. There must be more than one person to share common intention to commit criminal act for attracting the applicability of Sec. 34 IPC. It is clear from the evidence that A-4 did not act conjointly with the appellant in committing the murder. If he did not act conjointly with the appellant, the appellant could not have acted conjointly with A-4.

On consideration of the evidence and the material available on record and in the light of the legal principles referred to hereinabove, it is clear that the accusations made against the appellant making him constructively liable for the criminal act of murder committed by A-4 with the aid of Sec. 34 IPC were not established. So far as the present appellant is concerned, there is no evidence whatsoever available on record to show sharing of any common intention.

We accordingly affirm the judgment of the trial Court acquitting the appellant of the offence punishable under Sec. 302 read with Sec. 34 IPC. Consequently, the judgment of the High Court convicting the appellant under Sec. 302 read with Sec. 34 IPC is set aside. We however, affirm the conviction of the appellant under Sec. 457(1) IPC. The trial Court as well as the High Court convicted the appellant for the offence punishable under Sec. 457(1) IPC and sentenced to undergo rigorous imprisonment for a period of 2 years and to pay a fine of Rs. 500/-, in default, to further undergo rigorous imprisonment for a period of 6 months. No effort has been made before us challenging the conviction of the appellant under Sec. 457(1) IPC. We, accordingly, confirm the conviction and sentence of the appellant under Sec. 457(1) IPC imposed by the Courts below. The appellant however, had already undergone the sentence. Since there is no appeal preferred by the State as against the judgment of the High Court acquitting the appellant of other charges the same is not interfered with. *Arun vs. State*, AIR 2009 SC 1256 : 2008 (15) SCC 501 : 2008 (12) JT 571 : 2008 (17) SCR 279 : 2008 (16) Scale 361 : 2009 (1) Supreme 355 : 2009 (1) SLT 492.

* * * * *

Sec. 458. Lurking house-trespass or house-breaking by night after preparation for hurt, assault wrongful restraint.—Whoever commits lurking house-trespass by night or house-breaking by night, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Synopsis

1. Scope 2823
2. Cases 2823
3. Procedure 2823
4. Charge 2823

1. Scope.—This section only applies to the house-breaker who actually has himself made preparation for causing hurt to any person or for assaulting any person or for wrongfully restraining any person and so on, and not to his companion as well who themselves have not made such preparation. AIR 1923 Lah 509.

2. Cases.—6 Lah LJ 622 ; Madh BLR 1954 Cr 337 ; Madh BLJ 1955 HCR 75 ; AIR 1959 MP 6 ; 1979 MPLJ 200.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compound-able—Triable by any Magistrate of the first class.

4. Charge.—Same as in Section 452, with necessary alterations.

* * * * *

Sec. 459. Grievous hurt caused whilst committing lurking house-trespass or house-breaking.—Whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, shall be punished with *imprisonment for life* or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Amendment 2823
2. Scope 2823
3. Procedure 2824
4. Charge 2824

1. Amendment.—The words in italics were substituted for the words "transportation for life" by Act 26 of 1955, Section 117 and Sch. (with effect from 1.1.1956).

2. Scope.—This section provides for a compound offence the governing incident of which is that either "lurking house-trespass or house-breaking" must have been completed, in order to make the person who commits that offence either by causing grievous hurt or attempt to cause death or grievous hurt, responsible under this section. In other words, the causing of the grievous hurt or the attempt to cause death or grievous hurt must be done in the course of the commission of the offence of lurking house-trespass or house-breaking, and at the time when it is being committed. 8 All 649 ; *see also* 13 CPLR 125. The offence of house-breaking is complete when entry into the house is effected and any grievous hurt subsequently caused by the persons breaking into a house cannot be said to be grievous hurt caused while they were committing the house-breaking. 25 ALJ 516 : 102 Ind Cas 490 : 28 Cr LJ 554 : AIR 1927 All 536. This section applies in case of actual use of lathis in trying to escape after burglary. 11 LLJ 230 : 30 PLR 125 : 30 Cr LJ 838 : 117 Ind Cas 802.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

4. Charge.—I (*name and office of Sessions Judge, etc.*), hereby charge you (*name of the accused*) as follows :—

That on or about the....day of.....at....you, while committing lurking house-trespass or house-breaking caused grievous hurt to *AB*, or (attempted to cause death of *AB*, or grievous hurt to *AB*), and that you thereby committed an offence punishable under Section 459 of the Indian Penal Code, and within the cognizance of the Court of Session (or High Court).

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 460. All persons jointly concerned in lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them.—If, at the time of the committing of lurking house-trespass by night or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with *imprisonment for life*, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Amendment....2824
2. Scope....2824
3. Cases....2825
4. Procedure....2826
5. Charge....2826
6. Sentence....2826

1. Amendment.—*See* notes under Section 459, *ante*.

2. Scope.—This section does not provide for an offence but merely lays down a principle of constructive liability. AIR 1940 Lah 281 : 41 Cr LJ 779 : 189 IC 672. An offence under this section is not an offence which includes theft though it may frequently form part of a transaction which also includes theft. AIR 1936 All 337 : 37 Cr LJ 794 : 58 A 695 : 163 IC 258 Persons causing death at the time of committing lurking house-trespass by night, may also be convicted under Section 302, or Section 304 AIR 1940 Lah 281 : 42 PLR 229; 41 Cr LJ 779 : 189 IC 672. This section is intended to provide for the punishment of persons who were jointly concerned in the committing of the house-trespass or house-breaking altogether irrespective whether they were the persons who caused or attempted to cause grievous hurt. 8 ALJ 575. The expression "at the time of committing house-breaking by night" must be limited to the time during which the criminal trespass continues which forms an element in the house-trespass, which is itself essential to house-breaking and cannot be extended so as to include any prior or subsequent time. 2 PR 1862 Cr ; *see* also 38 Ind Cas 997. The section must be limited in its application to offences committed at the time during which the criminal trespass continues which forms an element in house-trespass which is itself essential to house-breaking and cannot be extended so as to include any prior or subsequent time. 2 Lah 342 : 23 Cr LJ 164 : 65 Ind Cas 628. The provisions of the section must be construed strictly and it is not contemplated that where the principal action done by accused persons is no more than a mere attempt to commit the offences of lurking house-trespass or house-breaking, the section should be applicable. 8 All 649 : AWN 1896, 253 ; *see* also AIR 1924 All 1032 : 1934 Cr C 1339 : 1934 ALJ 1160. This section applies to those persons who have actually committed the lurking house-trespass at night and not to those who may have accompanied them but did not commit the offence. 48 PLR 425 : AIR 1947 Lah 188 : 48 Cr LJ 269. Section 460 makes those, who join the person who voluntarily causes or attempts to cause death or grievous hurt while committing lurking house-trespass or house-breaking at night, liable to enhanced punishment for their own conduct of simply committing such lurking house-trespass by night or house-breaking by night. The person who actually acts in that manner will not be liable for that conduct of his under Section 460, IPC, but will be liable under other section making that conduct an offence. 1953 All LJ 501 : 1953 All WR (HC) 596 : 1954 Cr LJ 168 : AIR 1954 All 99. If on the.evidence, the Court is satisfied that the accused guilty of murder there Section 460 is out of place. *Ibid.*

Where K and two others trespassed into the house of the deceased at night with the purpose of committing robbery and though their object could not have been initially to kill any person during the commission of the robbery, one or the other of them caused the death of the person in the house. AIR 1954 All 99 : 1953 All LJ 501 : 1954 Cr LJ 168. It does not apply to the case of a single individual who alone commits lurking house-trespass and during such commission causes or attempts to cause death or grievous hurt to any person, *Ibid.* Section 460 can be invoked only if from the evidence it is clearly possible to conclude that before the commission of the lurking house-trespass by night or house-breaking by night, the offenders did not have common intention of committing anything other than above mentioned offences and that if during the course of the commission of such an offence one of the person causes death or grievous hurt to any person then only every person jointly concerned in committing lurking house-trespass by night or house-breaking by night shall be guilty of an offence under Section 460. AIR 1954 Mad 152 : ILR 1954 Mad 602 : (1953) 2 MLJ 526 : 1954 Cr LJ 115. For a conviction under Section 460, it is not necessary to ascertain the identity of the person who causes or attempt to cause death or grievous hurt. AIR 1954 Pat 37 : 1954 Cr LJ 4.

The words "every person" cover those person who have voluntarily caused or attempted to cause death or grievous hurt. (1974) 1 Andh WR 358. The house-breaking continues till the accused have left the premises. *Ibid.*

3. Cases.—Where a number of persons jointly enter into house at dead of night with intention of abducting a woman and some of them mortally wound the inmates, an offence under this section has been committed. 165 Ind Cas 874 : 38 PLR 1150 : 1936 Cr C 1009 : AIR 1936 Lah 911. Where the charge against the accused was that he with others committed house-breaking by night and that he being with others at the time of committing the offence voluntarily caused the death of the accused, a separate conviction under Section 304, Pt. II, read with Section 34, IPC, in addition to his conviction under Section 460, IPC, is not sustainable. 52 Cr LJ 390 : AIR 1951 Assam 60, where *K* and two others trespassed into the house of the deceased at night with the purpose of committing robbery, and though their object could not have been initially to kill any person during the commission of the robbery, one or the other of them caused the death of the person in his house. 1959 All WR (HC) 500 : 1959 All Cr R 418 : 1959 All LJ 694. Person actually committing offence of causing grievous hurt can not be committed under Section 460. AIR 1954 All 99 : 1954 Cr LJ 168 : 1953 All LJ 501. This section will not apply to the case of a single individual who alone commits lurking house-trespass and during such commission causes or attempts to cause death or grievous hurt to any person. AIR 1954 All 99 : 1954 Cr LJ 168 : 1953 All LJ 501 : 1953 All LJ 501.

Section 460 merely provides for constructive liability of persons committing or concerned in. *inter alia* house-breaking by night in the course of which death is caused by one of the offenders and it prescribe enhanced penalty for the joint offenders. 64 Punj LR 30 : 1964 (1) Cr LJ 353 : AIR 1964 Punj 130 ; *see* 1983 All LJ 1179 : 1983 UP Cr R 177.

4. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

5. Charge.—"I *(name and office of Sessions Judge, etc.),* hereby charge you (name *of the accused), as* follows :—

That on or about the................day of...........at..............you were jointly concerned with *CD* in the committing lurking house-trespass by night (or house breaking by night) by entering into the building in the possession of *AB* and used as a human dwelling and that at the time of the committing of such lurking house trespass by night (or house-breaking by night) the said *CD*, who is guilty of such offence, voluntarily caused death (or attempted to cause death, or grievous hurt to AB) and that you thereby committed an offence punishable under Section 460 of the Indian Penal Code. and within my cognizance.

"And I hereby direct that you be tried on the said charge".

6. Sentence.—*Vide* AIR 1936 Lah 941 : 38 Cr LJ 30 : 165 1C 874 ; AIR 1936 Lah 15 : 37 Cr LJ 430.

* * * * *

Sec. 461. Dishonestly breaking open receptacle containing property. —Whoever dishonestly or with intent to commit mischief, breaks open or unfastens any closed receptacle which contains or which he believes to contain property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Synopsis

1. Scope 2827
2. Procedure....................2827
3. Charge 2827

1. Scope.—"This section and the next section though ranged under the head of riminal trespass and perhaps within the scope of the definition of that offence, seem to unish a certain form of attempt to commit theft or mischief though criminal trespass n a closed receptacle. 'Case, package, or receptacle', are mentioned in Section 480, elating to the offence of using of a false trade mark. The 'receptacle' may include not nly a room a part of a room, or closed, *etc.* but a box or closed packing".—*Morgan and Macpherson*, 408.

2. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by ny Magistrate.

3. Charge.—I *(name and office of Magistrate, etc.)*, hereby charge you *(name of the ccused)*, as follows :—

That on or about the.....day of...at......you dishonestly (or with intent to commit nischief) broke open (or unfastened) a certain closed receptacle (Exhibit) belonging to B, which contained (or which you believed to contain, certain property, to wit.....), and hat you thereby committed an offence punishable under Section 461 of the Indian enal Code, and within my cognizance.

And I hereby direct that you be direct on the said charge.

* * * * *

Sec. 462. Punishment for same offence when committed by person ntrusted with custody.—Whoever, being entrusted with any closed eceptacle which contains or which he believes to contain property, without aving authority to open the same, dishonestly, or with intent to commit nischief, breaks open or unfastens that receptacle, shall be punished with mprisonment of either description for a term which may extend to three ears, or with fine, or with both.

Synopsis

1. Forged document 2827
2. Procedure....................2827
3. Charge 2827

1. Forged document.—When such forged document in custody of court is used, complaint in writing of such court is mandatory. *Ram Singh* v. *State of U.P.* 1995 (32) ACC 224 : 1996 Cr LJ 96 : 1995 All LJ 1642 : 1995 A Cr R 38.

2. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate.

3. Charge.—I *(name and office of the Magistrate, etc.)*, hereby charge you *(name of the accused)* as follows :—

That on or about the......day of....at.....you being entrusted with a certain closed receptacle. Ex......by *AB* containing (or which you believed to contain) certain property, to wit....you dishonestly (or with intent to commit mischief) broke open (or unfastened) the said receptacle, without having authority to open the same and thereby committed an offence punishable under Section 462 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

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CHAPTER - XVIII

OF OFFENCES RELATING TO DOCUMENTS AND TO [1][x x x] PROPERTY MARKS

Sec. 463. Forgery.—Whoever makes any false document or part of a document, with intent to cause damage or injury, to the public or to any person, or to support any claim or to cause person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Synopsis

1. Forgery.......2829
2. Intent to defraud.......2831
3. Claim.......2832
4. Illustrative cases.......2832
5. Essentials of offence.......2834
6. Forgery committed for the purpose of defending one-self.......2834
7. Private Complaint.......2835

1. Forgery.—The offence of forgery committed when, by a counterfeit, a document is falsely made to represent some other supposed genuine document for a purpose of deception. The relation which this offence bears to the general system of penal law may be thus stated. In most affairs of importance the intentions, assurances or directions of men are notified and authenticated by means of written instruments. Upon the authenticity of such instruments, the security of many civil rights, especially the right of property, frequently depends ; it is therefore of the highest importance to society to exclude the numerous frauds and injuries which may obviously be perpetrated by procuring a false and counterfeit written instrument to be taken and acted on as genuine. In reference to frauds of this description, it is by no means essential that punishment should be confined to cases to actually accomplished fraud. The very act of falsely making and constructing such an instrument with an intention to defraud or deceive is sufficient according to the acknowledged principles of criminal jurisprudence to constitute a crime. The false making is in itself part of endeavour to defraud, and the existence of criminal intent is clearly manifested by an act done in furtherance and in part execution of that intention.

An instrument which is false or untrue only because the facts which it states are false and untrue, differs from a forged document. Where the instrument is forged, as when a certificate purporting to be signed by a public servant was not in truth signed by him, a person to whom it is shown is deceived, because he is induced to suppose that the fact certified by the public servant whose certificate it purports to be ; and he is deceived in that respect, whether the fact certified is true or false. If on the other hand, such a certificate is in truth signed by the public servant whose-name it bears, the document is not forged, although the fact certified is falsely certified ; for here the person receiving the certificate is deceived not by being falsely induced to believe that the public servant had accredited the document by his signature, but by the officer having falsely certified the fact. The document may therefore be forged, although the fact which it authenticates is true. And the document may be genuine, although the fact stated in it is false. .Where money or other property is obtained dishonestly by a document of the latter description, that is, where it is false merely containing a false statement, or representation, the offence of cheating but not of forgery, is committed.

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[1] The words "trade or" *Omitted* by Act 43 of 1950, Section 135 and Sch. (w.e.f. 25.11.1959).

"When a document, whether it is a forged document or a genuine document, containing false statements, is fabricated in order that it may appear in evidence in a judicial proceeding or in a proceeding taken by law before a public servant, and with the intention to mislead the Judge or public servant, the offence defined by Section 192, of fabricating false evidence is committed."—*Morgan and Macpherson*, 410.

In order to constitute forgery, the first essential ingredient is that the accused should have made a false document. 1980 All Cr R 22 ; AIR 1962 All 582 ; 1972 BLJR 193 ; 1983 All LJ 793 ; (1963) Supp 2 SCR 585 (where there is a benefit to the deceiver but no corresponding loss to the deceived second condition fulfilled). AIR 1965 Raj 9.

Making part of a document—The "making of a part of a document" must be the making of a part of a false document. Not only the intention but also falsity of the document should be proved. AIR 1929 All 396 : 1929 ALJ 592 : 30 Cr LJ 408 : 115 Ind Cas 135. The definition of forgery under this section includes the making of a part of a document also, and provided the requisite intention is present, a scribe of a document can be brought within its purview and be convicted of the offence. 13 Mys LJ 182 : 39 Mys HCR 1140.

The mere making of a false document with intent referred to in the section constitutes an offence under Section 463. (1978) 1 Malayam LJ 240. Certificates forged to get admission in college cannot be described as a valuable property. AIR 1981 SC 297 : 1980 Cr LJ 1345 ; AIR 1981 SC 80 : 1983 Cr LJ 1312 ; AIR 1981 SC 217 : 1980 Cr LJ 1345. (Accused can be convicted under Section 465, read with Section 471). On the proved facts the complaint would be covered by Section 464, Cl. (1) though it did not come within the offence charged. 1983 Cr LJ 691 : AIR 1983 SC 352 : 1983 (1) Crimes 989.

In absence of any evidence to prove any wrongful gain or loss as a result of such forgery is not record nor any proof of false preparation dishonestly or fraudulently, no forgery is committed by accused. *Ranjit Singh* v. *State of U.P.* 1993 (30) All Cr C 660.

Sections 465 and 468, IPC, are covered under any offence described in Section 463 and without any written complaint of court, accused could not have been prosecuted under Sections 465, 468 and 471, IPC. *Narendra Patra* v. *State of Orissa*, (1995) 8 OCR 274.

What constitutes forgery.—To constitute a forgery, the false document must be made with intent to cause damage or injury to the public or to any class of the public or to any community. Forgeries of public securities of the records of Courts of justice, of registers kept by public servants of documents certifying that a person has the requisite medical skill and fitness to act as a matter mariner, or has competent medical skill, *etc.* or of such documents as are mentioned in illustrations (*j*) and (k) of the following section seem to come within these words. A beat constable who writes in his note book the signature of headman, whose village he has not visited, does not commit thereby the offence of forgery. UBR (1897-1901) Vol I, 356. The term "forgery" is used as a general term in Section 463, Indian Penal Code, and that section is referred to in a comprehensive sense in Section 195 of the Cr PC. AIR 1926 Oudh 485 : 1 Luck 523 : 3 OWN 614 : 27 Cr LJ 969 : 96 Ind Cas 521 ; *see* also AIR 1925 Lah 266 : 5 Lah 550 : 26 Cr LJ 537 : 85 Ind Cas 377. It is not forgery where the act is done under the honest belief that the party doing it has a right to do although in point of fact he had no such authority. 52 Cr LJ 1480 : 5 AI Cr D 816 : AIR 1951 Cal 581 : 6 DLR (Cal) 154. There can be no forgery within the meaning of Section 463, unless there is a dishonest and fraudulent preparation of a false document or part thereof. 1965 MLJ (Cr) 463; 1983 : All LJ 393 : 1983 All WN 376 (for the meaning of the expression of making false document').

"Or to any person".—Besides such documents as tend to a public damage or injury every false document, by whatever name it is called, which is intended to cause damage or injury to an individual is included. An idol being a judicial person and therefore, a person within the definition under the Code, the signature of an idol constitutes the offence of forgery. AIR 1944 Mad 77 : ILR 1944 Mad 685 : 211 IC. 528 : 45 Cr LJ 405.

2. Intent to defraud.—The expression "intent to defraud" implies conduct coupled intention to deceive and thereby to injury ; in other words "defraud" involves two conceptions, namely, deceit and injury to the person deceived, that is infringement of some legal right possessed by him but not necessarily deprivation of property. 42 Cr LJ 215 : 90 Ind Cas 534 : 36 Cr LJ 1574. In order to constitute, in point of law, an intent to defraud, there must be possibility of some person being defrauded by the forgery, or there must be a possibility of some person being not only deceived by injured by the forgery. AIR 1930 Pat 271 : 1930 Cr C 458. The term "fraud" as used in the Penal Code, is used in its ordinary and popular acceptation. Hence, a man, who deliberately makes a false document with false signatures, in order to shield and conceal an already perpetrated fraud is himself acting with intent to commit fraud. 15 Bom LR 708 : 14 Cr LJ 518 : 20 Ind Cas 998. Giving a false name and address in a certificate of the purchase at the time of purchasing fire-arms is an offence under this section. 20 CWN 326 : 43 Cal 421 : 32 Ind Cas 661 : 17 Cr LJ 69. In order to constitute forgery the document need not be intended to support a claim or a false title. If, in order to support a true claim or a genuine title a false document is created, it is forgery. 96 Ind Cas 850 : 27 Cr LJ 994 : AIR 1926 Mad 1078 ; AIR 1943 Sind 46 : 43 Cr LJ 905 : 202 IC 773. In forgery, the intent to defraud is essential. AIR 1926 Cal 224. If a man intends to gain an unfair advantage by deceitful means and uses a false document, for that purpose his conduct is fraudulent. 27 Cr LJ 994. Mere ante-dating document is not forgery unless there is dishonesty or fraud on the part of the alleged forgerer. 98 Ind Cas 111 : 27 Cr LJ 1263 : 8 Pat LT 104. An intent to commit fraud involves an intent to cause injury. It involves something more than mere deceiving. Where a process-server forged names on the notices with a view to save himself from the consequences of his neglect of duty or to save himself troubles ; *Held*, that it did not amount to intent to commit fraud. AIR 1935 Rang 203 : 156 Ind Cas 888 : 36 Cr LJ 1025 : 1935 Cr C 747. Where a person becomes a party to antedating a document his intention is obviously to make the act appear to have been done at a time when it was not done and by force of such a falsity to give it an operation which in truth and justice it ought not to have ; the act therefore amounts to forgery. 13 Mys LJ 182. Unless there is an element of fraud, the making of a false document does not amount to a forgery because one of the intent contemplated by Section 463 is that false document must be made with intent to commit fraud or that fraud may be committed. AIR 1957 Cal 222 : 1957 Cr LJ 442. On the fact of this case, the intention of the accused at the time when he made out the false documents was to short circuit the alternative procedure open to him and receive the money without going through the expense and trouble involved therein. On the said facts, there is no doubt that he had made the false documents with an intention to cause wrongful gain to himself. In that event he had secured an uneconomic advantage ; in the former case *(i.e.*, after obtaining a succession certificate, at considerable expense and trouble) he made false documents dishonestly and in the latter case *(i.e.*, he can after the expiry of three months from the date of death of the holder satisfy the post master-general about his sole heirship in case the current value of this certificate does not exceed Rs. 5000/-) fraudulently by saving the trouble. In either case, he is guilty of offence under Section 463. AIR 1963 SC 1577 : (1963) 2 Ker LR 169 : 66 Punj LR 60 : 1963 (2) Cr LJ 439 ; but in cases reported in AIR 1961 Guj 117 : (1961) 2 Cr LJ 76 and in AIR 1983 SC 252 : 1983 (1) Crimes 989, it was held that can be no conviction for forgery, as a false document as defined in Section 464, IPC, has not been made. *See* 1978 All Cr R 461 : 1978 Cr LJ (NOC) 294.

"Or to support any claim for title".—Even if a man has legal claim or title to property, he will be guilty of forgery, if he counterfeits documents in order to support it. Any false document purporting to create, extend, transfer, or otherwise to support, a right or alleged right is included.

"Or to cause any person to part with property".—As order or requests for the payment of money or delivery of goods, *etc.*

"Or to enter into any express or implied contract".—"As when a man is induced to employ another in a certain capacity by forged documents respecting his qualifications". *Morgan and Macpherson* ; *see* also 21 All 113

Intention to cause damage or injury on the basis of a false document is must to constitute offence of forgery. *Suresh Lalchand Lulla* v. *Neela Sudhish Talpade*, 1992 Mah LJ 1455.

3. Claim.—The term "claim" is not limited in its application to a claim to property only. AIR 1929 Lah 152 : 10 Lah 545 : 30 Cr LJ 900 : 33 PLR 724 : 118 Ind Cas 315.

The word "claim" is not limited to a claim to property. A written certificate is "property' within the meaning of this section. 15 All 210 : AWN 1893, 96 ; *see* also 25 Cal 512 ; 30 Cr LJ 900.

4. Illustrative cases.—The mere fact that the person forged signature of another person in a plaint, to enable him to file the plaint in time to save case being barred by limitation will not make the act of the person fraudulent. AIR 1930 Pat 271 : 1930 Cr C 258. An entry of excess payment in a muster roll would not make the muster roll a forged document. A false certificate of not very great importance is not a forgery as it is not made on affidavit. 27 ALJ 591 : 115 Ind Cas 135 : 30 Cr LJ 408. Creation of false document for supporting even a true or genuine title is forgery. 96 Ind Cas 850 : 27 Cr LJ 994 : AIR 1936 Rang 389 : 37 Cr LJ 1059. Using false document for giving unfair advantage is fraudulent within the meaning of Section 25. 96 Ind Cas 850 : 27 Cr LJ 994 : AIR 1926 Mad 1072. A false copy of a forged document by an authorised maker is a false document. But if he has no such authority then he does not commit the offence of making the false copy. 20 Cr LJ 142 : 4 Pat LJ 16 : 49 Ind Cas 174. Where a Sub-Inspector keeps persons under surveillance to extort confession and alters diary to save himself from the consequence of his act offence does not amount to forgery. 34 Bom LR 1090 : AIR 1932 Bur 545. In the above case *Baker* J., said ; "The alteration could not be held to have been made either dishonestly or fraudulently. As dishonesty involves wrongful gain or wrongful loss, obviously it does not apply to the present case when no pecuniary question arises. The element of fraud is also absent. There is no question in the present case of any loss being caused to the Deputy Superintendent of Police who was inquiring into the case by the fact of this diary being altered and pages substituted for the original. It would be a straining of language to say that because he was thereby likely to be led to come to a wrong conclusion as to the guilt of the Sub-Inspector or that there was a probability that the proceedings against him might not result in his conviction, this would therefore render the alteration of the document fraudulent within the meaning of the Penal Code". In the same case *Broomfield J.*, said ; "The element of injury or risk of injury to an individual or to the public is an essential ingredient in the definition of forgery". Imitation closely copied from disputed writing cannot be proper standard of comparison. 144 Ind Cas 301 : 1933 Cr C 452 : 34 PLR 694 : 34 Cr LJ 714 : AIR 1933 Lah 608. Maker of even part of document can be guilty of forgery. 142 Ind Cas 74 : 27 SLR 105 : 1933 Cr C 166 : AIR 1933 Sind 37. Forgery is offence of too grave public importance to make if triable merely by subordinate Magistrates. 136 Ind Cas 780 : 35 MLW 267 : 33 Cr LJ 262 : AIR 1932 Mad 216. In forgery cases, circumstantial evidence of fraud must not fall short of proof. 144 Ind Cas 301 : 1933 Cr C 542 : 34 PLR 694 : 34 Cr LJ 714 : AIR 1933 Lah 308. Comparison of handwritting is valuable aid. AIR 1933 Pat 481 : 34 CLJ 828 : 1933 Cr C 1010 : 144 Ind Cas 872.

When criminal complaint against petitioner for preparing a forged will to claim ownership of property—Civil suit was also filed proceedings in Criminal Court should be stayed till decision of Civil Court. It was held that when some controversy is pending before Civil Court and also before Criminal Court it would be proper to stay further proceedings in criminal complaint till matter regarding genuineness of will was finally settled by Civil Court. *Lt. Col. Anant Pal Singh* v. *Bharat Pal Singh*, (1994) 1 Recent Cr R 368 : (1994) XXI Cr LT 202 (P&H).

When alleged forged will was prepared to claim ownership of property and both criminal complaint and civil suit filed disputing genuineness of will, further criminal proceedings be staged till matter regarding genuineness of will finally settled by civil court. *Lt. Col Anant Pal Singh* v. *Bharat Pal Singh*, 1994 (1) Recent Cr R 368 (P&H).

The heir of the deceased holder of the Post-office National Savings Certificate, which was deposited as security with the Controller of Rationing put his signature and got the securities transferred was guilty of forgery within the meaning of the section. AIR 1963 SC 1577.

In the case on hand as per the allegations made in the complaint the petitioner/accused forged the signatures of the opposite party No. 2/ complainant in the respective petitions filed in the said title suit and falsely induced the Court to believe that those were the genuine signatures of the complainant and obtained the order by adopting such deceitful means causing loss to the party concerned against whom the interim order of injunction was obtained. *Prima facie* offence of forgery was held to have been made out. *Ashok Kumar Yagnik* v. *State of WB*, 2005 Cr LJ 3620 (Cal) : 2005(4) All Cri LR 758 : 2005 Cal Cri R 348.

5. Essentials of the offence.—The definition of the offence of forgery declares the offence to be completed when a false document or false part of a document is made with specified intent. The questions are : "(1) is the document false ? (2) was it made by the accused ? (3) was it made with the intent to defraud ?" If all these questions are answered in the affirmative, the accused is guilty. 1 Weir 548 ; 10 CLR 181. The falsity as well as the fact that it was forged with one of the intents mentioned in Section 463, has to be proved. 19 Cr LJ 343 : AIR 1918 Pat 36. In order to constitute an offence of forgery under this section the document must be made dishonestly or fraudulently. But dishonestly or fraudulently are not tantological. Fraudulently does not imply deprivation of property or an element of injury. In order to be fraudulent, there must be some advantage on the one side with a corresponding loss on the other. Each case has to be decided on its own facts. AIR 1944 Lah 308 : 46 Cr LJ 341 : 217 IC 387 ; AIR 1932 Bom 545 : 34 Cr LJ 557. An intent to commit fraud involves an intent to cause injury. AIR 1936 Rang 203 : 36 Cr LJ 1025. Every forgery postulates a false document either in whole or in part however small. A piece of blank paper is not a document. Procurement of a piece of paper or of writing instrument or of a scribe cannot separately or by combination be regarded as making a false document. 52 Cr LJ 1480 : 5 Al Cr D 816 : AIR 1951 Cal 581 : 6 DLR (Cal) 154. For the purpose of charge of forgery it is immaterial that the document contains lecitals, which may be false in other respects if it is not the case of the prosecution that the signature appearing in the document is not that of the person whose signature it purports to be. ILR 1951 Nag 714 : 1952 Cr LJ 98 : AIR 1952 Nag 12. In order that a document should be false document within the meaning of the first part of Section 464, IPC, it must appear that it was made with the intention of inducing the belief that such document was made by or by the authority of one who did make it or give such authority. In other words, the document must purport to have been made, signed or sealed by a person who did not in fact make it. ILR 1958 Andh Pra 917 : 1958 MLJ (Cr) 854 : (1958) 2 An WR 489 ; see (1981) 1 WLR 148 : (1977) 1 Malayam LJ 180 ; AIR 1968 Mad 399 ; 1968 Cr LJ 1282 ; AIR 1969 SC 724 : 1969 Cr LJ 194 (for what constitutes forgery).

To bring the case within clause (1) of Section 464, Penal Code, it is necessary to establish that the accused intended to induce a belief that a document was made, signed, sealed or executed by the authority of a person who did not make sign seal or execute it or that it was made, signed, sealed or executed at a time where it was not so done. 1964 Raj LW 501 : AIR 1965 Raj 9.

The word "property" is used in the Code in a much wider sense that the expression movable property. AIR 1962 SC 1821 : (1962) 2 Cr LJ 805.

6. Forgery committed for the purpose of defending one-self.—The fabrication of a false document, or the use of such document by an accused person for the sole purpose of defending himself, does not fall within the range of the sections dealing with forgery. 25 All 31.

7. Private complaint.—Private complaint not maintainable in respect of offence of using forged document in a suit in vies of Section 195, Cr PC. *Dabwetti Pedda Rajaiah* v. *Rachakonda Rajkumari*, 1994 (1) ALT (Cri) 126.

Private complaint not maintainable in view of bar under Section 195 (1) (b) (ii), Cr PC as civil court is competent to decide nature of document. *Alluri Surya Prasad* v. *Kalidindivenkataraja*, 1991 (3) ALT 595.

Private complaint in respect of forgery is not maintainable. *Dabbetti Pedda Rajaiah* v. *Rachakonda Rajkumari*, (1994) 1 ALT (Cri) 126 (AP).

Offence under Section 468, IPC, is one described under Section 463, IPC, and this private complaint is not maintainable in view of Section 195, Cr PC. *Venkata Ramana* Murthy v. *P. Sanyasi Naidu*, 1992 (3) ALT 38 (NRC).

* * * * *

Sec. 464. Making a false document.—[1][A person is said to make a false document—

First.—Who dishonestly or fraudulently

(a) makes, signs, seals or executes a document or part of a document,

(b) makes or transmits any electronic record or part of any electronic record;

(c) affixes any [2][electronic signature] on any electronic record;

(d) makes any mark denoting the execution of a document or the authenticity of the [2][electronic signature],

with the intention of causing it to be believed that such document or part of a document, electronic record or [2][electronic signature] was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at time at which he knows that it was not made, signed, sealed or executed, or

Secondly.—Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration ; or

Thirdly.—Who dishonestly or fraudulently causes any person to sign, seal execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or the nature of the alteration.

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[1] Subs. by Act 21 of 2000, sec. 91 and Sch. I, for certain words (w.e.f. 17-10-2000)

[2] Subs. for words "digital signature" by Act 10 of 2009, Sec. 51(e).

Illustrations

(*a*) *A* has a letter of credit upon *B* for Rs. 10,000, written by *Z*. *A*, in order to defraud *B*, adds a cipher to the 10,000 and makes the sum 1,00,000, intending that it may be believed by *B* that *Z so* wrote the letter. A has committed forgery.

(*b*) *A*, without *Zs* authority affixes *Z's* seal to a document purporting to be a conveyance of an estate from *Z to A*, with the intention of selling the estate to *B* and thereby of obtaining from *B* the purchase money. *A* has committed forgery.

(*c*) *A* picks up a cheque on a banker signed by *B*, payable to bearer, but without any sum having been inserted in the cheque. *A* fraudulently fills up the cheque by inserting the sum of ten thousand rupees. *A* commits forgery.

(*d*) *A* leaves with *B*, his agent ; a cheque on a banker, signed by *A*, without inserting the sum payable and authorizes *B* to fill up the cheque by inserting a sum not exceeding ten thousand rupees for the purpose of making certain payments. *B* fraudulently fills up the cheque by inserting the sum of twenty thousand rupees. *B* commits forgery.

(*e*) *A* draws a bill of exchange on himself in the name of *B* without *B*'s authority, intending to discount it as genuine bill with a banker and intending to take up the bill on its maturity. Here, as *A* draws the bill with intent to deceive the banker by leading him to suppose that he had the security of *B* and thereby to discount the bill, A is guilty of forgery.

(*f*) *Z's* will contains these words—"I direct that all my remaining property be equally divided between *A*, *B* and *C*." *A* dishonestly scratches out *B*'s name, intending , that it may be believed that the whole was left to himself and *C*. *A* has committed forgery.

(*g*) *A* endorses a Government promissory note and makes it payable to *Z* or his order by writing on the bill the words "Pay to *Z* or his order" and signing the endorsement. *B* dishonestly erases the words "Pay to *Z* or his order", and thereby converts the special endorsement into a blank endorsement. *B* commits forgery.

(*h*) *A* sells and conveys an estate to *Z*. *A* afterwards, in order to defraud *Z* of his estate executes a conveyance of the same estate to *B*, dated six months earlier than ' the date of the conveyance to *Z*, intending it to be believed that he had conveyed the estate to *B* before he conveyed it to *Z*. *A* has committed forgery.

(*i*) *Z* dictates his will to *A*. *A* intentionally writes down a different legatee from the legatee named by *Z*, and by representing to *Z* that he has perpared the will according to his instruction, induces *Z* to sign the will. *A* has committed forgery.

(*j*) *A* writes a letter and signs it with *B*'s name without *B*'s authority, certifying that *A* is man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtains aims from *Z* and other persons. Here, as *A* made a false document in order to induce *Z* to part with property. *A* has committed forgery.

(*k*) *A* without *B's* authority writes a letter and signs it in *B*'s name certifying to *A*'s character, intending thereby to obtain employment under *Z*. *A* has committed forgery inasmuch as he intended to deceive *Z* by the forged certificate. and thereby to Induce *Z* to enter into an express or implied contract for service.

Explanation 1.—A man's signature of his own name may amount to forgery.

Illustrations

(*a*) *A* signs his own name to a bill of exchange. intending that it may be believed that the bill was drawn by another person of the same name. *A* has committed forgery.

(*b*) A writes the word "accepted" on a piece of paper and signs it with *Z*s name. to order that *B* may afterwards write on the paper a bill of exchange drawn by *B* upon *Z*, and negotiate the bill as though it had been accepted by *Z*. A is guilty of forgery and if *B*, knowing the fact, draws the bill upon the paper pursuant to *A*'s intention *B* is also guilty of forgery.

(*c*) *A* picks up a bill of exchange payable to the order of a different person of the same name. *A* endorses the bill in his own name. intending to cause it to be believed that it was endorsed by the person to whose order it was payable. here *A* has committed forgery.

(*d*) *A* purchased an estate sold under execution of a decree against *B*. *B*, after the seizure of the estate, in collusion with *Z*, executes a lease of the estate, to *Z* at a nominal rent.and for a long period and dates the lease six month prior to the seizure, with intent to defraud *A*. and cause it to believed that the leave was granted before the seizure. *B*, though he executes the lea*see* in his own name. commits forgery by antedating it.

(*e*) *A*, a traders, in anticipation of insolvency, lodges effect with *B* for *A*'s benefit. and with intent to defraud his creditors and in order to give a colour to transaction writes a promissory note binding himself to pay to *B* a sum for value received, and antedates the note, intending that it may be believed to have been made before *A* was on the point of insolvency. *A* has committed forgery under the first hand of the definition.

Explanation 2.—The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime. may amount to forgery.

Illustration

A draws a. bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

[1][*Explanation* 3.—For the purposes of this section, the expression "affixing [2][electronic signature]" shall have the meaning assigned to it in clause (d) of sub-section (1) of section 2 of the information Technology Act, 2000.]

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[1] Ins. by Act 21 of 2000, sec. 91 and Sch. I (w.e.f. 17-10-2000).

[2] Subs. by Act 10 of 2009. sec. 51(e).

Synopsis

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1. Scope.—Assertion of a false claim in a document—It does not constitutes an offence under Section 464. *B.R. Gupta* v. *Kaushal Kumar*, 1995 (XXII) Cr LT 297 (P&H).

2. Fraudulently.—An intent to defraud implies something more deceit. The advantage intended to be secured or the harm intended to be caused need not have relation to property or be such as is implied in the term "dishonestly" but it must be something to which the party perpertrating is not entitled either legally or equitably. There can be no intention to defraud where no wrongful result was intended or could have arisen from the act of the accused. 28 Ind Cas 102. To constitute a document as a false document, it must be shown that it was made with such an intention as is implied in the term fraudulently or dishonestly. A mere intention to deceive is not sufficient. 1 Weir 542 ; *see* also 22 Bom 768 : 28 All 358 ; 13 M 27 ; 6 CWN 382 ; 2 JG 11 ; LBR (1894-1900), 437 ; 25 Cal 512 ; 22 Cal 513 ; 12 Bom 515 ; 9 WR Cr 20 : 6 PR 1895 Cr. Absence of intention to cause it to be believed that the document was signed by another person negatives offence. 52 Cal 47 : 29 CWN 447 : 26 Cr LJ 401. The term "fraudulently" means that there must be (1) deception actual or intended (2) and injury or risk of injury though not to any person. AIR 1954 MB 73 : ILR 1953 MB 204 : 1954 Cr LJ 88 (tenant forged the signature of the landlord, because without his consent the Electricity department would not give electricity).

3. Making a false document.—A person makes a false document who dishonestly or fraudulently signs with the intentions of cause it to be believed that the document was signed by a person by whom he knows it was not signed. 7 Ind Cas 179. The "meaning" of a document or part of a document, does not mean "writing" or "printing" it, but singing or otherwise executing it. The falsity (of a document) consists in the document or part of a document, being signed or sealed with the name or seal of a person, who did not in fact sign or seal it 8 CLR 572 ; 1964 MLJ (Cr) 395 (the word "make" in Section 464, does not mean any other than "makes" that is to say "creates or brings" into existence). Such a document must be dishonestly or fraudulently made.

signed or executed by the person who is charged and it must be made with the intention of causing it to be believed that such document or part of a document was made, signed, sealed and executed by or by the authority of a person, by whom or by whose authority he knows that it was not made, signed, sealed or executed. 17 CWN 354. "Makes" means "creates" or brings into existence". AIR 1928 Lah 781. Where only some of intended executants signs a deed, yet the document is made. 19 Cr LJ 177 : 41 M 589 : 43 Ind Cas 593. The "making of a part of a document" must be the making of a part of a false document and in the making of a part of a document not be proved. 27 ALJ 592 : 115 Ind Cas 135 : 30 Cr LJ 408. Where a Mahommedan executes a *Kabinnama* in favour of his alleged wife with a view to claim her property, he is not guilty of making a false document. AIR 1924 Cal 336 : 23 Cr LJ 723 : 69 Ind Cas 451. A person flying in blank columns in the "Store Issue Order" knowing it to be signed not by the officer authorised to sign and issue it, but another who has forged that officer's signature, commits forgery within the meaning of Section 464, IPC. 6 DLR (Pat) 13 : 5 AI Cr D 97 : AIR 1951 Pat 86 : 52 Cr LJ 771. A person to be guilty of forgery under the first clause of Section 465, must make a false document or part of a false document and merely cause it to be made. 1953 Cr LJ 1826 : AIR 1953 Cal 798. Antedating a document to defeat the provisions of an Act in the absence of proof of that this was done dishonestly or fraudulently regarding the persons affected by it, is not making a false document under Section 464. AIR 1962 All 582 : 1962 All Cr R 285 : 1962 (2) Cr LJ 722 ; *see* also AIR 1968 Mad 349 : 1968 Cr LJ 1282 ; AIR 1963 SC 1572 ; 1963 (2) Cr LJ 434 (non-economic advantage to the deceiver and non-economic loss to the deceived).

The fundamental pre-requisite of Section 464, is that the document must be fraudulent in the sense that it has direct tendency to injure the interest of a third person. AIR 1966 Pat 154 : 1956 Cr LJ 647 (proceeding under Section 144, Cr. P. Code).

A document is made falsely if the signature, seal or act is false or in other words, if the signature is affixed by a person other than the person whose signature it purports to be. AIR 1979 SC 1012 : 1979 Cr LJ 890 ; *see* also 1969 Ker LT 1 ; 1980 Cr LJ (NOC) 87 ; *see* also AIR 1983 SC 352 : 1983 Cr LJ 691 (conviction fails because no circumstance to prove the charge of forging *Nikah* form of marriage) ; *see* also AIR 1963 SC 1577 : 1963 (2) Cr LJ 434.

Under Section 464 of the Indian Penal Code, a person is said to make a false document who dishonestly or fraudulently makes, signs, seals or executes a document or part of document. The reasoning of the High Court, therefore, that the bail order without the signature cannot be said to be a document thereby not attracting the provision of section 464 of the Indian Penal Code is wholly unsustainable. *State of U.P. v. Ranjit Singh*, 1999 Cri LJ 1830 (SC) : AIR 1999 (SC) 1201 : 1999(2) SCC 617 : 1999(1) JT 626 : 1999(1) Scale 580.

4. Document.—The word 'document' has an extensive meaning assigned to it. The word seems to include everything done by the pen, by engraving, by printing or otherwise, whereby it is made on paper parchment, wood, other substance or representation of words of their equivalents addressed to the eye. Every writing used for the purpose of authentication, if falsely made, is a 'false document',—as in the case of a will by which a testator signifies his intentions as to the disposition of his property,—or of a certificate by which a public servant assures others of the truth of any fact,—or of a warrant by which a Magistrate signifies his authority to arrest an offender. And the words 'false document' include not only writings, but also false seals, stamps, and all the other visible marks of distinction by which the truth of fact is authenticated. But where the falsehood consists in a mark of distinction falsely testifying to the quality or genuineness or to the ownership of any article, it seems to be a false trade or property mark and to be properly dealt with under the penal provisions contained in the latter part of this Chapter. The most obvious way of making a false document is to write or print, as the case may be, the whole in imitation of a real or imaginary original. But to write a signature is the same in law as to write the entire instrument. And the signature may be made by a mark as well as by writing the letters of a name. It can make no difference whether the whole document is false or whether it is merely false in the material part by which the fraud or deceit is to be effected. If the document is falsified for a dishonest or fraudulent purpose, it is a false document".—*Morgan and Macpherson*, 412.

5. Or by the authority of a person, etc.—"If a man writes another's name by his authority, it is not course of forgery. And if he has no authority in fact, but acting in good faith 'without fault or carelessness believes himself to be authorised, he does not commit the offence. But if he is authorised to do a certain thing, as to fill up with a certain sum a blank cheque signed by *A* [*see* Illustration (*d*)] and he departs from his authority by dishonestly inserting a larger sum, he commits forgery".—*Morgan and Macpherson*, 413, If *A* signs for *B* and *B* is present at the time, *A* must be held to authorised to do so. AIR 1935 All 410 : 154 Ind Cas 517 : 1935 ALJ 651 : AIR 1935 All 410. Under Section 464, what is essential is that intention of making it to be believed that it was signed by or by the authority of some one else, while he knows that it was not so made or authorised by that person. AIR 1955 Andh 82 : (1954) 2 MLJ (Andh) 103 : 1954 Cr LJ 769.

6. Or at a time at which he knows that it was not made, etc.—As when the document is made to bear a wrong date for some dishonest purpose. These words are to be read distributively and are not governed by the proceeding words "by or by authority act". Rat Un Cr C 722. Elements to be proved in a case of forgery are (i) that the document was not executed on the date on which it purports to have been and (ii) that the parties who executed it did so with fraudulent intent. AIR 1928 Rang 117 : 6 Rang 49 : 29 Cr LJ 599 : 109 Ind Cas 679. No forgery is committed by mere antedating a document unless it acts or would act prejudicially to another. AIR 1926 Pat 535 : 5 Pat 573 : 8 PLT 133 : 27 Cr LJ 1308 : 98 Ind Cas 252. Change of date in a document by accused prejudicial to his cases, is not dishonest though improper. 20 Cr LJ 573 : 17 ALJ 972 : 52 Ind Cas 161.

7. Forged document.—Every forged or fabricated document is not a forged document. It must satisfy both Sections 464 and 463. An entry in the credit-side which does not impose any liability on the debtor, and as such would not cause any damage is not forgery. AIR 1923 Lah 11 : 3 Lah 373 : 25 Cr LJ 337 : 77 Ind Cas 225. *Kabuliyat* of a past period prepared subsequently by unsfractuary mortgage to defraud mortgagor as the amount paid by mortgagor's tenant are forged documents. 26 Cr LJ 1115 : 88 Ind Cas 283. It is one thing to hold that because an account book does not appear to have been kept in the regular course of business and does not contain entries that it ought to have contained, therefore, it cannot be acted upon in order to convict a person whose name appears therein as having received money, and it quite a different thing to hold as a positive fact that the account book is forged. In the absence of any other evidence, no prosecution should be allowed to be launched on the basis that it was forged. 98 Ind Cas 56 : 27 Cr LJ 1240 : AIR 1927 Pat 47. A document is forged if it is a false document. Under this section, the making of a false document is not restricted to the act of signing it. The section is wide enough to cover the making of a document, which really means creating or bringing into existence provided the act of signing or making the document is done dishonestly or fraudulently and with the intention of causing it to be believed that the document or any part of it was made, signed, sealed or executed by the authority of a person. 1963 (2) Cr LJ 36 : AIR 1963 Pat 262 *see* : AIR 1965 Raj 9 (section does not apply where a public officer knowingly making false entry). Not a case of forgery on the facts of the case as proved. (1981) 2 Malayam LJ 176.

Accused himself need not forge a document by his own-hands but can be executed through a skilled person. *K.P.S. Kanakaj* v. *State*, 1995 MLJ (Cri) 674.

8. Clause (2).—"A document which has once existed as a genuine document, may become "false document" by reason of some addition, or omission or by obliteration of some material part. *Vide* Illustrations (a), *(f)* and *(g)*. But a complete cancellation or obliteration of a document, like the destruction of a document is an offence specially made punishable by a latter Section 477, and which seems not to fall within this definition".—*Morgan and Macpherson*, 414.

Attesting a document knowing it to be forged, the accused was held to be guilty of abetment. AIR 1942 Mad 92 ; AIR 1961 Guj 117 : 1961 (2) Cr LJ 76.

9. Clause (3).—"A document may be false document, although it is signed or executed by the person by whom it purports to be signed or executed. This happens, where a person [as in the case given in the Illustration (f) is fraudulently induced to execute a will, or a material alteration is made in the writing without his knowledge ; for in such a case, although the signature is genuine, the instrument is false because it does not truly indicate the testator's intention, and it is forgery of the person, who fraudulently caused such will to be signed, for he made it to be the false instrument which really is".—*Morgan and Macpherson*, 415.

10. Explanation (1).—"It is a false document if the offender makes it falsely in the name of any other person, although that name happens also to be the offender's own name. A man, who makes a promissory note in his own name without any false description or addition and with an honest intention, if he afterwards use or attempts to use the note pretending that it is signed by the another person of the same name does not, by this false representation, make the promissory note a "false document". It was genuine document when he signed it and does not become false by his subsequent use of it for the purpose of cheating. In such cases, as those mentioned in the Illustrations (d) and (e), a man signs or execute, a document in his own name which is false in a material part and is calculated to induce another to give credit to it as genuine and authentic where it is false and deceptive. A man who having conveyed land afterwards for fraudulent purpose executes a document, purporting to be a prior conveyance of the same land intends by this false document to obtain credit by deception, the document purporting to have been made at a time earlier than the true time of execution".—*Morgan and Macpherson*, 416 ; *See* 1967 Ker LJ 689.

11. Explanation (2).—"If a man forges the name of another person, real or factitious or the name of a deceased person, he makes a false document if the document is made for a fraudulent or dishonest purpose. It is nonetheless false, because the name used is a mere fiction".—*Morgan and Macpherson*, 416 ; *see* 1967 Ker LJ 689.

12. Cases.—Entering previous payments on the back of a bill is not forgery. 8 CWN 278. A charge of forgery cannot lie against a person who is not the writer of a document or who does not sign the forged name. 17 CWN 354. The prisoner made certain entries in his ledger, which consisted of rough loose sheets, showing that certain sums of money had been paid to the prosecutor, which in fact, had not been repaid. *Held*, that the prisoner was guilty of forgery. 1 Ind Jur N 46. The alteration of a date in a bond is an alteration in a material part thereof, although the alteration is not made for the purpose of saving limitation. 14 PR 1881 Cr ; *see* also 21 WR Cr 41 ; 23 WR Cr 49 ; 4 LBR 46 ; LBR (1893-1900), 266 ; 13 Cal 349 ; 77 Ind Cas 423 ; AIR 1918 Pat 36 ; 41 M 589 ; 43 Ind Cas 828 ; 3 Lah 373.

13. False description.—It would be going too far to hold that, whenever the executant of a document attaches a false description of his name, he comes within the purview of this section. But a false description may make a document a forgery when it is found that the accused, by giving such a false description, intended to make out or wanted it to be believed that it was not be that executing the document but a fictitious person. 19 MLJ 78.

14. Conviction.—Accused getting it prepared through skilled person. It can be convicted under Section 464. K.P.S. *Kanakaraj* v. *State*, 1995 MLJ (Cr) 674 (Mad).

15. Alteration of.—To attract the second clause of Section 464 there has to be alteration of document dishonestly and fraudulently. So in order to attract the clause "secondly" if the document is to be altered it has to be for some gain or with such objective on the part of the accused. Merely changing a document does not make it a false document. Therefore, presuming that the figure "1" was added in date in document in question, as was done in this case, it cannot be said that the document became false for the simple reason that the appellant-accused had nothing to gain from the same and she was not going to save the bar of limitation. *Parminder Kaur vs. State of U.P. and Anr.*, AIR 2010 SC 840.

* * * * *

Sec. 465. Punishment for forgery.—Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Synopsis

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4. Case 2843
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8. Jurisdiction..2846
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1. Scope.—When there is no attempt to show that a document has been prepared of a person other than the one who has prepared it, there is no offence of forgery. *State of Gujarat* v. *M.J. Makwana*, (1992) 1 Guj LR 764.

Where the words "under Section 114, IPC, added after main offence under Section 342, Cr PC, it was held that offence under Section 465 is not disclosed and enquiry would not be in interests of justice. 1987 Cr LR 430 (Guj).

When offence of using forged document as genuine was committed prior to documents produced in pending civil suit, bar under Section 195 (1) (b) (ii), not attracted. *T. Govindaraju* v. *State of Karnataka*, 1995 Cri LJ 1491 (Kant).

Mere making of false document without dishonest intention has not amount to forgery. *Vijay Kumar Thakur* v. *Mahesh Prasad Singh*. 1992 East Cr C 278 (Pat).

In absence of mens *rea*, no offence under Section 465 or 465/511, IPC, is committed. *State of Gujarat* v. *Motibhai Jethabhai*, 1992 Cr LR 261 (Guj).

2. Intention.—This section cannot apply except where the dishonest or fraudulent intent embraced in the definitions given in Section 464, is made out and such intention is not made out merely by establishing, however, clearly that, under conceivable circumstances, a particular error might be used to support some false claim. Rat Un Cr C 201. In cases under this section, the immediate and more probable intention of an accused is that to which the Court must look and not some more remote and less probable intention. AWN 1892, 243 ; *see* also 16 Cr LJ 76. Clear proof is required in a case of forgery. It should be clearly shown upon whom the fraud was committed. UBR (1892-1896) Vol 1, 279. A document false in fact which *B* concurred to commit fraud completes the offence. 28 M 90 (FB). In order to convict a person under this section the prosecution has to prove beyond reasonable doubt that he knew that the document was forged. 47 Cr LJ 317 : 222 Ind Cas 620.

3. Evidence.—"The facts which show that the document is a false document within Section 464, must be proved also that the accused made the false document : and lastly, the guilty intention of accused to cause damage or injury, or to support a claim, *etc*. It is not a necessary part of this offence that any damage or injury should bar actually suffered or that any fraud should be perpetrated. Nor is a using or uttering the forged document a part of this offence. From the intention that the false document should deceive others into a belief that it is genuine it may generally be inferred that there is an intention to damage or injure. It will not avail the offender to show that he meant to pay the promissory note or other forged document when it became due, or even that he actually paid it and so prevented damage or injury".—*Morgan and Macpherson*.

4. Case.—Where a charge is laid against an accused under Section 465, read with Section 471, Penal Code, he cannot be convicted and sentenced under Section 466, read with Section 471. 13 Cr LJ 449 : 15 Ind Cas 81 : 17 CWN 94 An accused person cannot be convicted of forgery on the mere similarity of handwriting of the forged document with the handwriting of the accused 51 Ind Cas 774 : 20 Cr LJ 534 : 18 ALJ

1137. Criminal intention to cause wrongful gain to one or wrongful loss to another is sufficient for forgery. AIR 1931 All 251 : *see* also AIR 1932 Sind 53 ; 1932 Cr C 194 : 25 SLR 471 : 138 Ind Cas 766. Fraudulent execution of document on a date other than that on which it was actually executed constitutes an offence under this section 109 Ind Cas 679 : 29 Cr LJ 599 : AIR 1928 Rang 117. Where the evidence is sufficient to prove that accused actually committed forgery, he may be convicted under Section 471, and not under Section 465. 130 Ind Cas 492 : 1930 ALJ 1451 : 32 Cr LJ 559 : AIR 1931 All 258. Fabrication of electoral roll is an offence punishable under this section. ALR 1934 Cal 838 : 1934 Cr C 1359. Where an accused person manipulates entries in certain registers with the main object of screening himself from punishment for a past offence, he will yet be liable if he stands to gain by his act, as for example, if as a result of such entries, he will be continued in service while as a fact he is not fit to be continued. 18 SLR 199 : AIR 1925 Sind 233. Producing before the Official Receiver a forged receipt showing payment of a debt with a view to obtain certificate or solvency from him amounts to offence under Sections 465 and 471, as the intention of the person was to obtain a wrongful gain though the creditor had written on the debt as barred. 18 ALJ 1137 : 22 Cr LJ 56 : 43 All 225 : 59 Ind Cas 200. False statement in an application for a post and a forged certificate amounts to offence under Section 465. AIR 1925 Rang 9 : 25 Cr LJ 129 : 76 Ind Cas 225. Mere antedating a will does not amount to forgery in the absence of other circumstances. 17 Cr LJ 540 : 3 OLJ 477 : 36 Ind Cas 538. When a document is relied on by the accused, it is the duty of the defence duly to prove it, but when the prosecution alleges it to be forged and asks for conviction on that ground, it is the duty of the prosecution to prove the forgery beyond all reasonable doubt. AIR 1950 Lah 190 (FB). Accused, an European, entitled to possess arms, signed certificate of purchase of arms in the name of another with an address not his own. It is forgery as the act is done fraudulently if not dishonestly. 43 Cal 421 : 17 Cr LJ 69 : 20 CWN 326 : 32 Ind Cas 661. Where the accused was asked to produce documents in support of his complaint of trespass and he knowingly produced forged documents, he is guilty. AIR 1925 Lah 33 : 6 Lah 50 : 26 Cr LJ 1171 : 26 PLR 156 : 88 Ind Cas 595 Offence of false preparation of signature sheet in an election is specially provided for under Section 171 *(f)* and as such it is not open to Court to treat it as an offence under Section 465. AIR 1925 All 230 : 22 ALJ 1106 : 26 Cr LJ 362 : 47 All 268 : 84 Ind Cas 714. Conviction for forgery cannot be based on mere similarity of handwriting without other evidence of complicity. 20 Cr LJ 534 (Pat) : 51 Ind Cas 774 ; *see* also AIR 1922 Pat 619 : 65 Ind Cas 882. Conviction for forgery cannot be based on non-resemblance of handwriting. AIR 1924 Cal 960 : 28 CWN 947 : 40 CLJ 135 : 25 Cr LJ 1217 : 82 Ind Cas 145. Where the charge is under Section 465, conviction under Section 468 is illegal. AIR 1921 LB 36 : 11 LBR 45 : 69 Ind Cas 628. The offences under Sections 196 and 464 are indeed serious and difficult to detect and consequently called for deterrent punishment. AIR 1926 Bom 555 : 50 Bom 783 : 28 Bom LR 1051 : 27 Cr LJ 1173 : 97 Ind Cas 805. Where accused alters " the date of the *bahi* realising that the claim may be time-barred, a sentence of fine would be sufficient. ILR 1937 Nag 45 : 166 Ind Cas 310 : 38 Cr LJ 233 : AIR 1937 Nag 39. Where a school teacher alters the date in a diary, required to be kept and regularly filled in accordance with a circular issued by the School Board, with a view of disguising the fact that on certain dates the diary had not been kept and thus escaping the penalty, which is in the form of loss to pay, there is, if not actual dishonestly, such an intention on the part of the teacher to obtain an advantage to himself, and the corresponding disadvantage to the School Board, as would constitute fraud and the teacher is guilty of an offence under Section 465, Penal Code. 164 Ind Cas 1088 : 57 Cr LJ 1039 : 9 RR 178 : 1936 Cr C 782 : AIR 1936 Rang 380.

A person bringing into existence a document, bearing a certain date, but brought into existence on a latter date, by antedating it, he is guilty of the offence of forgery under Section 465. 1961 (2) Cr LJ 139. A person who sends a cover insured for a much bigger amount than the money inside it and obtains an acknowledgment of the receipt of the cover from addressee by deceiving him does not commit an offence of cheating under Section 415, IPC, and cannot be convicted under Section 417, IPC. Where there is no evidence on record to show that it was the sender alone who put the money inside the cover and insured it for higher amount, he cannot be held guilty for forgery and can not be convicted under Section 465, IPC. 1956 All WR (HC) 117; *see* also AIR 1979 SC 1266 ; AIR 1979 SC 1012 : 1979 Cr LJ 890 (for onus of proof was not discharged by the prosecution) ; 1983 (1) Crimes 1128 (for evidence of forgery) ; 1978 Cr LR 557 (acquittal order set aside) ; AIR 1981 SC 80 : 1980 Cr LJ 1312 ; (conviction under Section 471, read with Section 467, was altered to one under Section 471 read with Section 465) AIR 1931 SC 297 : 1980 Cr LJ 1345 (conviction under Sections 417, 420, read with Section 511, altered to one under Section 471, read with Section 465).

Where there was taking of cognizance and issue of process questioned in revision petition. It was held that in instant case in hand, the forgery of valuable security for purpose of cheating alleged to have been committed immediately after the death of the deceased couple. The signatures are obtained by false representation on 7.12.91 and 9.12.92. The forgeries are stated to have been committed in respect of documents before they were produced in the original suit pending before Civil Judge, it is view of High Court that Section 195 (1) (b) (ii), Cr PC, has no application. *T. Govindaraju* v. *State of Karnataka*, (1995) 1 East LJ 38 (Kant).

Bill was challenged which was seized by Civil Court regarding genuineness—Criminal proceedings initiated—Petition against the same was filed criminal proceeding was not justified. *Keshwa Nand* v. *Bhag Singh*, (1994) 2 Recent Cr R 453 (P&H).

5. Quashing of criminal proceedings—on the ground of civil nature.—Merely on the ground that it is a civil dispute, the criminal proceedings cannot be quashed. Pendency of civil suits between the parties cannot stand in the way of criminal prosecution. *Bimal Kanti Ghose Dastidar* v. *Sri Sukhen Roy*, (2004) 1 Crimes 544 (Cal).

6. Procedure.—Not cognizable—Warrant—Bailable—Not compound-able—Triable by any Magistrate.

7. Charge.—I *(name and office of Magistrate, etc.)*, hereby charge you (*name of the accused*) as follows :—

That on or about the.....day of....at.....you forged certain document, to wit...... (*describe* it) with intent to cause a damage or injury to *A, B or* to support a certain claim of title to wit......or to cause *A, B,* to part with certain property, to wit..... or to enter into a certain contract with *A, B* with regard to *(mention the object)* or with intent to commit fraud (*specify it) or* that fraud may be committed by *P, Q* (or a person unknown and that you thereby committed an offence punishable under Section 465 of the Indian Penal Code, and within my cognizance'.

And I hereby direct that you be tried on the said charge.

8. Jurisdiction.—In conspiracy case, trial court is competent to decide allegations of forgery committed during proceedings also. *Dr. Malok Raj Makkar* v. *Daya Nand*, 1992 (1) SLJ 812 (P&H).

Court not to interfere with case of forgery at the stage of investi-gation. *Daya Nand Malik* v. *State of Haryana*, 1994 (1) SLJ 720 (P&H).

9. Acquittal.—Where there was forgery when prosecution failed to establish case beyond reasonable doubt, accused entitled to be acquitted. *State of Gujarat* v. *Patel Haribhai Bhaychandas*, 1993 Cri LJ 143 (Guj).

In a Bombay case, the accused made an application for *bona fide* student certificate which was to use in civil proceedings in the name of his brother. The accused knew fully well that he would not have got the said certificate of he had applied in his own name and thus the intention to deceive was clear. It was held that intention to deceive was not the same as intention to defraud as no wrongful loss had been suffered nor wrongful gain was made by accused and, therefore, the acquittal of accused was proper. *State of Maharashtra* v. *Ramchandra Kishan Bhala*, 2004 Cr LJ 2823 (Bom) : 2004(22) All Ind Cas 767 : 2005(1) Cur Cri R 117 : 2004(4) Rec Cri R 812.

* * * * *

Sec. 466. Forgery of record of Court or of public register *etc.*—Whoever forges a document, purporting to be a record of proceeding of or in a Court of Justice, or a register of birth, baptism, marriage or burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment or a power of attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[1][*Explanation.*— For the purposes of this section, "register" includes any list, data or record of any entries maintained in the electronic from as defined in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000.]

Synopsis

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1. Elements of fraud or dishonesty.—The elements of fraud or dishonesty, as explained in the Penal Code, must be present in the mind of the accused to bring his case under this section. 28 Cal 434. Tampering with the proceeding of Court to obtain favourable decision amounts to fraud. AIR 1943 Pat 343 : 45 Cr LJ 292. Alteration of name and age in an education certificate and using it as genuine with a view to obtain the official appointment constitute, in the absence of a satisfactory explanation, offences under Sections 466 and 471. 2 LBR 216. This section is not intended to apply to cases of persons, whose duty it is to make, entries in a public book, and who knowingly make a false entry, but to cases where a certificate or other document is forged by some unauthorised person with a view to make it appear that it was duly issued by a public officer. 7 CLR 356. The section seeks to treat forgery or certain specified kind of document as an aggravated form of offence. The expression "to institute or defend a suit or take any proceedings therein, or to confess judgment" has evidently to be associated with these words authority preceding the expression. 1964 Raj LW 501 : AIR 1965 Raj 9.

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[1] Ins. by Act 21 of 2000, sec. 91 and Sch. I (w.e.f. 17-10-2000).

The essential ingredient are that the accused forged a document which is specified in this section. AIR 1966 All 510 : 1966 Cr LJ 1112 ; *see* also 1970 Pat LR 309.

Three disputed letters purporting to have been written by the Minister to officers of the department recommendatory in nature, were sent to handwriting expert whose report showed they were written by the accused. *Held*, that letters were forged with the intention of using them for cheating and accused actually used them for cheating he was clearly guilty of offence under Section 468. No charge under Section 466. 1987 Cri LJ 933 (All).

The expression "wrongful" in Section 23 of the Code means prejudicially affecting a party in some legal right. The words "gaining wrongfully or losing wrongfully" need not be confined only to the acquisition or to the actual deprivation of property. In this view of the matter if by virtue of preparing a false document purporting it to be a document of a Court of justice and by virtue of such document, a person who is not entitled to be released on bail, could be released then, undoubtedly, damage or injury has been caused to the public at large and, therefore, there is no reason why under such circumstances the accused who is the author of such forged document cannot be said to have committed offence under Section 466 of the Indian Penal Code. Then again under Section 464, whoever dishonestly or fraudulently makes a document or part of a document can be said to have made a false document. A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. The expression 'defraud' involves two elements namely "deceit" and "injury" to the person deceived. "Injury" is something other than economic loss and it will include any harm whatever caused to any person in body, mind, reputation or such others. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceased where, therefore a document is prepared with the intention to deceive and by means of deceit, an advantage is obtained then there is a fraud and judged from this stand point the preparation of a forged bail order by the utilisation of which the person concerned obtained an advantage of being released deceiving the Courts and the society at large cannot be said to have made the document fraudulently, thereby attracting Section 466 of the Indian Penal Code. *State of U.P.* v. *Ranjit Singh*, 1999 Cri LJ 1830 (SC) : AIR 1999 (SC) 1201 : 1999(2) SCC 617 : 1999(1) Scale 580 : 1999(2) Supreme 291.

2. Cases.—Where the accused, a public servant, who committed criminal breach of trust made false entry in account book and was convicted of an offence under Sections 409 and 466 of the Indian Penal Code, and it appeared that the entry was not made with intent to defraud, *held*, that the conviction under Section 466 of the Indian Penal Code, must be set aside. 8 PLR 1904 : 1 Cr LJ 41. A rough sketch to serve as practice for a finished forgery but which has not been used and which could not be used in its then form, would not, apparently, come under the provisions of Section 466 or Section 467. 16 Bom 165. The real and substantial test by which to determine whether several offences are so connected as to form the same transaction depends on whether they are so related to one another in point of purpose, or as to cause and effect or as principal and subsidiary acts as to constitute one continuous action, irrespective of the persons by whom the same may have been committed, 17 OC 276 : 15 Cr LJ 643 : 25 Ind Cas 843. There is nothing illegal in a person being convicted for forgery and also for using a forged instrument as genuine one. The offence are separate and if both are committed separate convictions are legal. AIR 1925 Nag 162 : 77 Ind Cas 825 : 25 Cr LJ 473. Where a person was convicted under Section 406, IPC, for having committed forgery and made fraudulent use of a forged document altering the dates on the copying sheet of an appeal application, the lower Courts sentenced him to seven years' imprisonment on each count. *Held*, on appeal that separate sentences against the accused under Sections 466 and 401, IPC, read with Section 466, IPC, are illegal and the sentence under the latter section was set aside. 3 Mys LJ 38 ; *see* also 86 Ind Cas 993 : 26 Cr LJ 929. A man who signs a document makes himself responsible for it as he was the original drafter of it. It is no defence that some body else wrote it out and he only signed it. If a legal practitioner signs a document he will be deemed to have read it and would be responsible for its contents. He would be responsible for any dishonest or untruthful statement in it and it is no answer to say that it was done in the interests of the client, or that he did not read it before signing it. AIR 1927 All 45 : 48 All 442 : 27 Cr LJ 1373 : 98 Ind Cas 493. Whoever forges a document purporting to have been made by a public servant in his official capacity, is guilty of an offence under Section 466, IPC. (1967) 40 Mys LJ 880.

The forgery must be definitely proved. 1980 All LJ 1067 : 1971 Cr LJ 1364 (suspicion is not enough) ; *see* AIR 1954 SC 322 (accused cannot be held guilty of forgery for bringing existence a document bearing antedate on a later date).

The forgery need not be for the purpose of instituting or defending a suit. AIR 1965 Raj 9 : 1965 (1) CrLJ 213. No *prima facie* case was made. AIR 1983 SC 194 : 1983 CrLJ 348.

3. Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by a Magistrate of the first class.

4. Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*), *as* follows :—

That on or about the......day of...at......you forged the document, exhibit.......which purported to be a record (or proceeding of (or in) a Court of Justice, etc.) and you thereby committed an offence punishable under Section 466 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

5. Sanction.—*Vide* AIR 1940 Cal 286 : 44 CWN 520 : 1 Cr LJ 662 ; *see* also 1975 Cr LJ 1929 ; AIR 1966 All 510.

* * * * *

Sec. 467. Forgery of valuable security, will *etc*.—Whoever forges a document which purports to be a valuable security or a Will, or authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, movable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with *imprisonment for life*, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

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15. Framing of charge.....2856
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1. Amendment.—The words in italics were substituted for the words "transportation for life" by Act 26 of 1955, Schedule (with effect from 1.1.1956).

2. Scope.—This section punishes the forgery of such documents as are valuable securities (*see* Section 30), and of the other documents here mentioned. Forgery of a *hundi* is an offence under this section. 31 PR 1910 ; *see* also 149 Ind Cas 936 : 34 Cr LJ 392 : 14 PLT 580 : AIR 1933 Pat 488 : 1933 Cr C 1030. To convict a person under Sections 467/109, it must be established that the act was done dishonestly or fraudulently as required by Section 464. 10 LLJ 369 : 29 Cr LJ 1031 : 112 Ind Cas 359 ; *see* also 32 Ind Cas 665. A person who takes in his name a document which is antedated though he cannot be deemed to have "made" the document, will nevertheless be liable as the principal offender, because, he is the person benefited by it : and he will be responsible for bringing the deed into existence where he is himself present at time. 13 Mys LJ 182 : 39 Mys HCR 1140. A person who has been convicted under Sections 467 and 109, IPC, cannot subsequently be convicted of an offence under Section 471, read with Section 467, *i.e.*, using the document as genuine. 26 Cr LJ 1387. It is not safe to order a prosecution for forgery based on the sole evidence of an expert witness. 86 Ind Cas 428 : 26 Cr LJ 796. A *Kabuliyat* is a valuable security for the purposes of this section, and remains such, even if the period for which it is granted has expired. 26 Cr LJ 1115 : 88 Ind Cas 283. The writer of a forged receipt is not guilty under this section where there is no evidence that he was present at the execution of the receipt or that he helped any one to make use of it. AIR 1925 Cal 192. The essence of an offence under this section is deceit and where nobody has been deceived or injured by the action of the accused no offence under this section is made out. 1932 M Cr C 41 : 1932 MWN 117. Person representing himself as owner of property and executing sale deed in owner's name is guilty under this section even the purchaser knows that he is not the owner. ILR 1945 Nag 542 : AIR 1945 Nag 200. The offence of abetment of forgery is plainly quite different from the offence of using as genuine a forged document. There is nothing either in law or in fact to prevent a man being innocent of the first offence and guilty of the second. 55 CLJ 336 : 140 Ind Cas 544 : AIR 1932 Cal 545. The mere antedating a document is not forgery, but if it is shown that the antedating had or could have had any operation to the prejudice of any one it will be forgery. 5 Pat 573 : 98 Ind Cas 252. The forger using the forged document can be punished only under Sections 467 and 471. AIR 1925 Nag 440 : 26 Cr LJ 1275 : 88 Ind Cas 1051.

The word "defraud" involves two elements, namely deceit and injury to the person deceived. Injury is something other than the economic loss that is deprivation of property, whether movable or immovable, or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. Even in those rare cases where there is a benefit or advantage to the deceiver, but corresponding loss to the deceived the second condition is satisfied. 1963 SCD 802 : (1963) 2 SCJ 559 : (1963) 2 Cr LJ 434 : AIR 1963 SC 1572. Section 467 can not be said to be a minor offence as compared with Section 468. 1980 UP (Cr) LR 267. A mutation in revenues remedy can not be said to be such as kind that creates, title. (1980) 1 Chand LR (1) 196 ; (1974) 76 Punj LR 780 ; (1977-79) Punj LR 502.

Accused executed deeds *bona fide* believing that suit property belongs to him. He had not misrepresented himself as someone else or authorised by someone else.

When a person executes a document conveying a property describing it as his, there are two possibilities. The first is that he *bona fide* believes that the property actually belongs to him. The second is that he may be dishonestly or fraudulently claiming it to be his even though he knows that it is not his property. But to fall under first category of 'false documents', it is not sufficient that a document has been made or executed dishonestly or fraudulently. There is a further requirement that it should have been made with the intention of causing it to be believed that such document was made or executed by, or by the authority of a person, by whom or by whose authority he knows that it was not made or executed. When a document is executed by a person claiming a property which is not his, he is not claiming that he is someone else nor is he claiming that he is authorised by someone else. Therefore, execution of such document (purporting to convey some property of which he is not the owner) is not execution of a false document as defined under Section 464 of the Code. If what is executed is not a false document, there is no forgery. If there is no forgery, then neither

Section 467 nor Section 471 of the Code are attracted. *Md. Ibrahim & Ors. vs. State of Bihar & Anr.*, 2010 (2) CrLJ 2223 (SC).

The accused, working as Sub-Postmaster, was alleged to have withdrawn money from depositor's account by forging signature of the depositor in withdrawal form. It was observed that there was no reliable evidence which threw a doubt on expert's evidence. Apart from of expert evidence of co-employees also stated that writings were the accused. Evidence was corroborated by the statement of accused himself. It was held that charged against accused under Sections 467 and 471, were fully established. 1987 Cri LJ 612 (Ori).

Three disputed letters purporting to have been written by the Minister to officers of the department, recommendatory in nature, were sent to handwriting expert whose report showed they were written by accused. *Held*, that letters were forged with the intention of using them for cheating and accused actually used them for cheating he was clearly guilty of offence under Section 468. No charge under Section 467. 1987 Cri LJ 933 (All).

To constitute forgery the simple making of a false document is sufficient. *Shri Dhirubhai* v. *Shri Tulsi*, (1995) 8 OCR 22.

When advocate of accused filed photocopy of forged will in civil court, no offence is made out against accused. *Shivkant Choubey* v. *Smt Chhotibai*, 1992 MPLJ 920.

Offence under Section 467, IPC, aggravated form of offence described in Section 466—Elements of forgery was set out—Signing or sealing of the document completes the execution and 'Forgery' and 'making of false documents' explained. *Dhirubhai* v. *Tulsi*, (1995) 8 OCR 22 (Ori).

3. Proof of handwriting.—Where the document alleged to have been forged purports to be in the handwriting of the accused and he has not denied it to be his handwriting but has on the other hand stated that the handwriting and the signature on the document appear to be like his handwriting and signature and where the handwriting expert after comparing the signature of the accused with some of his admitted signatures stated definitely that the signature is that of the accused, the Court is justified in holding that the document is in the handwriting of the accused. 1936 OWN 1066 : 1936 Cr C 990 : AIR 1936 Oudh 381.

4. Cases.—Where a person sells a note purporting by an endorsement on it to have been sold to his firm, and it is proved that it was not sold to his firm by the persons named in the endorsement, it must be held that the person sells the note knowing or having reason to believe it to be forged, and is liable to be punished under Sections 467 and 471 of the Penal Code. 15 Cal; 269 ; *see* also AIR 1943 Pat 227. There must be a separate Court for every alleged item of perjury forgery or, in other words, there must be independent evidence of user in the case of each document. 14 CLJ 652 : 13 Cr LJ 62 : 13 Ind Cas 398. In order to proceed under this section on the basis of a document which has been found forged by a Civil Court, previous sanction of the Civil Court is necessary. 16 Cr LJ 617 : 30 Ind Cas 441. To base a conviction simply upon the opinion of an expert is, as a general rule, very unsafe. 18 PWR 1912 Cr : 14 PLR 1912 : 15 Ind Cas 979 : 13 Ind Cas 563. A conviction for the offence of forging a document and also for using it as genuine is not illegal in the course of the same trial. 17 Cr LJ 73 : 32 Ind Cas 665. A conviction for forgery should not safely be based entirely upon a comparison of the handwriting. But the Court is competent to *see* for itself whether certain handwriting placed before it are similar or not. 65 Ind Cas 426 : 23 Cr LJ 74 : *see* also 144 Ind Cas 872 : 34 Cr LJ 828 : 1933 Cr C 1010 : AIR 1933 Pat 481. Where the accused forges the money order acknowledge he commits an offence under this section. 24 Bom LR 99 : 66 Ind Cas 328 : 23 Cr LJ 264. Where accused withdrew money on two different dates by forged withdrawal cheque, two charges are necessary. 144 Ind Cas 936 : 1933 Cr C 1030 : 14 PLT 580 : 34 Cr LJ 892 : AIR 1933 Pat 488. In a criminal trial the burden of proof is on prosecution to make out its case. Where in a prosecution for offence under Sections 467 and 471, IPC, the accused was alleged to have filed a forged receipt in a suit on a promissory note in which he was the defendant and the accused pleaded that the receipt filed by the pleader was not the same as that given by him to the pleader. *Held*, that there was fair presumption that the document given to the pleader was the document filed and the accused should offer some rebuttal. 1930 MWN 76 : 31 LW 384 : AIR 1930 Mad 192. Where a person did make, sign or execute a false document dishonestly or fraudulently but was merely instrumental in getting it made, he is not guilty of forgery under Section 476 of the IPC, but only guilty of abetment of forgery under Section 467, read with Section 109. 113 Ind Cas 68 : 30 Cr LJ 52 : AIR 1929 Lah 210. If a person falsely puts his name down as an attesting witness to the signature of somebody whom he knows has never signed at all, he is guilty of forgery just as well as the scribe. The persons attesting like the above must be put on their trial on a charge under Section 367, read with Section 120-B. AIR 1929 Cal 539 : 1929 Cr C 194. Where it appeared that certain procedure was not followed but there was nothing to show that the act of taking thumb impression contrary to rules was actuated by fraud or dishonesty. *Held*, that under these circumstances a conviction under Sections 467 and 109, IPC, could be sustained. 10 Lah LJ 369 : 102 Ind Cas 359. Conviction for forgery should not be based entirely upon a comparison of handwriting. But the Court can see for itself, whether certain handwritings placed before it are similar. 65 Ind Cas 426 : 23 Cr LJ 74. Document held to be valuable security under Section 20, falls also under Section 467. 8 PWR 1916 Cr : 17 Cr LJ 205 : 34 Ind Cas 317. To constitute offence under Section 367, or Section 471, nature of user is immaterial. 138 Ind Cas 705 : 59 Cal 1233 : 33 Cr LJ 685 : 55 Cr LJ 349 : 36 CWN 349 : AIR 1932 Cal 390. Where in offences under Sections 467 and 471, sanction is necessary under Section 196-A, previous sanction must be obtained. AIR 1933 Pat 273 : 34 Cr LJ 938 : 12 Pat 353 : 14 PLT 281 : 145 Ind Cas 268. Conviction cannot be sustained merely on the evidence of the handwriting expert. AIR 1932 Lah 490 : 33 PLR 697 : 33 Cr LJ 593 : 138 Ind Cas 268. Attestors to forged valuable security can plead that they signed it believing in representation of others. AIR 1939 Mad 730 : 41 Cr LJ 11 : 184 IC 460. Offence under this section is not proved by the admission of the accused that he wrote the body of the document, when there is no evidence that he wrote the signature of the landlord in the rent receipt. AIR 1949 Dacca 9 : 50 Cr LJ 776. Where the scribe of a document is charged under this section no complaint by the Court against him is required by the provisions of Section 195 (1) (b) or (c) of the Criminal Pro. Code. AIR 1947 All 173 : 48 Cr LJ 706 : ILR 1947 All 411.

Section 195 (1) of the Criminal Procedure Code, refers to an offence described in Section 403, IPC, and the latter is used there in a comprehensive sense so as to embrace all species of forgery and includes a case falling under Section 467, IPC. 5 Lah 550. An applicant for an appointment appended to his application a forged certificate.

Held, his object was to obtain wrongful gain and he was guilty of offences under Sections 467 and 471, IPC. AIR 1925 Rang 9 : 76 Ind Cas 225 : 25 Cr LJ 126. It is an offence under Section 467 to forge a document, even though there is no intention to use the same. 25 Cr LJ 1162 : 81 Ind Cas 986. A person who wrote a forged receipt cannot be convicted under Section 467 IPC, in the absence of evidence that he was present at its execution or that he helped any person to use it. 82 Ind Cas 261 : 25 Cr LJ 1253. Where the bench clerk of a Sub-Divisional Magistrate's Court received a sum of money, being the amount of fine levied on the payer, and misappropriated it and with a view to screen the misappropriation, made a false report he is guilty of an offence under Sections 467 and 471, IPC. 25 Cr LJ 1378 : 83 Ind Cas 338 : 3 Bur LJ 113. The offence of forging a document and using it as genuine under Sections 467 and 471, IPC, includes the offence of a public servant framing an incorrect document with intent to cause injury under Section 467, IPC, and a conviction both under Sections 467, 471 and under Section 167 is not maintainable. AIR 1926 Oudh 615. The bare fact that the stamp on which the document was executed are not supposed to have been issued on the date of the execution of the document is not sufficient for convicting a person under this section. It must be proved that the said stamp paper could not have been issued to the public at that date. 35 PLR 599.

A Photostat copy of the alleged rent-note was filed in the civil suit and the original rent-note was recovered during investigation. Thus, it is clear that the original document has not been produced, before the civil Court either before or after filing of complaint and therefore, the provisions of Section 195(1)(b)(ii) of Cr PC, has no application. Therefore, the order of discharge of accused is liable to be set aside. *Om Prakash* v. *Mangilal*, (2004) 1 Crimes 648 (Raj).

Once it is established that the signature of 'A' is a forgery and it is further established that the only person who benefitted from the forgery is '*B*', it is impossible to think of any alternative theory about some one else having committed the forgery without the knowledge and instigation of *B*. (1960) 2 OJD 261. Where the accused was prosecuted under Section 467, on the allegation that he had forged the thumb impression of the payee by putting his own thumb impressions in token of payment to payee and it was established that the amount covered by the money order to the payee and that the impression found on that voucher is that of the payee. If he fails to do that, he will be liable under Section 467. AIR 1957 Mad 47 : (1956) 2 Mad LJ 427 : 1957 Cr LJ 73. Having forged the bill for the purpose of cheating, he had used the same as genuine and had by his act cheated the State officers concerned. The accused was therefore guilty under Sections 467, 468, 471 and 420. The accused did have the requisite *mens rea* for commission of the offence of cheating under Section 420, and other offences under Sections 467, 468 and 471 or 467. 1963 (2) Cr LJ 36 : AIR 1963 Pat 262.

Mere wrong description of the name and parentage of the appellant does not amount to making a false document. 1976 Chand LR (Cr) 322 : *see* also 1967 Ker LJ 629 : 1969 MLJ (Cr) 191 elements of fraud dishonesty must be present in order to bring the act of the accused under this section. The fact that one person induced and abetted the detaching of the used stamp from the old files and reusing them in the other cases does not involve any process of forgery or use of a forged document ; *see* also AIR 1963 SC 1572 : 1963 (2) Cr LJ 434 (not guilty under the section). A false recital in a document is not forgery. AIR 1961 Guj 117 : (1961) 2 Cr LJ 76. The term property may be defined to be anything that is the subject of ownership. *See* also AIR 1961 SC 1698 (a College certificate held a property). The over statement of consideration to defraud a pre-emptor or as description of one person as the son of another with intent to give him a false status with intent to defraud another ; *see* also 1983 Cr LJ 691 : AIR 1983 SC 352 ; (1983) 1 Crimes 959. As the purpose of fraud must be something more substantial than obtaining recognization to an empty title". (1970) 1 Cr LJ 1502 : AIR 1970 Mys 254. In a case reported in AIR 1975 SC 1842 the handwriting expert gave the evidence that the body of the cheque was in the handwriting of the appellant but was not able to say whether the signature of the cheque was in the handwriting of the appellant, held that it was not possible to say that the appellant must have forged the cheque. *See* also 1982 Cr LJ 294 (mere existence of thumb impression of the accused found on the payee's receipt who is admittedly an illiterate person, would not able to incriminate the accused).

Employees can only be fastened if knowledge is attributable. *M/s Chitarmal Oil Co.* v. *State*, 1992 (29) ACC 332.

Charge was of forgery against accused petitioner. Forgery of signatures of other legal heirs in consent letters regarding transfer of shares of deceased father alleged—Village Administrative Office attested signatures as signed before him. But he deposed in evidence that actually signatories did not sign before him but attested only on believing statement of accused. VAO can not be treated as accomplice as he could not have knowledge that signatures were forged—Forgery was established. *Kanakaraj K.P.S.* v. *State*. (1995) 2 LW (Cri) 663 (Mad).

Signing of Vakalatnama without mentioning designation—No offence.—The first respondent is shown as Forbes Campbell & Co. Ltd. represented by *D*. Therefore, *D* has right to file the *Vakalatnama*. It may be that on the date when the *Vakalatnama* was filed in the case, he could not show the name of the old company since it is no longer in existence and he cannot show his designation in the new company since the new company has not been made party to the revision application. Hence *D* has not committed any impropriety much less any offence. *Massrath Balchandran* v. *Forbes Campbell & Co. Ltd.*, 1996 Cri LJ 2131 (Bom).

5. Procedure.—Not cognizable–Warrant–Not bailable–Not compoundable–Triable by a Magistrate of the first class. When valuable security is a promissory note–Cognizable–Warrant–Not bailable–Not compoundable–Triable by a Court of Session. AIR 1945 Sind 125 : ILR 1945 Kar 109.

6. Charge.—I (name *and office of Magistrate, etc.*). hereby charge you (*name of the accused*), as follows :—

That on or about the...... day of.......at.......you forged a certain document purporting to be a valuable security to wit........ or a will made by........; or an authority to adopt given by......to.....; or an authority given to........to make or transfer a certain valuable security, to wit....) ; and that you thereby committed an offence punishable under Section 467 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

7. Sanction.—*Vide* AIR 1943 Nag 327 : ILR 1943 Nag 238 : 45 Cr LJ 175 : AIR 1941 Mad 323 : 42 Cr LJ 468 ; AIR 1940 Cal 277 : 41 Cr LJ 719 ; AIR 1968 Bom 123 [Maharashtra Co-operative Societies Act 1969].

8. Sentence.—AIR 1939 Mad 730 : 41 Cr LJ 11 ; AIR 1955 SC 322 : 1955 Cr LJ 871 (sentence of four and half years RI was a deterrent sentence in case of conviction under Section 467, read with Section 471) ; AIR 1957 Mad 796 ; 1957 Cr LJ 1424 ; 1976 Cr LJ 758 ; 1976 Cr LJ 854 ; 1974 Cr LJ 1160.

When petitioner forgery got the ownership of tractor—Charge was proved—Forged document was prepared by the petitioner. It was held that due to 12 year's harassment and agony, imprisonment reduced. Sentence of fine maintained and order for consideration to pay. *Nahar Singh* v. *State of Punjab*, (1994) 1 CC Cases 306 : (1994) 1 Recent Cr R 226 (P&H) : (1994)1 CC Cases 306.

When accused got registration of tractor in his name through forged affidavit of complainant and was convicted by facing trial for 12 years and he paid required amount to complainant, sentence reduced to period already undergone. *Nahar Singh* v. *State of Punjab*, 1994 (1) Recent Cr R 226 (P&H) : (1994)1 CC Cases 306.

9. Conviction.—There can be no basis for conviction without stating and proving the motive governing the conduct of the accused. (1986) 1 Crimes 162.

10. Cognizance of offence.—Where offence alleged has been committed before start of proceeding there is no bar in taking cognizance by Magistrate in respect of such offence. *Dr. Satrughan Ram* v. *State of Bihar*, 1995 (2) East Cr C 621 (Pat).

Section 195 (1) (b) (ii) of Cr PC is not a bar to prosecution where in document in respect of which charge was laid had not itself been produced Govt. only a copy of same. *Vijay Peoji Tea Company* v. *Bimaleswar Goswami*, 1994 (2) Crimes 340 (Gau).

If there is time gap between time when forgery was committed and time when civil proceedings commenced, then bar under Section 195 (1), Cr PC, will not apply. *Subramania Iyer* v. *State*, 1994 MLJ (Cr) 214.

Magistrate can not take cognizance on a private complaint. *Rajendra Singh* v. *Surendra Singh*, 1992 MPLJ 650.

11. Limitation.—Limitation of 3 years under Section 468 (2) (c), Cr PC not applicable to such offence as imprisonment may extend to 10 years. *State of Haryana* v. Shiv *Singh* 1993 Cri LJ 547 (P&H).

12. Quashing of proceedings.—When *prima facie* allegations in complaint not made out, order ignoring process liable to be quashed. *Robert Salbir* v. *Ashok Sonulo*, 1992 (2) Crimes 940 (Bom).

When accused obtained Rs. 1.48 lacs from bank by producing false documents, FIR can not be quashed on account of delay in proceedings for 13 years. *Rajinder Golcha* v. State *of Punjab*, 1994 (3) Recent Cr R 521 (P&H).

FIR and charge-sheet not disclosing congizable offence can be quashed. *Pradeep* v. *State of Maharashtra*, (1995) 2 Bom CR 341.

Petition under Section 482, Cr PC, for quashing of FIR was filed. No *prima facie* case is made out for the commission of offence of issuing fake licence and registration certificate—Petitioners arms ammunition dealers were not named in FIR. No documen was produced to show *prima facie* that any fake stamp of any licence for arms whic was not genuine was recovered at the Instance of the petitioners. Since FIR contains n allegation against petitioners it is quashed. *Avinash Kumar and another* v. *State o Punjab.* (1994) 3 CC Cases 305 (P&H).

13. Acquittal.—Offence of criminal conspiracy was held to defraud the corporatio by public servant—Sanction was granted—Offence was established by evidence— Acquittal was not justified. *State of T.N.* v. *Thulasingam.* 1994 SCC (Cri) 1504 : AI 1995 (SC) 1314 : 1994(4) JT 73 : 1994(2) Scale 1065 : 1995 Cr LJ 2080.

When state appeal against acquittal was filed. There is nothing on record to sho that accused knew that alleged order was fabricated. Hence order of acquittal is no perverse or illegal. *State of M.P.* v. *Hasir Khan*, 1994 Cr LR (MP) 277 (N).

14. Offence of forgery.—On scrutiny of the evidence it was found that origina accused No. 3-Advocate had admitted his signature in Form A below the certificate. Th handwriting expert also opined that the signature of Advocate below the certificate a 'Q' was in the handwriting of the Advocate *i.e.* original accused No. 3 the handwritin expert also opined that the signature on the document is from A identified as 'Q' wa not that of the petitioner. In other words, the signature of the petitioner was forged Only because handwriting expert could not positively say that the forgery wa committed by either accused No. 1 and 2 or , 3 the acquittal of all the accused person of all the charges in this case was not justified. *Mallinath Ambanna Shedjale, v Purushotam vasudeo Somshetty and others*, 2002 Cri LJ 506 Bom. : 2001 All MR (CRI 1324 : 2001(3) Bom LR 712.

15. Framing of charge.—The reliance of the High Court on the ruling was totall uncalled for as the factual situation in that case was entirely different than the on prevalent here in this case.

We were also taken through the report of the Central Vigilance Commission. Par 7.21 of the said report reads as under:

> "The allegations against Shri V.K. Bhutiani are held proved only to the extent of making a faulty judgment in recommending the proposal for the PC limit as pointed out in para 6.61 and the article of charge is held proved only to the extent as various allegations have been substantiated or otherwise as mentioned in the assessment portion of the report."

Thus, it cannot be held that the Central Vigilance Commission had given a clea chit to the respondent-accused.

In our opinion, though the report of the Central Vigilance Commission may be relevant factor, it cannot be held to be "be all or end all" of the matter for prosecutin the accused persons of such serious offences.

We do not find any such reasoning having been given in the present case by th High Court. On the other hand, a perusal of the impugned order suggests that the Hig Court did not examine the material available by way of charge-sheet and has proceede to follow the ruling of *P.S. Rajya* We are, therefore, satisfied that this appeal has to b allowed by setting-aside the impugned order passed by the High Court. Accordingly, th appeal succeeds. The impugned order is set-aside and the matter is remanded. Now th rial Court shall proceed with the trial since the charges have already been framed. All ne contentions in law and fact shall be available to the respondent as well as the rosecution. This judgment shall not be treated to be an expression of opinion on our art. *C.B.I. vs. V.K. Bhutiani*, 2009 (10) SCC 674 : 2009(13) Scale 64.

16. Transfer of criminal case—Apprehension of miscarriage of justice.—The nalysis of all the materials, the transfer of the case as sought for, at this stage, is not nly against the interest of prosecution but also against the interest of other accused ersons, the prosecution witnesses and the convenience of all concerned in the matter. or the sake of repetition, it is relevant to mention that when the complainant was xamined as PW. 56, he disowned his complaint and asserted that it (complaint) was ot filed by him though he admitted his signature found therein. Further, all important itnesses particularly government officials informed that what they said before the ourt alone is absolute truth and they were forced to make false statement at the time f registering the complaint. As stated earlier, similar transfer petition which was filed efore the High Court ended in dismissal and it became final. We are satisfied that the residing officer of the Special Court is conscious of his power and how to conduct fair rial at the same place. We are also of the opinion that the public prosecutor cannot act n the dictates of the State Government, he has to act objectively as he is also an fficer of the Court. The Special Court is free to assess whether prosecution has stablished its case. We have already pointed out that a mere allegation that there is pprehension that justice will not be done in a given case alone does not suffice. onsidering the totality of all circumstances, we are of the opinion that in a secular, emocratic Government, governed by the rule of law, the State of Punjab is responsible or ensuring free, fair and impartial trial to the accused, notwithstanding, the nature of he accusations made against them. In the case on hand, the apprehension entertained y the petitioners cannot be construed as reasonable one and the case cannot be ransferred on a mere allegation that there is apprehension that justice will not be done.

Taking into consideration the entire facts and circumstances of the case and the naterials on record, we are of the view that the petitioners have not made out a case hat they have reasonable apprehension of not availing justice in the State of Punjab. Ve would like to clarify that we have not expressed anything on the merits neither of he prosecution case nor the defence of the accused and whatever said in the earlier aragraphs are applicable only for disposal of transfer petitions and ultimately it is for he Special Court to decide the issues in the light of the material placed and in ccordance with the law. The inevitable conclusion is that both the transfer petitions iled by the petitioners deserve to be dismissed. *Amarinder Singh vs. Prakash Singh adal*, 2009 (6) SCC 260 : 2009 (3) Crimes 174 (SC) : 2009 (7) JT 187 : 2009 (7) Scale 82 : 2009 (9) SCR 194 : 2009 (5) Supreme 95 : 2009 (4) SLT 415.

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Sec. 468. Forgery for purpose of Cheating.—Whoever commits orgery, intending that the [1][document or electronic record forged] shall be sed for the purpose of cheating, shall be punished with imprisonment of ither description for a term which may extend to seven years, and shall lso be liable to fine.

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[1] Subs. by Act 21 of 2000, sec. 91 and Sch. I, for "document forged" (w.e.f. 17-10-2000).

Synopsis

1. Scope 2858
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1. Scope.—The accused forged letters purporting to have been made by the Minister which were only of recommendatory nature. The accused succeeded in obtaining certain appointments from the officers concerned on the basis of forged letters. Accused was held to be clearly guilty of offence under Section 468. 1987 Cri LJ 933 (All).

Since matter in dispute is under scrutiny of civil Court and bindings of civil court are binding on criminal court, proceedings stayed till final disposal of Civil Court. *Mahla Ram* v. *Hawa Singh* 1991 (2) CC Cases 473 (P&H).

On face of concurrent finding that trap was laid and tainted money was recovered from accused, mere denial of said charges by accused not sufficient. *Narain Lal Nirala* v. State *of Rajasthan*. 1993 Cri LJ 3911 (SC) : AIR 1994 (SC) 118 : 1994 SCC (Cr) 1404.

Where the accused introduced AB and a marriage negotiations was held in the quarters where AB and his father and the accused lived and the forged documents showing AB, a Central Government Employee were produced in the same residence in presence of the accused to the informant the conviction of the accused was proper under Sections 468, 471, 420 and 120B of IPC are not unlawful. *Sujit Kumar Roy* v. *State*, 2004 Cr LJ 3693 (Jhar) : 2004 AIR Jhar HCR 2255 : 2004(2) East Cr C 310.

2. Cheating.—"Where the offence is committed after the offence of cheating is completed, the accused cannot be convicted under this section. 15 PR 1876 Cr. The offence under Section 468, is complete as soon as there is a forgery with the particular intent. When the intent is accomplished another distinct offence is committed. AIR 1924 Nag 120 : 25 Cr LJ 475 : 77 Ind Cas 827. Process-server filing a forged *attokshi* to explain delay in returning the process is guilty under Sections 468 and 471. 42 M 558 : 36 MLJ 201 : 20 Cr LJ 287 : 25 MLT 345 : 1919 MWN 433 : 50 Ind Cas 175. Where offence has been committed by a party in civil proceedings and document was given no evidence in suit, complaint of Civil Court is necessary. 143 Ind Cas 15 : 34 Cr LJ 526 : AIR 1943 Cal 481. A partner commits forgery if he forges a document in the name of the firm. 6 Bom LR 533. Conviction under this section is bad when the use of the forged document by the accused is not proved. 89 Ind Cas 398 : 26 Cr LJ 1358. *J.* who was on friendly terms with S. one day called on *W* as Railway Superintendent, and asked for a vendor's contract and in support of his request handed to him a closed envelope containing a letter alleged to be written by the Governor of the Punjab. It was proved that as a matter of fact the letter was forgd by *S* at the instigation of J. *Held*, on those facts that it may be presumed that *S*, wrote the document knowing it will be used to defraud *W* and on that the Magistrate rightly convicted *S*, of the offence under Section 468, IPC and *J* of the offences under Section 468 read with Section 109 and Sections 471 and 511, IPC, namely of the offences of abetment of forgery and attempt to cheat. 9 Lah LJ 103 : 101 Ind Cas 493 : 28 Cr LJ 461. Where court-fees stamp was purchased for client but was not used, client's name was altered and stamp was used offence under Section 468 held not to be committed. AIR 1931 Lah 337. Forgery though a substantive offence, partakes the nature of an attempt. It is usually an act done in furtherance of some criminal design. If it can be proved that the purpose of the offender in committing the forgery is to obtain property dishonestly, or if his guilty purpose comes within the definition of cheating (Section 136), he is punishable under the present section. The intention of the forger may be fairly inferred in most cases from the contents of the forged document".—*Morgan and Macpherson.*

Section 468, applies only where forgery is for the purpose of cheating. (1981) 29 BLJR 9 ; 1983 All LJ 253 ; 1983 Simla 107 ; 1983 (1) Crimes 833 : (1966) 1 Mys LJ 500 ; (1964) 30 Cut LJ 253 ; 1980 Cr LJ 369 ; 1983 All LJ 750 : 1983 All Cr R 53 ; 1984 Bihar LJ 116 ; 1983 Cur LJ 165. Accused must have forged the document. AIR 1979 SC 850 : 1980 Cr LJ 822 ; (1977) 1 Malayam LJ 180. For evidence and proof, *see* AIR 1980 SC 499 : 1980 Cr LJ 220.

3. Procedure.—Not cognizable—Warrant—Not bailable—Not comp-oundable—Triable by any Magistrate of the first class.

4. Charge.—I (*name and office of Magistrate, etc.*), hereby charge you. (*name of the* accused) as follows :—

That on or about the.......day of......at......you forged a certain document, to wit..... (*describe* it) intending that it shall be used for the purpose of cheating, and that you thereby committed an offence punishable under Section 468 of the Indian Penal Code, and within by cognizance.

And I hereby direct that you be tried on the said charge.

5. Offence of conspiracy.—When money drawn from Provident Fund Account deposited in bank in account of another accused who withdrew it and petitioner only introduced another accused in bank account, conduct of petitioner does not attract offence of conspiracy. *Narendra Kumar Bhardwaj* v. *State of Bihar*, 1991 (1) Crimes 817 (Pat).

When there was criminal conspiracy by Government servant—Recovery established and there was acceptance of gratification offence was made out— Conviction was fully justified. *Narain Lal Nirala* v. *State of Rajasthan*, 1994 SCC (Cri) 1404 : AIR 1994 (SC) 118 : 1993 Cri LJ 3911 (SC).

6. Quashing of proceedings.—The accused were charged of conspiring to purchase the units at a price below than market value. The petitioner in this case is principal of the technical institution which was functioning in premises taken on hire from accused person. There was no *prima facie* evidence to establish conspiracy in sale of units nor there was proof about involvement of petitioner in the said transaction. The Court held that the proceedings are liable to be quashed. *Saroj Kumar Sahoo* v. *State*, 2003 Cr LJ 1872 (Orissa) : 2003(3) Crimes 517 : 2002(94) Cut LT 65.

7. Cheating and forgery.—It is true that the disclosure of material information is necessary for processing an Application seeking grant of Arms Licence to an applicant and the record shows that the petitioners have disclosed almost the entire details of pending criminal cases and have submitted application form for issuance of Arms Licence for protection of their persons and property as well as their family members and, therefore, it could not be believed that there was any deliberate concealment of information about the solitary criminal case. Since, the petitioners have honestly made disclosure of pending criminal cases against them in the application form, and adequate information about its correctness was available with the District Magistrate in the form of recommendation of the Superintendent of Police, therefore, it could not be said that either the petitioners have made concealment of the material information or the Investigating Authority was unaware of the fact of pending cases against the petitioners.

Therefore, in the peculiar facts and circumstances of the case, it appears that there was no criminal intention of the petitioners in not disclosing about the remaining criminal case, pending against them while submitting the application form and as such, no case of concealment of material information is even *prima facie* made out. Since the record fails to demonstrate that there exist a criminal intention even in the mind of the alleged wrong doer, therefore, it could not be said that they have committed either of the offences. The elements of cheating require that one has to deceive or induce any person, fraudulently or dishonestly to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induce the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and that act or omission causes or likely to cause damage or harm to that person in body, mind, reputation or property and since, all these mandatory elements are missing, it cannot be said that even a *prima facie* case exist against the petitioners for being tried in relation to the alleged commission of offence in terms of Sections 420, 467, 468 & 471 of IPC. *Ummed Singh & Ors. vs. State of M.P.*, 2010 (2) CriLJ 1257 (MP).

8. Sections 409 and 468 and Prevention of Corruption Act.—If the Special Judge has no jurisdiction to try an offence under Section 5(2) of the P.C. Act for want of valid sanction, he lacks jurisdiction to take cognizance of allied offences and to try the same, in view of the specific powers on a Special Judge with limitations specified in Section 7(3) of the Amendment Act. Where there is no valid sanction for prosecution under Section 5(1)(c) read with Section 5(2) the conclusion becomes inevitable that, the orders of conviction recorded against the accused in respect of the charges under Sections 409 and 468 of the IPC and the sentences passed against him thereunder cannot be sustained and thus, are liable to be set aside. *Duryodhan Patra vs. State of Orissa*, 2010 (3) CrLJ 2505 (Orissa).

9. Framing of charge.—The reliance of the High Court on the ruling was totally uncalled for as the factual situation in that case was entirely different than the one prevalent here in this case.

We were also taken through the report of the Central Vigilance Commission. Para 7.21 of the said report reads as under:

> "The allegations against Shri V.K. Bhutiani are held proved only to the extent of making a faulty judgment in recommending the proposal for the PC limit as

> pointed out in para 6.61 and the article of charge is held proved only to the extent as various allegations have been substantiated or otherwise as mentioned in the assessment portion of the report."

Thus, it cannot be held that the Central Vigilance Commission had given a clean chit to the respondent-accused.

In our opinion, though the report of the Central Vigilance Commission may be a relevant factor, it cannot be held to be "be all or end all" of the matter for prosecuting the accused persons of such serious offences.

We do not find any such reasoning having been given in the present case by the High Court. On the other hand, a perusal of the impugned order suggests that the High Court did not examine the material available by way of charge-sheet and has proceeded to follow the ruling of *P.S. Rajya* We are, therefore, satisfied that this appeal has to be allowed by setting-aside the impugned order passed by the High Court. Accordingly, the appeal succeeds. The impugned order is set-aside and the matter is remanded. Now the trial Court shall proceed with the trial since the charges have already been framed. All the contentions in law and fact shall be available to the respondent as well as the prosecution. This judgment shall not be treated to be an expression of opinion on our part. *C.B.I. vs. V.K. Bhutiani*, 2009 (10) SCC 674 : 2009(13) Scale 64.

10. Conviction.—*Sufficient material.*—Conspiracy for drawing scholarship on the basis of fictitious post metric students of Government Junior College. Accused, officials of Social Welfare Department. Prosecution able to prove its case of conspiracy amongst the accused persons in drawing money twice over in respect of students on the basis of fictitious names. *Y. Venkaiah vs. State of Andhra Pradesh*, AIR 2009 SC 2311 : 2009 CrLJ 2834 : 2009(12) SCC 126 : 2009(4) Scale 154 : 2009(4) JT 432.

* * * * *

Sec. 469. Forgery for purpose of harming reputation.—Whoever commits forgery, [1][intending that the document forged] shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall be liable to fine.

Synopsis

1. Scope 2861
2. Procedure 2862
3. Charge 2862

1. Scope.—"*A*, with the intention of harming *B*'s reputation or knowing that what he does is likely to have this effect writes a letter in imitation of *B*'s handwriting purporting to be addressed to confederate in some disgraceful and dishonest transaction and shows this letter to other persons. He has committed this offence. As to what written statements may be said to harm a person's reputation, the Chapter XXI of defamation should be consulted".—*Morgan and Macpherson*. For a case under this section, *vide* 1 WR Cr 61 ; 2 BLRA Cr 12. For meaning of words *see* AIR 1966 SC 1773.

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[1] Subs. by Act 21 of 2000, sec. 91 and Sch. I, for "intending that the document forged" (w.e.f. 17.10.2000).

2. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by a Magistrate of the first class.

3. Charge.—I (*name and designation of Magistrate*, etc.), hereby charge you, (*name of the accused*) as follows :—

That on or about the.......day of......at......you forged a certain document, to wit..... (*describe* it) intending that the same shall harm the reputation of *A. B* (or knowing that it likely to be used for the purpose of harming the reputation of *A, B*), and you thereby committed an offence punishable under Section 469 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 470. Forged [1][document or electronic record].—A false [1][document or electronic record] made wholly or in part by forgery is designated "a forged document"

* * * * *

Sec. 471. Using as genuine a forged [1][document or electronic record].—Whoever fraudulently or dishnonestly uses as genuine any [1][document or electronic record] which he knows or has reason to believe to be a forged [1][document or electronic record], shall be punished in the same manner as if he had forged such [1][document or electronic record].

Synopsis

1. Scope 2862
2. Proof 2864
3. User 2864
4. Cases 2864
5. Execution of forged will 2868
6. Benefit of probation to convicted accused medical-students who got admitted in college by forged documents 2869
7. Procedure 2869
8. Charge 2869
9. Jurisdiction of Court 2869
10. Sentence 2870
11. Conviction 2871

1. Scope.—It is necessary for the prosecution when the charge is under this section, to show that the accused knew or had reason to believe the document to be forged and used it fraudulently or dishonestly. AIR 1940 Pat 486 : 41 Cr LJ 427 : 187 I.C. 256. To constitute use as contemplated by Section 471, it is not necessary that the forged document should be used as evidence in a Court. It is sufficient that it used in order that it may ultimately appear in evidence or used dishonestly or fraudulently. 1961 BLJR 369 : 1961 (2) Cr LJ 169 ; 1963 SCD 186 : (1963) 3 SCR 376 : 1963 (2) Cr LJ 698. Where it was held that what Section 471, requires is the use as genuine of any document which he knows or believes to be a forged document ; it does not lay down that such use can only occur when the original itself is produced, for the section does not require the production of the original. The mere fact that the suspicions of a Pleader ought to have been aroused by the sight of the document is not *prima facie* evidence that he knew or had reason to believe the document to be forged. AIR 1940 Nag 360 : 41 Cr LJ 753. The use of forged documents contemplated by this section is such use as causes wrongful gain or wrongful loss. That is to say, the section applies to the case of a person, who appears before some other person, or before a Court, with a document, and endeavours to induce that person or Court to do some act which he or it would not do, if the document was known to be a forgery. 11 CWN 838 : 5 CLJ 454, 1 Weir 550. Deprivation of property actual or intended, is not a necessary ingredient of the pretext to defraud in this section. 5 CWN 897. A copy of a document alleged to be false does not come within the definition of a "false document" and a conviction under Section 471, upon such copy, cannot stand. 20 MLJ 534 ; but *see* AIR 1932 Sind 90 : 1932 Cr C 530 :33 Cr LJ 452. Where it has been held that production of certified copy of forged document with necessary knowledge and intention is offence under Section 471. The production by a part of a document which he is bound by law to produce cannot by itself constitute a user of document by him. 22 MLJ 181. The filing of a forged document in a Court with the intention of relying on it at the trial of a case, amounts to an attempt to use such document, though the document itself was not actually used, and the person filing it may be prosecuted for offences under Sections 511 and 471. 13 Ind Cas 99. Where a person give his pleader a copy of a false document for the purpose of using it in the trial of his suit, *held*, that he was guilty of an offence under this section and not merely of an attempt to commit that offence. 26 Cr LJ 863 ; *see* also 19 CWN 125 ; 5 Cr LJ 233 ; 5 Cal 717. 'There must be a using of the document by a person who knows or has reason to believe that it is forged, and such using must be with the intention to defraud or to cause wrongful gain or wrongful loss. In deciding whether there has been a 'using as genuine' of the document, the Courts will advert to the nature of the document. Some document, such as receipts, are intended to remain in the holder's possession, other documents such as cheques or promissory notes must be tendered to the persons who are to pay them. Whoever the document, the dealing with it by the accused person, must be such as to satisfy the Court that he intended to defraud, but it is not necessary that wrongful gain or wrongful loss should actually be caused by the use.—*Morgan and Macpherson.* The fact that the primary object of the appellant in using the forged receipt was to get out of the difficulty in which he was put by the criminal case and that he did not support the document by production of perjured evidence may be taken into account in mitigation of punishment. 16 CWN 633. In a charge under Sections 471 and 193, failure to establish that the document is forged would result in acquittal. 72 CLJ 46. Where post-man was charged under Sections 409, 467 and 471, sanction of the Governor-General was held necessary for prosecution under Section 471, but trial could proceed for other offences. AIR 1941 Mad 33 : 42 Cr LJ 263 (1). The fabrication of a false document is criminal only when certain intentions can be attributed to the person who fabricates it. 42 Cr LJ 247 : AIR 1940 All 551.

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[1] Subs. by Act 21 of 2000, Sec. 91 and Sch. I, for "document" (w.e.f. 17.10.2000).

All that the section requires is that there must be fraudulent or dishonest use of a document as genuine and knowledge of reasonable belief on the part of the person using the document that it is a forged. AIR 1961 Pat 451 : 1961 BLJR 411 : (1961) 2 Cr LJ 677 ; 1983 Simla LC 107 ; (1963) 3 SCR 376 (use as genuine, forged document).

2. Proof.—For the purpose of obtaining a conviction under Section 467, read with Section 471, IPC, it is not sufficient for the prosecution to establish that the document was not a genuine document ; it must be shown affirmatively that the accused either knew or had reason to believe that the document was forged. The prosecution must negative the possibility of the document having been prepared behind the accused's back and without his knowledge and of his having been imposed upon led to believe that it was genuine and to file it at such in good faith. 166 Ind Cas 531 : 38 Cr LJ 235 : 3 BR 177.

For a conviction under Section 471, the mere fact that the documents was forged could not conclude the matter, unless it is also established that he was a party to the forgery. It is incumbent on the prosecution to establish beyond reasonable doubt that the accused knew or had reason to believe that the certificates were forged. AIR 1960 Madh Pra 269 : 1960 Cr LJ 1217 ; AIR 1957 Ker 78: 1957 Cr LJ 755 : ILR 1957 Ker 277. For *proof and evidence see* (1942) 4 Ori JD 4.

3. User.—The use of a document contemplated by this section must be a voluntary one, and not the mere production of the document in compliance with an order of the Court which must be obeyed. 159 Ind Cas 287 : 1935 Cr C 1186 : AIR 1935 All 940 : 1935 AWR 1453 ; *see* also 159 Ind Cas 149 : 39 CWN 1309 : 1935 Cr C 1079 : AIR 1935 Cal 687 ; AIR 1935 All 521 : 157 Ind Cas 557 : 36 Cr LJ 1199 : 1935 ALJ 493 : 1935 A Cr C 128 : 1935 Cr C 546. The mere filing of a certified copy of a forged document may not amount to user of the forged document within the meaning of Section 471 of IPC. But the filing of the certified copy with the knowledge that it is a copy of a forged document would amount to user of the document because when a person files a copy he is using in substance the original itself if the filing is with the knowledge that the copy is the copy of the forged document. AIR 1956 Pat 354 : 1956 Cr LJ 1091 ; 1955 BLJR 641. Forged invoices produced in support of claim for evasion of sales tax. (1963) 2 SCJ 120 : 1963 (1) Cr LJ 330 : AIR 1963 SC 416 ; 175 IC 458 (as to preparation time and production of forged documents) ; (1981) 29 BLJR 530 ; 1983 (1) Crimes 833 (use must be fraudulent or dishonest. The essential ingredients are (1) knowledge or reasonable belief on the part of the person using the document is a forged one and fraudulent or dishonest use of the document as genuine. 1971 Cr LJ 1799 : (1970) 1 Cut WR 424 ; 1961 (2) Cr LJ 139.

Certain documents (cheques) were forged to create a tenancy in favour of the accused. Pay-in-slip signed by some one else were used to deposit the two cheques in the account of the complainant who had filed the pay-in slips in a civil suit instituted by the accused. *Held*, has under Section 195 (i) (b) (ii) against had not precluded cognizance of the offence. (1986) 2 Crimes 49 (Del).

4. Cases.—The fact that a person charged with an offence under Section 471, Penal Code, is himself, the forger of the document, is no reason why he should not be charged under Section 471, Penal Code, especially when he cannot be charged under Section 467. 13 Cr LJ 862 : 17 Ind Cas 798. In order to sustain a conviction under this section for using a forged document as genuine, it is not sufficient to prove that the accused was responsible for its use and should have been aware of its contents. It should also be proved that the accused himself used the document, that is, put in the document. 1 Weir 550 ; AWN 1887, 195 ; 25 PR 1913 Cr : 14 Cr LJ 667. It is extremely doubtful whether the mere filing of a copy of which the original is alleged to be forgery, is user of forged document. 20 CWN 262 : 43 Cal 783 : 17 Cr LJ 130.

A *hundi* purporting to have been drawn by a firm which never had any existence is a forgery. 30 PWR 1916 : 17 Cr LJ 574 : 36 Ind Cas 154. The production of a document which was a title-deed in answer to a citation in which no particular deed was specified is a voluntary production and amounts to user within the meaning of Section 471. 18 Cr LJ 839 : 41 Ind Cas 663. Using false *attakshi* with forged signature to defraud Court is an offence under this section. 42 M 558. An accused cannot be convicted under this section, for making change in a document so that it may be taken in evidence where the change is not material to facts. 17 ALJ 872 : 52 Ind Cas 61 : 20 Cr LJ 575. Where pending a police investigation a person tenders a forged document to the investigating officer and thereby causes that officer to do something which would otherwise not have done, he is guilty of having used a document within Section 441, IPC. 60 Ind Cas 674 : 22 Cr LJ 274. Accused obtained a prescription "from a medical man" for one tube of morphia and altering the words "one tube" to "four tubes" presented the prescription to a chemist and obtained four tubes of morphia from him. *Held*, that the accused was guilty of an offence under Section 471, IPC, 63 Ind Cas 617 : 22 Cr LJ 681. Where evidence is insufficient to prove that accused actually committed forgery, he may be convicted under Section 471, and not under Penal Code, Section 465. AIR 1931 All 258. Section 471 of the Penal Code, is no bar to the imposition of separate sentences on an accused persons who is convicted at the same trial of both the offences of forgery and using the forged document as genuine. Section 35 of the Criminal Procedure Code, authorises the imposition of such separate sentences. 52 M 532 : 29 LW 559 : 119 Ind Cas 63 : 30 Cr LJ 983 : AIR 1929 Mad 450 : 56 MLJ 554.

In order to qualify for appearance at a certain competitive examination, *C* attached a copy of a certificate as a true copy of original along with his application. On being asked to produce the original *C* produced it. The date of birth in the original certificate was changed from 5th January, 1901 to 15th January, 1904, so as not to debar him from appearing in the above competitive examination. *Held*, that the original document was a forged one inasmuch as the original date in it was altered and that *C* knew that it was a false document ; that it was made with intent to cause damage and injury to other candidates for the examination and to support *C*'s claim to appear. 10 Lah 565 : 30 PLR 724 : 118 Ind Cas 385 : 30 Cr LJ 900. An offence under Section 471 of the Indian Penal Code, has no relation to the Registration Act and is governed entirely by different principles. Where therefore a prosecution was ordered both under Section 82 of the Registration Act, under Section 471, IPC, and the proceedings under the Registration Act are found to be illegal, such illegality in no way affects the validity of the prosecution under the Penal Code. 10 Pat LT 889 : 119 Ind Cas 888 : 30 Cr LJ 1101 : AIR 1929 Pat 500. *S* was convicted under Section 471, for having used a forged document and *P* for having abetted the same ; *S* was sentenced to four year's and *P* to two and a half years rigorous imprisonment. *Held*, that the sentence was not severe. 49 Cr LJ 193 : 116 Ind Cas 632 : 30 Cr LJ 656 : AIR 1929 Cal 203. Party setting up two titles and supporting one by false document is guilty. 2 AICR 58. If a forged document is presented for registration, that amounts to user for purposes of Section 471, IPC. 89 Ind Cas 1050 : 29 Cr LJ 1482.

Where the accused, who was a witness in the suit from some interest in, or desire to assist the defence, filed certain document for the purposes of the suit in advance of a trial. *Held*, that he used the document within the meaning of Section 471. 49 CLR 193 : 116 Ind Cas 632 : 30 Cr LJ 656 : AIR 1929 Cal 203. But a charge under this section is not maintainable when the accused was forced by the complainant to refer to such a document in evidence. 175 Ind Cas 488 : 10 RR 497 : 39 Cr LJ 592 : AIR 1938 Rang 194. If a person puts forward a document as supporting his claim in any matter whether that document is acted upon by the Court or used in evidence is immaterial for the purpose of constituting use of the document by the party within the meaning of Section 471. 111 Ind Cas 433 ; 29 Cr LJ 849.

Accused executed deeds *bona fide* believing that suit property belongs to him. He had not misrepresented himself as someone else or authorised by someone else.

When a person executes a document conveying a property describing it as his, there are two possibilities. The first is that he *bona fide* believes that the property actually belongs to him. The second is that he may be dishonestly or fraudulently claiming it to be his even though he knows that it is not his property. But to fall under first category of 'false documents', it is not sufficient that a document has been made or executed dishonestly or fraudulently. There is a further requirement that it should have been made with the intention of causing it to be believed that such document was made or executed by, or by the authority of a person, by whom or by whose authority he knows that it was not made or executed. When a document is executed by a person claiming a property which is not his, he is not claiming that he is someone else nor is he claiming that he is authorised by someone else. Therefore, execution of such document (purporting to convey some property of which he is not the owner) is not execution of a false document as defined under Section 464 of the Code. If what is executed is not a false document, there is no forgery. If there is no forgery, then neither Section 467 nor Section 471 of the Code are attracted. *Md. Ibrahim & Ors. vs. State of Bihar & Anr.*, 2010 (2) CrLJ 2223 (SC).

The uses of a forged document for the purpose of securing an acquittal is dishonest and the same can form the basis of a conviction under Section 471, IPC. 9 Pat LT 800. Where the accused dishonestly used as genuine a forged document in a suit against an illiterate man. *Held*, that he could be punished under Section 471 with the punishment provided by Section 467, IPC. 109 Ind Cas 903 : 29 Cr LJ 631 : AIR 1927 Oudh 630. Even if a man uses a false document to support a good title, he is guilty of an offence under Section 471, IPC. AIR 1924 Cal 718 : 83 Ind Cas 504 : 51 Cal 469. Section 471 is only directed against persons other than the forger. 29 Cr LJ 1387 : 89 Ind Cas 523 : 21 NLR 1152. Where a person has been convicted for forgery under Section 467, IPC, he cannot be convicted under Section 471, for using the forged document as genuine. 88 Ind Cas 1051 : 26 Cr LJ 1295 : AIR 1925 Nag 440. Whenever a person fraudulently presents a document to another person being what it purports to be or causes the same to be so presented, knowing or having reasons to believe that the said document is a forged document, the document is "used as genuine" with Section 471. It matters not whether the document is presented by the accused himself or by his agent or whether it is produced by the accused of his own motion or pursuant to the order of the Court. 52 Cal 881. Although a person who produces documents in obedience to the order of the Court may not be held guilty of using forged documents even if they are found to be forged, the case would be different where the production of the documents in the Court not voluntary, but is in pursuance of a conspiracy between the accused, one of them being made the custodian of the document in order to get over some technical objection. 88 Ind Cas 181 : 6 Cr LJ 1093 : AIR 1925 Nag 45. A complainant when asked by Court to produce documents in support of his complaint produced certain forged ones. *Held*, he was guilty of an offence under Section 471, IPC, and he could not escape on the ground that it was an involuntary production of documents in Court. 6 Lah 50 : 26 PLR 156 : 88 Ind Cas 595 : 26 Cr LJ 1171. Intention to produce for material gain or material loss is not essential. Using a document for securing an acquittal would fall under Section 471, as it is the obtaining of an advantage. AIR 1929 Pat 60 : 9 PLT 800 : 30 Cr LJ 236 : 113 Ind Cas 712. "Fraudulently" does not necessarily connote deceit or injury to the person deceived. AIR 1926 Cal 89 : 52 Cal 881 : 27 Cr LJ 117 : 91 Ind Cas 993. Whenever a document is used as genuine with intention to deceive and gain an advantage to the user or to the injury of some other, an offence under Section 471 has been committed. AIR 1926 Cal 89 : 52 Cal 881 ; *see* also 5 OWN 138 : AIR 1927 Oudh 630. Whether there has been user or not must depend upon the circumstances of each case. AIR 1926 Cal 89 : 52 Cal 881 : 27 Cr LJ 117 : 91 Ind Cas 993. Presentation of a forged document before the Sub-Registrar amounts to user. AIR 1924 Pat 128 : 2 Pat 459 : 4 PLT 727 : 24 Cr LJ 792 : 26 Cr LJ 1482. Filing of forged document with plaint amounts to user within the meaning of this section. 19 Cr LJ 709 : 3 Pat LJ 386 : 46 Ind Cas 293. Insolvent who uses a forged document with intent to support his claim to be declared insolvent is guilty under Section 464. 43 All 225 : 18 ALJ 1137 : 22 Cr LJ 56 : 59 Ind Cas 200. Production of a forged Will before a Deputy. *Tashildar* in proceedings to transfer of *patta* amounts to production before a Revenue authority. AIR 1929 Mad 87 : 16 MLW 534 : 24 Cr LJ 15 : 71 Ind Cas 63. Neither acquisition nor deprivation of property is essential under Section 471. AIR 1926 Cal 89 : 52 Cal 881 : 27 Cr LJ 177 : 91 Ind Cas 993. That accused did not rely on the document as a voluntary security is no defence to a charge under Section 471. AIR 1924 Cal 960 : 28 CWN 947 : 40 CLJ 135 : 25 Cr LJ 1217 : 82 Ind Cas 145. Where accused filed certain receipts in a rent suit against him and placed them before the plaintiff for admission or denial and the plaintiff denied them. *Held*, it the plaintiff had been deceived and had admitted them the appellant would have achieved his object. The term "use" in Section 471, is of wide meaning of the accused did use the receipts. AIR 1935 All 521. It is user whether the party files the document personally or, as more usually happens, through a legal representative. Further such legal representative will be presumed to have filed the document with the knowledge and authority of his client until the contrary is shown. AIR 1932 Cal 545 : 55 Cr LJ 336 : 140 Ind Cas 544.

The use of certified copies of forged originals by a person who knows that the originals are forged clearly amounts to making use of forged documents within the meaning of Section 471. 26 Cr LJ 929 : AIR 1925 Oudh 413 ; *see* also AIR 1926 Oudh 255 : 1 Luck 306 : 13 OLJ 391 : 27 CLJ 402 : 93 Ind Cas 66. If a party to a suit sets up two different titles and supports one of them with a false document, he has committed an offence under Section 471, even if it be found that the other title is good. 96 Ind Cas 850 : 27 Cr LJ 994 : AIR 1926 Mad 1072. Prosecution under Section 471, alone without complaint of District Munsiff before whom document is used does not lie. AIR 1933 Mad 413 : 35 Cr LJ 800 : 1933 MWN 217 : 144 Ind Cas 519 ; *see* also AIR 1932 Sind 90 : 33 Cr LJ 452 : 1932 Cr C 530 : 20 SLR 73.

Accused securing service on allegation that he had passed certain examination and that he was a discharged person from Army and police service and producing certain forged certificates in support was found guilty under the section and sentenced to six years Rigorous Imprisonment. 1965 (2) Cr LJ 394 : AIR 1965 Pat 364.

A-1 aged 17 years got admission in MBBS Course by using forged mark-sheets in criminal conspiracy with A-2 his doctor-father A-1. From findings of High Court factual position leaves no manner of doubt that both the accused had not only the knowledge but also had reason to believe that the document *i.e.*, the mark-sheet was forged one before they used it. For an offence under Section 471, one of the necessary ingredients is fraudulent and dishonest use of the document as genuine. The act need not be both dishonest and fraudulent. For sustaining conviction under Section 471 is necessary for the prosecution to prove that accused knew or had reason to believe that the document to be forged one and whether the accused knew or had reason to believe the document in question to be a forged one has to be adjudicated on the basis of materials and the finding recorded in that regard is essentially factual and as such the judgment of the High Court convicting the accused under Sections 471 and 420/120B of IPC does not suffer from any infirmity to warrant interference. *A.S. Krishnan* v. *State of Kerala*, (2004) 2 Crimes 317 (SC) : (2004) 11 SCC 576 : AIR 2004 SC 3229 : AIR Cr LJ 2833.

In a Surpeme Court case, amount from recurring deposit account was made by using forged vouchers. The accused-bank employees acted negligently in passing vouchers. It was not itself sufficient to convict them under Section 409. Further it could not be shown that they were acting in conspiracy and that they had knowledge that one of accused had fraudulently and dishonestly prepared forged vouchers. It was held that offences under Section 467, 471 & 409 were not proved and accused were entitled to the acquittal. *L. Chandraiah* v. *State*, 2004 Cr LJ 365 (SC) : AIR 2004 (SC) 252 : 2003(10) JT 165 : 2003(9) Scale 537 : 2003(8) Supreme 89.

Accused No. 1 forged a number of receipts and passed as genuine and collected donations from various persons against those receipts. The only limited role of the accused two was that he accompanied the accused no. 1, when he collected the donation. The duty of the prosecution was to prove that the accused no 1 know from before that the receipt used by the accused no. 1, was forged and also that he had show in the accused no. 1, in passing of the forged receipt as genuine and obtaining donation against such receipts. (1974) 4 SCC 338 : 1979 Cr LR 111 ; 1980 SC Cr R 146 ; *see* also (1981) 2 BLJR 9 ; 1979 Cr LR 467 ; 1980 All LJ 1067. For instance of fraudulent or dishonest uses of forged documents *see* AIR 1971 SC 2593 : 1972 Cr LJ 34 ; AIR 1955 SC 323 : 1955 Cr LJ 821. For onus of proof. AIR 1980 SC 499 : 1980 Cr LJ 220 ; (1982) 2 SCW 198 ; AIR 1963 SC 416 : 1963 ALJ 1.

5. Execution of forged will.—W here the accused took no benefit on the basis of said forged will not be acted upon in any proceedings and accused was facing the trial for more than 26 years, therefore, the sentence reduced to the period already undergone which was about 7 months. Apart from this, the findings of convention recorded by the Courts below are based on correct appreciation of evidence and it cannot be said that the approach of the Courts below in dealing with the evidence is manifestly erroneous and the conclusions drawn are wholly unreasonable and perverse. The judgments of the Courts below did not suffer from any illegality in the approach to the case or any perversity in appreciation of the evidence on record. *Jagdish v. The State of Rajasthan.* 2002 Cri LJ 2171 (Raj).

6. Benefit of probation to convicted accused medical-students who got admitted in college by forged documents.—In a case when students use forged mark-sheets to obtain admission thereby depriving eligible candidates to get seats and that too a medical course and a doctor is involved in the whole operation, uncalled for leniency or undue sympathy will be misplaced and actually result in miscarriage of justice. Such types of crime deserve deterrent punishment in the large interest of society. Plea relating to sentence or extending the benefits of the Probation Act cannot be entertained. *A.S. Krishnan* v. *State of Kerala,* (2004) 2 Crimes 317 : (2004) 11 SCC 576 : AIR 2004 SC 3229 : AIR Cr LJ 2833.

7. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by a Magistrate of the first class.

See AIR 1955 Cal 175 : 1955 Cr LJ 513 (for misdirection to the jury in a trial for offences under Section 467 Sections 471, 467 and 420 IPC). Offence under this section comes within the ambit of Section 176, Cr PC. 1964 SCD 262.

8. Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*), *as* follows :—

That on or about the..... .day of..... at..... .you fraudulently (or dishonestly) used as genuine a certain document, to wit.....which you then knew (or had reason to believe) to be forged document ; and that you thereby committed an offence punishable under Section 465, (or 466, or 467) and 471 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Where two persons were charged and one of them pleaded guilty held charge against the other should be proved independently. 1986 Cr LJ 1181 (Mad) : 1985 Mad LW (Cr) 148

9. Jurisdiction of Court.—*Vide* 4 DLR (Mad) 254 : (1949) 2 MLJ 152.

Transfer of criminal case—Apprehension of miscarriage of justice.—The analysis of all the materials, the transfer of the case as sought for, at this stage, is not only against the interest of prosecution but also against the interest of other accused persons, the prosecution witnesses and the convenience of all concerned in the matter. For the sake of repetition, it is relevant to mention that when the complainant was examined as PW. 56, he disowned his complaint and asserted that it (complaint) was not filed by him though he admitted his signature found therein. Further, all important witnesses particularly government officials informed that what they said before the Court alone is absolute truth and they were forced to make false statement at the time of registering the complaint. As stated earlier, similar transfer petition which was filed before the High Court ended in dismissal and it became final. We are satisfied that the presiding officer of the Special Court is conscious of his power and how to conduct fair trial at the same place. We are also of the opinion that the public prosecutor cannot act on the dictates of the State Government, he has to act objectively as he is also an Officer of the Court The Special Court is free to assess whether prosecution has established its case. W have already pointed out that a mere allegation that there is apprehension that justic will not be done in a given case alone does not suffice. Considering the totality of al circumstances, we are of the opinion that in a secular, democratic Government governed by the rule of law, the State of Punjab is responsible for ensuring free, fair an impartial trial to the accused, notwithstanding, the nature of the accusations mad against them. In the case on hand, the apprehension entertained by the petitioner cannot be construed as reasonable one and the case cannot be transferred on a mer allegation that there is apprehension that justice will not be done.

Taking into consideration the entire facts and circumstances of the case and th materials on record, we are of the view that the petitioners have not made out a cas that they have reasonable apprehension of not availing justice in the State of Punjab We would like to clarify that we have not expressed anything on the merits neither o the prosecution case nor the defence of the accused and whatever said in the earlie paragraphs are applicable only for disposal of transfer petitions and ultimately it is fo the Special Court to decide the issues in the light of the material placed and i accordance with the law. The inevitable conclusion is that both the transfer petition filed by the petitioners deserve to be dismissed. *Amarinder Singh vs. Prakash Sing Badal*, 2009 (6) SCC 260 : 2009 (3) Crimes 174 (SC) : 2009 (7) JT 187 : 2009 (7) Scal 382 : 2009 (9) SCR 194 : 2009 (5) Supreme 95 : 2009 (4) SLT 415.

10. Sentence.—There was offence of submitting false document regarding claim o leave Travel Concession committed 10 years before and accused already undergon three months R. I, sentence reduced to period already undergone. *Manjur Faiju Inamda v. State of Maharashtra,* 1993 Cri LJ 2832 (Bom).

It was proved beyond a reasonable doubt that the accused used the duplicat certificate with changes, as a true certificate knowing it to be false in material particula and thereby got admission. Therefore, there was no reason to interfere with the conviction. However, looking to the nature of the offence and the fact that the accused's post and present records had been good and the fact that he had already lost his caree and was now married the sentence was reduced to that period already undergone. *Tubibhai Jivabhai Changani* v. *State of Gujarat* 2001 Cri LJ 741 (SC) : 2001(1) SCC 71 : 2001(1) JT 156 : 2000(8) Scale 238 : 2000(8) Supreme 455.

Where there was false claim of Rs. 2,500/- through LTC will by appellant— Travelling was not actually undertaken—Long time of 10 years was elapsed afte committing offence. Sentence was reduced to that period already undergone with sentence of fine. *Manjur Faiju Inamdar* v. *State of Maharashtra*, (1994) 1 East Cr C 5 (SC) : AIR 1993 (SC) 2322 : 1993 Cr LJ 2832 : 1993(2) UJ 323 : 1993(4) JT 147 : 1993(3) Scale 94.

The accused who came from the police department to the Dducation Department on transfer brought/prepared even the seals of the police department and he used those seals in forging the documents. He in order to see his own benefit, not only produced a forged document but also tried to obtain money of the salary of other teachers by producing this document. The Court declined to reduce even a day's sentence in such a serious matter. *Jata Shanker Jha* v. *State of Rajasthan*, 2000 Cri LJ 2108 (Raj) : 2000(1) Raj Cri C 344 : 2000(2) Raj Lr 266 (Raj).

11. Conviction.—When accused utilised forged document to get land mutated in s name, conviction under Section 471, IPC, justified. *State of Punjab* v. *Joginder ngh.* 1991 (1) SLJ 638 (P&H).

* * * * *

Sec. 472. Making or possessing counterfeit seal, *etc.* with intent to ommit forgery punishable under Section 467.—Whoever makes or ounterfeits any seal, plate or other instrument for making an impression, ntending that the same shall be used for the purpose of committing any orgery which would be punishable under Section 467 of this Code, or with uch intent, has in his possession any such seal, plate or other instrument, nowing the same to be counterfeit, shall be punishable with *imprisonment or life*, or with imprisonment of either description for a term which may xtend to seven years, and shall also be liable to fine.

Synopsis

1. Amendment.......2871
2. Scope.......2871
3. Procedure.......2871
4. Charge.......2871

1. Amendment.—The words in italics were substituted for the words "transportation for life" by Act 26 of 1955, Section 117, and Schedule (with effect from 1.1.1956).

2. Scope.—This section covers only the case of a counterfeit of an existing thing. 81 Ind Cas 986. *See* also AIR 1984 SC 151 : 1984 Cr LJ 162.

3. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by a Magistrate of the first class.

4. Charge.—I (*name and office of the Magistrate, etc.*), hereby charge you (*name of the* accused) as follows :—

That on or about the.......day of......at.....you made (or counterfeited) a seal. Ex...... (or plate or instrument) for making an impression, intending that the same shall be used for the purpose of committing any forgery punishable under Section 467 of the Indian Penal Code, (or had in your possession the seal. Ex...... (or plate or instrument) intending that the same shall be used for purpose of committing any forgery which would be punishable under Section 467 of the Indian Penal Code, and that you thereby committed an offence punishable under Section 471 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 473. Making or possessing counterfeit seal, *etc.* with intent to commit forgery punishable otherwise.—Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery whic would be punishable under any section of this Chapter other than Sectio 467, or with such intent, has in his possession and such seal, plate or othe instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seve years, and shall also be liable to fine.

Synopsis

1. Cases 2872
2. Procedure....................2872
3. Charge 2872

1. Cases.—13 WR Cr 16.

2. Procedure.—Cognizable—Warrant—Not bailable—Not compoun-dable— Triabl by Magistrate of the first class.

3. Charge.—Same as in Section 472, *ante*, with necessary alterations.

* * * * *

Sec. 474. Having possession of document described in Section 466 or 467, knowing it to be forged and intending to use it as genuine.—[1][Whoever has in his possession any document, knowing the same to be forged, and intending that the same shall fraudulently or dishonestly be used as genuine, shall, if the document is one of the description mentioned in Section 466 of this Code], be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ; and if the document is one of the description mentioned in Section 467, shall be punished with *imprisonment for life*, or with imprisonment of either description, for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Amendment....................2872
2. Gist of the offence 2872
3. Procedure....................2873
4. Charge 2873
5. Acquittal 2873

1. Amendment.—The words in italics were substituted for the words "transportation for life" by Act 26 of 1955, Section 117, and Schedule (with effect from 1.1.1956).

2. Gist of the offence.—To support a charge under this Section it is necessary for the prosecution to prove : (1) that the documents, the subject of the charge, were rged: (2) that the accused knew them to be forged ; (3) that he was in possession of em ; (4) that he intended that they should be fraudulently or dishonestly used as nuine : and (5) that each of the documents was of the description mentioned either in ction 466, or in Section 467. 16 Bom 165. The guilty intent cannot be suspected or rmised. WR 1864 Cr 12 : 2 PR 1895 Cr ; *see* the case in 6 MLT 466. The words ntention to use" in Section 474, should fructify into an actual use to attract Section 95, Cr. Pr. Code. AIR 1927 Mad 1060 : 28 Cr LJ 225 : 99 Ind Cas 1025.

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[1] Subs. by Act 21 of 2000, Sec. 91 and Sch. I, for certain words (w.e.f. 17.10.2000).

The onus of proving the knowledge of the accused that it was forged and it was in s exclusive possession must be on the prosecution. (1971) 2 MLJ 427 ; 1979 Cr LJ 29 : (1980) 2 Mah LR 174 : (1972) 1 Cut WR 69 : 1971 Cr LJ 1811 : 1982 Cr LJ 2177 : 982 All Cr R 301 (if Section 195, is applicable).

3. **Procedure.**—Cognizable—Warrant—Not bailable—Not compoundable—Triable a Magistrate of the first class.

4. **Charge.**—The charge should run thus :—

"I, (*name and designation of Magistrate, etc.*), hereby charge you (*name of the* ccused), as follows :—

That you on or about.........(date)........(time)....... (place)...........had in your ossession a document, to wit..... knowing the same to be forged and intending that the ame shall be fraudulently (or dishonestly) used as a genuine, the document being one the descriptions mentioned in Section 466, IPC, (or the document being of the escriptions mentioned in Section 467, IPC), and thereby committed an offence unishable under Section 474, Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

5. **Acquittal.**—When evidence not establishing guilt and recovery of forged BPOS rom house of accused appeared to be planted one, benefit of doubt goes to appellant nd conviction such aside. *Ram Singh* v. *State*, 1991 JCC 539 (Del).

* * * * *

Sec. 475. Counterfeiting, device or mark used for authenticating locuments described in Section 467 ; or possessing counterfeit marked naterial.—Whoever counterfeits upon, or in the substance of, any material, ny device or mark used for the purpose of authenticating any document lescribed in Section 467 of this Code, intending that such device or mark hall be used for the purpose of giving the appearance of authenticity to any locument then forged or thereafter to be forged on such material, or who, vith such intent, has in his possession any material upon or in the ubstance of which any such device or mark has been counterfeited, shall e punished with *imprisonment for life*, or with imprisonment of either lescription for a term which may extend to seven years and shall also be iable to fine.

Synopsis

1. Amendment..2874
2. Scope 2874

3. Procedure...2874
4. Charge 2874

1. Amendment.—*Vide* notes under Section 474, *ante*.

2. Scope.—To support a charge under the latter part of the section it is necessa to prove : (1) that the accused was in possession of the papers referred to in the charg (2) that the devices or marks on these papers were counterfeited on them ; (3) that th devices or marks were such as used for the purpose of authenticating any documer described in Section 467 ; (4) that the accused intended that the device or mark should be used for the purpose of giving the appearance of authenticity to documen either then forged or thereafter to be forged. 16 Bom 165 ; *see* Rat Un Cr C 165 ; 1 Bom 189.

3. Procedure.—Not cognizable—Warrant—Not bailable—Not comp-oundable Triable by a Magistrate of the first class.

4. Charge.—I (*name and office of the Magistrate, etc.*), hereby charge you (*name the accused*) as follows :—

That on or about the..........day of........at.........you counterfeited upon (or in th substance of) any material, to wit....... (*describe* it) a device to wit......(or mark) used fo the purpose of authenticating any document, to wit....... (or that you were in possessio of any material, to wit....upon (or the substance in) which any device or mark used fo the purpose of authenticating any document, to wit....) intending that such device (o mark) shall be used for the purpose of giving the appearance of authenticity to som document then forged to wit...... (or to be forged on such material) and that you thereb committed an offence punishable under Section 475 of the Indian Penal Code an within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * *

Sec. 476. Counterfeiting device or mark used for authenticatin document other than those described in Section 467, or possessin counterfeit marked material.—Whoever counterfeits upon, or in th substance of, any material, any device, or mark used for the purpose o authenticating [1][any document or electronic record] other than th documents described in Section 467 of this Code intending that such devic or mark shall be used for the purpose of giving the appearance o authenticity to any document then forged or thereafter to be forged on suc material, or who with such intent, has in his possession any material upo or in the substance of which any such device or mark has bee counterfeited, shall be punished with imprisonment of either description fo a term which may extend to seven years, and shall also be liable to fine.

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[1] Subs. by Act 21 of 2000, Sec. 91 and Sch. I, for "any document" (w.e.f. 17.10.2000).

Synopsis

1. Notes....2875
2. Procedure....2875
3. Charge....2875
4. Sanction....2875

1. Notes.—Where application for agricultural loans bearing signature of tenants was not signed by him but by the accused but tenant returned the same and received he same, the accused is not guilty under Section 476, as there was no gain or advantage to him nor any injury or loss to the Government. 145 Ind Cas 229 : 34 Cr LJ 922 : AIR 1933 Rang 114. Under special circumstances, sentence may be reduced. AIR 1934 Cal 532 : 35 Cr LJ 1279. The statutory power of the police to investigate cognizable under Section 471, 475 or 476, is no way barred by virtue of the provisions of Section 195 (1) (b) (ii) of Cr PC. 1983 Cr LJ 713 : (1983) 85 Punj LR 293.

2. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by a Magistrate of the first class.

3. Charge.—Same as in Section 475, *ante*, with necessary alteration.

4. Sanction.—The prosecution for the offence requires sanction in a case arising under Section 195 (c) of the Criminal Procedure Code.

* * * * *

Sec. 477. Fraudulent cancellation, destruction, *etc.* of will, authority to adopt or valuable security.—Whoever fraudulently or dishonestly, or with intent to cause damage or injury to the public or to any person, cancels, destroys or defaces, or attempts to secret any document which is or purports to be a will, or an authority to adopt a son, or any valuable security or commits mischief in respect to such document, shall be punished with *imprisonment for life*, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Amendment....2875
2. Scope....2875
3. Valuable security....2876
4. Conviction....2876
5. Procedure....2876
6. Charge....2876

1. Amendment.—The words in italics were substituted for words "transportation for life" by Act 26 of 1955, Section 119, and Schedule (w.e.f. 1.1.1956).

2. Scope.—The words "purports to be" in this section make the law of India upon this matter what it has in a long succession of cases, been held to be in England. In order to constitute an offence under this section, it is not necessary that the document must be stampted and receivable in evidence. 1 Weir 552. Where documents purports to be a valuable security under this section, the question whether it is invalid for want of consideration is immaterial. 1 Weir 554 ; 1 Weir 553. To support a prosecution under this section, the proof of the fraudulent secretion of a document is sufficient and it is not necessary to prove the validity of such a document. 97 Ind Cas 1055 : 27 Cr LJ 1230. A person may secret a document not only when its existence is unknown to other persons for preventing its becoming known, but also when its existence is known to others. In the latter case, he may secret it preventing its being produced in Court, mere failure to produce when there was duty to produce is not enough though this is evidence of section. Falsely denying the possession of the document is also good evidence. AIR 1931 Cal 184 : 1931 Cr C 248 : 25 CWN 425 : 58 Cal 1051 (FB) ; *see* also 58 Cr LJ 283. Document destroyed must amount to valuable security. Administration under of Court is not valuable security. 35 Bom LR 1062 : AIR 1933 Bom 494. Where a Post Master received a V.P. letter and handed over the same to the addressee without getting payment on or before 20.10.25 and then altered his accounts so as to make it appear that he only handed it over on 24.10.25. *Held*, that he was guilty of criminal breach of trust and falsification of accounts in the absence of proof by him of the dishonest intention. 102 Ind Cas 488 : 28 Cr LJ 552 : AIR 1927 Mad 626.

An act done with intent to save one self from criminal prosecution or conviction but not with intent to cause wrongful loss to another is not offence under this section. AIR 1963 All 131 : 1963 (1) Cr LJ 219 : ILR 1976 Cut 121. *See* also AIR 1978 SC 438 : 1978 Cr LJ 507 (important aspects of the case under this section).

When parties were closely related while entering into compromise the prosecution should be quashed. It was held. *Shanmuganathan* v. *State rep. by the Sub-Inspector of Police, Thirumangalam, Madurai District*, (1995) 2 LW (Cr) 567 (Mad).

3. Valuable security.—In order to become valuable security (under Section 30), the document itself should create the right or liability. Ordinarily speaking account books do not by themselves create any such right or liability though they may be evidence of the existence of such right or liabilities, that is not to say that under no circumstance can an account book be considered valuable security. 1962 Ker LJ 1072 : 1962 Ker LJ 615 : AIR 1963 Ker 68 ; 1963 (1) Cr LJ 279 : AIR 1963 All 131 ; *see* also 1973 Cr LJ 1640.

4. Conviction.—*Sufficient material.*—Conspiracy for drawing scholarship on the basis of fictitious post metric students of Government Junior College. Accused, officials of Social Welfare Department. Prosecution able to prove its case of conspiracy amongst the accused persons in drawing money twice over in respect of students on the basis of fictitious names. *Y. Venkaiah vs. State of Andhra Pradesh*, AIR 2009 SC 2311 : 2009 CrLJ 2834 : 2009(12) SCC 126 : 2009(4) Scale 154 : 2009(4) JT 432.

5. Procedure.—Not cognizable—Warrant—Not bailable—Not compo-undable—Triable by a Magistrate of the first class.

6. Charge.—I *(name and office of Magistrate, etc.)* hereby charge you *(name of the accused)* a follows :—

That on or about the......day of......at......you fraudulently (or dishonestly or with intent to cause damage or injury to *A, B* (*or* to be public) cancelled (or destroyed, or defaced or attempted to cancel, destroy, deface or secreted or attempted to secrete, or ommitted mischief in respect of) a document, Ex..... .which is (purported to be) a will or an authority to adopt or any valuable security) and that you thereby committed an ffence punishable under Section 477 of the Indian Penal Code, and within my ognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 477-A. Falsification of accounts.—Whoever, being a clerk, officer r servant, or employed or acting in the capacity of a clerk, officer or ervant, wilfully, and with intent to defraud, destroys, alters, mutilates or alsifies any [1][book, electronic record, paper, writing,] valuable security or ccount which belongs to or is in the possession of his employer, or has een received by him for or on behalf of his employer, or wilfully, and with ntent to defraud, makes or abets the making of any false entry in, or omits r alters or abets the omission or alteration of any material particular from r in, any such book, paper, writing, valuable security or account, shall be unished with imprisonment of either description for a term which may xtend to seven years, or with-fine, or with both.

Explanation.—It shall be sufficient in any charge under this section to lleged a general intent to defraud without naming any particular person ntended to be defrauded or specifying any particular sum of money ntended to be the subject of the fraud, or any particular day on which the ffence was committed.]

Synopsis

1. Amendment........2877
2. Scope........2877
3. Intent to defraud........2880
4. Criminal Breach of Trust........2880
5. Sentence........2881
6. Procedure........2881
7. Sanction........2881
8. Charge........2881
9. Conviction........2881
10. Forgery or permit........2881

1. Amendment.—This section has been added by the Criminal Law Amendment ct, 1895 (8 of 1895), Section 4.

2. Scope.—It is sufficient to satisfy the words of the section, that the person harged under the section is one who undertakes to perform and does perform the duty f a clerk or servant, whether, in fact, he is clerk or servant, or not, and though he is under no obligation to perform such duties and receive remuneration. By fraud is meant an intention to deceive, whether it be from any expectation of advantage, to the party himself or from ill will towards the other is immaterial. 1 Weir 554. 1957 MWN 495. There must be relationship of master and servant.. Merely performing the work of a clerk does not come make him liable under Section 477A. 1953 All LJ 318 : 1953 Cr LJ 149 : AIR 1953 All 660 (AIR 1932 Cal 464 and AIR 1952 Sind 428 distinguished). But the position is different so far as the charge of the offence or conspiracy is concerned, as it is a distinct and separate offence. All that is necessary is the establishment of the agreement for the doing of the act which is so punishable. ILR 1953 Hyd 293. Person being agent of A company and receiving payment for doing its work as agent in spite of the fact that he is a full time servant of *B* Company is a servant as contemplated in the section. A man who deliberately makes a false document in order to conceal a fraud already committed by him is undoubtly acting with intent to commit fraud, as by making the false document he intends the party concerned to believe that no fraud has been committed. AIR 1962 SC 1821 : (1962) 32 Com Cas 699 : 1962 (2) Cr LJ 805 (1963) 1 SCR 253. Where a partner in a firm is appointed as such as to manage the business of the firm or to write its accounts, he acts as its servant ; and if he falsifies the account, he is liable under this section. 6 Bom LR 552 ; *see* also 14 Ind Cas 603. A person who is acting as agent for another, who is many thousand miles away in another country, can not be described as his servant. An agent has the power to act on his own initiative, which is the ordinary mark of difference between a servant and an agent. 164 Ind Cas 369 : 37 Cr LJ 927 : 1936 Cr LJ 631 : AIR 1936 Rang 299. Replacing stamps on documents by used up stamps, is not an offence under this section. 47 Cal 71 : 23 CWN 935 : 30 Cr LJ 258. Where it is found that the accused made false entries in the accounts to cover his own defalcation he cannot be convicted under Section 477-A, IPC 20 ALJ 662 : 68 Ind Cas 824 : 33 Cr LJ 610 : 20 ALJ 662. Where a person is charged with falsification of accounts any number of false entries or omission of entries may be proved in order to prove falsification ; such a course is not contrary to Section 224 Criminal Procedure Code. 34 CWN 926 : 129 Ind Cas 356 : 32 Cr LJ 318 : AJR 1931 Cal 8. A serious of falsification of accounts made to cover a single act of defalcation may be laid in one charge under Section 477-*A*. 11 Lah LJ 384 : 30 Cr LJ 958 : 118 Ind Cas 645 : AIR 1929 Lah 843. A criminal case was commenced in the Court of the first class Magistrate and involved charges against the accused under Sections 408 and 477-A IPC. At the time the case commenced the charge under Section 477-A, was exclusively triable by a Court of Session. Since the amended Cr. Pr. Code, came into force charges under Section 477 A, were triable by Magistrate with first class powers. *Held*, that the trial by the Magistrate after the amended Code, came into force on the charges under Sections 408 and 477-A, IPC, was quite legal and proper. The amendment of the law which enables in Magistrate with first class powers to try charges under Section 477-A IPC is a matter of procedure only and the amending Act applies notwithstanding that the case was commenced before the amending Act come into force. 28 CWN 998 : AIR 1924 Cal 983. Public servant entrusted with money misappropriating it and making false entries in cash book is guilty under Section 409, and this section. AIR 1941 Sind 204 : 43 Cr LJ 328. Each defalcation is a separate offence. AIR 1942 Pat 401 : 43 Cr LJ 625 : 200 IC 380. The meaning of the term "with intent to defraud" is not restricted to cases of deceit and injury to person deceived". The term means either an intention to deceive and by means of deceit to obtain an advantage or an intention that injury should be fall some person or persons. Advantage which is intended must relate to some future occurrence, or in other words, must be of a prospective nature. AIR 1939 Rang 156 : 40 Cr LJ 552. It is doubtful whether a diary in a judicial proceeding falls within the category of "book, paper, writing, valuable security or account" within meaning of this section. *Ibid.* An entry in the accounts cannot by itself amount to the offence of falsification of account. 50 Cr LJ 682 : AIR 1949 Pat 326.

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[1] Subs. by Act 21 of 2000, Sec. 91 and Sch. I, for "book, paper, writing" (w.e.f. 17.10.2000).

Where a partner of a firm has been appointed to manage its business and writes its accounts, he is liable under Section 477-A of the Penal Code, if he falsifies the accounts. 88 Ind Cas 190 : 26 Cr LJ 1131 : AIR 1925 Sind 828 ; *see* also AIR 1932 Sind 53 : 25 SLR 62. A partner in a firm if appointed as such to manage the business of the firm or to write its accounts act as its servant. If he falsifies accounts he is liable to be convicted and punished under Section 477-A. AIR 1959 Bom 486 : ILR 1959 Bom 670 : 1959 Cr LJ 1032 ; AIR 1959 Cal 489 : 1959 Cr LJ 964. An accountant in a Bank, fearing that the bank may fail any day, and being anxious to recover his money deposited as security, obtained securities equal to the amount of his deposit by falsifying the accounts. He thus deceives the higher authorities of the Bank. *Held*, that as the falsity of the account was made to deceive the Bank authorities in case of liquidation and as together with the intention of deceiving there was an attempt to obtain an undue advantage that was in law an intent to defraud. 23 ALJ 657 : 89 Ind Cas 520 : 26 Cr LJ 1384. "Falsely" applies to the preparation of an entirely new document containing false information. AIR 1926 Lah 385 : 22 Cr LJ 1383 : 98 Ind Cas 599 ; *see* also 16 Pat 688 : 173 Ind Cas 759 : 19 Pat LT 297 : 39 Cr LJ 374 : AIR 1938 Pat 165. Where fraud has already been committed and the false document is made to conceal fraud, the maker of the document is guilty under Section 477-A. 145 Ind Cas 749 : 1933 ALJ 1372 : 34 Cr LJ 1056 : 1933 Cr C 850 : AIR 1933 All 525 ; *see* also 11 Mys LJ 321. Charges of embezzlement and falsifications can be linked together. AIR 1931 Pat 349 : 12 PLT 696 : 32 Cr LJ 1026 : 33 Ind Cas 450. Not Section 477A, but Section 363, is governed by Cr. Pro. Code, Section 195 (1) (c). 136 Ind Cas 766 : 25 SLR 471 : 1932 Cr C 194 : 33 Cr LJ 328 : AIR 1932 Sind 53. In a case under this section the prosecution should examine the complainants when the defence is that the accused, a servant of the firm, made the entries on the authority of one of the partners. 59 Cr LJ 83 : AIR 1934 Cal 800 : 152 Ind Cas 226. Section 477-A, only requires the falsification of account with intent to defraud. It does not require any deprivation of property. 1951 MWN 334 : AIR 1951 Mad 894 : 52 Cr LJ 1093 : (1951) 1 MLJ 691. The fact that accounts had been audited every year makes no difference when falsification of accounts had been demonstrated. 1957 MWN 495.

Where falsification of account is for covering breach of trust, there is no question of immediate or remote connection with breach of trust. AIR 1962 SC 1821 : (1962) 2 Cr LJ 805 : (1963) 1 SCR 253 : (1962) 32 Com Cas 629 ; 1965 MLJ (Cr) 453 : 1957 MWN 495. Making false entries in transport permits with intent to defraud the government is punishable under this section. AIR 1960 SC 460 : 1960 Cr LJ 541 (it is doubtful whether a transfer permit is an account). Where charge of criminal breach of trust is not proved, conviction under Section 477-A, is not sustainable. AIR 1965 Mys 128 : AIR 1976 SC 2140 : 1976 Cr LJ 913 (various items of defalcation made within one year can be joined together in a single charge). 1976 Cr LJ 913 : AIR 1976 SC 2140 : 1976 Cr LR (SC) 176 (whether prosecution has to prove that : (I) at the relevant time the accused was a clerk, officer or servant; (2) acting in that capacity he destroyed etc.; and (3) he did so intentionally). In the case reported in AIR 1972 SC 521 : 1973 Cr LJ 313 the charge under the section failed for want of evidence of account book ; *see* also 1970 SCC (Cr) 275 (failed to show in what way the accounts was false fraudulent or altered by the accused). Trial of the accused under this section is not barred by his previous conviction under Section 409. IPC, in respect of the same transaction. AIR 1963 Raj 14 : 1963 (1) Cr LJ 218. Joinder of two or more charges under Section 408 or Section 409, vitiates or more charges under the section would vitiate the trial. AIR 1956 All 466 : 1956 Cr LJ 459 but *see* AIR 1956 SC 149 : 1956 Cr LJ 322 (if the offences under this section are so connected together as to come within the purview of Section 235, Cr. P. Code, then they can be tried together). For appreciation of evidence under this section *see* AIR 1981 SC 721 : 1981 Cr LJ 420 ; AIR 1980 SC 1523 : 1980 Cr LJ (NOC) 175 ; AIR 1979 SC 1080 : 1979 Cr LJ 913 : AIR 1974 SC 1354 : 1974 Cr LJ 614 ; 1978 Cr LJ 45 (SC) ; AIR 1972 SC 958 (subsequently worked if a proper defence).

The accused, working as Sub-Postmaster was charged for withdrawal of money from depositor's account by forging signature of the depositor in withdrawal form. There had been no falsification of any entries in any book as on the basis of forged withdrawal from relevant entries were made in the relevant books. *Held*, that charge under Section 477-A, not established. 1987 Cri LJ 612 (Ori).

Creation of false records without actual execution of work with a view to defraud Government is permissible under Section 477-A. *M. Srinivasulu Reddy* v. *State* 1991 (3) ALT 542.

3. Intent to defraud.—One of the most important ingredients of Section 477-A. is "intent to defraud". Where the manager of a company offered bribe out of the funds of the company, with the intention of causing injury to the company but on the contrary to promote its interest. *Held*. that the act of the manager was not punishable under Section 477-A. 170 Ind Cas 257 : 38 Cr LJ 887 : AIR 1937 Rang 280. In order to bring home the guilt under Section 477-A. the prosecution has to prove that the accused had falsified the account books or made false entries therein wilfully with intent to defraud the State. AIR 1965 Mys 128 (charge that the accused had falsified accounts to cover up his own defalcations).

Intent to defraud must be established to sustain a charge under this section. 1973 Cr LJ 1534 ; AIR 1951 Mad 894 ; AIR 1959 Bom 486 : 1959 Cr LJ 1032. It does not require any deprivation of property. 1973 Cr LJ 1556 ; (1976) 1 Cr LJ 913 : AIR 1976 SC 2140 : 1976 SCC Cr 324 (falsification by act or omission but it does not necessarily follow that it was done with intent to defraud. The offence contemplated under the section must be in respect of documents specified in` the section. (1972) 13 Guj LR 617.

4. Criminal Breach of Trust.—As correctly pointed out by the learned Special Public Prosecutor and as laid down in the decision in *Vishwa Nath v. State of J & K.* AIR 1983 SC 174 : 1983 Cri LJ 231, after committing the criminal breach of trust in respect of money over which the accused had complete dominion, the refund of the amount after detection would not absolve him of the offence. Once it is proved that the amount was entrusted to him, then under Section 106 of the Evidence Act, he has to establish as to what happened to the said amount and that fact lies within the knowledge of the accused and as such, the burden of establishing the said fact is upon him. In this case, according to the defence, the appellant never received any amount from the loaness. But alternatively, it is contended that the amount had been paid back. *S. Jayaseelan v. State by SPF, CBI*, 2002 CriLJ 732 (Mad) : 2002 (2) RecCriR 484.

5. Sentence.—Grounds for reduction of the sentence. AIR 1956 Bom 671 : 1956 Cr LJ 1195. Sentence to be deterrent. 1953 MWN 772. *See also* AIR 1972 SC 1618 : 1972 Cr LJ 1089 ; AIR 1981 SC 721 : 1981 Cr LJ 420.

6. Procedure.—Not cognizable—Warrant—Bailable—Not compound-able— Triable by any Magistrate.

7. Sanction.—No sanction is needed with regard to production of document in Court. AIR 1960 SC 1960 : 1967 Cr LJ 1404. Charge under Sections 409 and 477-A, IPC, read with Section 120-B, IPC, not vitiated in respect of substantive charge under Sections 409 and 477-A, for want of sanction to file complaint under Section 120-B. AIR 1967 SC 1590 : 1967 Cr LJ 1401. In a case under Section 477-A and Section 420, the acquittal under Section 477-A, would operate for the benefit of the accused in a charge under Section 420. AIR 1980 SC 301 : 1980 Cr LJ 214.

8. Charge.—"I *(name and office of the Magistrate, etc.)*, hereby charge you (*name of the accused*), as follows :—

That on or about the...day of... at.....you being a clerk (or officer or servant, or employed, or acting in the capacity of a clerk, officer or servant) wilfully and with intent to defraud, destroyed (or altered, mutilated or falsified) and book to wit.... (or paper, writing, valuable security, or account) which belonged to '(or was in the possession of) your employer *A*, *B* (or which was received by you for on behalf of your employer the said *A*, B) (or you wilfully and with intent to defraud, made or abetted the making of any false entry, to wit.....in (or omitted or altered the omission or alteration of any material form) any such book, *etc*, and that you thereby committed an offence punishable under Section 477-A of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

How to frame charge—AIR 1944 Oudh 122 : 45 Cr LJ 538.

9. Conviction.—Where there was direct and positive evidence to show that fertilizer were not transported by the dealers in the manner alleged by them hence not entitled to benefit of doubt and there was no reason to interfere with the orders of conviction against the dealers. *A Jayaram* v. *State of Andhra Pradesh*, (1995) 3 Crimes 283 : 1995 AIR BCW 3285 : 1995 SCC (Cr) 801 (SC).

10. Forgery or permit.—Accused working in office of civil supplies Inspector. Allegation that they prepared and signed permit for issuance of Palmolein Oil. While Permit was found to be issued in favour of an other accused a shop owner. Counterfoil retained in office was for other shop. Witnesses produced by prosecution for proof of handwriting and signature of accused on Permit, not stating that interpolation was in hand of accused.

Witness stated in his examination-in-chief that he knew the accused persons, viz., accused was working in Civil Supplies Inspector's Office in the rank of UDC and that he had earlier worked with him in the Finance Department. Witness has however, nowhere stated in the examination-in-chief that the present instance of interpolation or forgery was in the hand of accused. In the cross-examination, witness stated that although he had worked along with accused in the Finance Department, but he was working in a different section of the Department. He has clearly stated that he was working in the Budget Section called F1 whereas accused was working in the Motor Conveyance Section called F2 Section. It has also been brought to notice that in the cross-examination, it was said that the files dealt by A2 and F2 Section in the Finance Department never came to the F1 Section where witness was working. Therefore, the interpolation as also the initials appended thereto have not been proved and established to be in the hand of accused.

In that view of the matter, the prosecution has miserably failed to prove and establish that the alleged interpolation and forgery was done by either accused. *Ravichandran v. State by Dy. Superintendent of Police, Madras*, 2010 (3) CrLJ 2879 (SC).

* * * * *

OF PROPERTY AND OTHERS MARKS

Sec. 478. Trade Mark.—(*Repealed by the Trade Merchandise Marks Act. 1958 (43 of 1958) Section 135, and Schedule (with effect from 25.11.1959)*). The section before the repeal stood as follows :—For the purposes of this Code, the expression "trade mark" includes a trade mark registered under the Trade Marks Act, 1940, (V of 1940) and any mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right to use the mark.

* * * * *

Sec. 479. Property mark.—A mark used for denoting that moveable property belongs to a particular person is called a property mark.

Comments

Property mark.—A property mark is intended to denote ownership over all movable property belonging to a person whether it is all of one kind or different kinds. So long as the person owns movable properties his property mark impressed upon them remains his, though any particular article out of it may, after such impression, pass out of his hands and cease to be his. The function of a property mark to denote certain ownership is not destroyed because any particular property on which it was impressed has ceased to be of that ownership. 6 Bom LR 513 : 1 Cr LJ 581.

Distinction between a trade mark and property mark whereas the former denotes the manufacture or quantity of the goods while the latter denote the ownership. AIR 1972 SC 2485 : 1972 Cr LJ 1751. The term "movable property" does not incorporal property. AIR 1975 Pat 228.

* * * * *

Sec. 480. Using a false trade mark.—(*Repealed by the Trade and Merchandise Marks Act, 1958 (43 of 1958), Section 135, and Schedule (with effect from 25.11.1959*). The section before the repeal stood as follows :—

Whoever marks any goods or any case, package or other receptacle containing goods, or uses any case, package or other receptacle with any mark thereon, in a manner reasonably calculated to cause it to be believed that the good so marked, or any goods contained in any such receptacle so marked, *have a connection in the course of trade with a person with whom they have not any such connection,* is said to use a false trade mark.

* * * * *

Sec. 481. Using a false property mark.—Whoever marks any moveable property or goods or any case, package or other receptacle containing moveable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, belong to a person to whom they do not belong, is said to use a false property mark.

Note.—AIR 1914 Sind 163 : 16 CrLJ 230.

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Sec. 482. Punishment for using a false property mark.—Whoever uses [1][* * *] any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Synopsis

1. Amendment....................2883
2. Facts to be determined....................2883
3. Cases....................2884
4. Procedure....................2886
5. Charge....................2886

1. Amendment.—The words appearing at the asteriks marked place "any false trade mark or" were omitted by Act 43 of 1958, Section 135 and Sch (with effect from 25.11.1959).

2. Facts to be determined.—Where a person is charged with an offence under Section 482, what the Court has to determine is whether the trade mark claimed by the complainant was a "distinctive" mark, and for that purpose, it has to take consideration the extend to which its user had rendered the mark in fact distinctive of the goods in question. ILR (1938) 1 Cal 665 : 175 Ind Cas 144 : 39 Cr LJ 537 : 66 CLJ 210 : 42 CWN 112 : AIR 1938 Cal 216. Where the accused is using a false trade mark, the burden is upon the accused to show that he is using such mark without intent to defraud. 161 Ind Cas 1007 : 37 Cr LJ 528 : 1936 Cr C 184 : AIR 1936 Rang 96. It is not necessary for a conviction under Section 482, IPC, that the trade marks or the paintings on them should be identical. It is enough that there is such similarity between the two that an unwary customer may not be able to distinguish one from the other, especially when he sees the one without having the other before him. The question whether the trade mark, the subject-matter of the prosecution, is a colourable imitation of another trade mark is one of fact, and the Court must come to its own conclusion after having placed itself in the position of the unwary customer. It is not necessary that any should in fact have been deceived. 165 Ind Cas 745 : 17 Pat LT 667 : 1936 Cr C 950 : AIR 1951 Pat 289, 290, *Agrawal, C.J.*, said : "Section 482, renders punishable the use of any false trade mark or any false property mark unless the user is able to prove that he acted without intent to defraud. The expression "trade mark" is defined in Section 478, as amended by the Merchandise Marks Act 1941, as including a trade mark registered under the Trade Marks Act, 1940, and any marks used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right to use the mark. At the relevant time no part of the design on the certain of the complainant or the petitioner had been registered under the Trade Marks Act, 1940, although I am told applications for registration were pending. This case, therefore, has to be decided with reference to the second part of the definition of the trade mark given in Section 478, Penal Code. The complainant relied on declarations which had been made in his application for registration which referred to a previous declarations made in 1905 and also to catalogues which he had issued over a course of many years for the purpose of establishing that he has been using this particular carton and deceive on it for a long time. It has. however, been pointed out in the case of *Loke Nath* v. *Ashwini Kumar De,* (1938) 1 Cal 665 : AIR 1938 Cal 216 : 39 Cr LJ 537, that a declaration of ownership for the purpose of registration is not evidence of legal ownership of trade mark for such a declaration represents nothing more than the opinion and claim of the declarant. What the .Court has to determine is whether the trade mark claimed by the complainant is distinctive mark. that is to say. a mark which is adopted to distinguish the goods of the proprietor of the particular trade mark from those of other persons. For that purpose it is necessary to ascertain the extent to which the user of the mark has rendered it in effect distinctive of the goods is question. For that purpose the evidence that is required is that persons bought the complainant's medicine because it was contained in his carton, that is to say, a person who received the complainant's carton would rely on finding in it the medicine he intented to purchase. If there was such evidence then any one selling medicine in a carton similar to that of the complainant as the mislead a purchaser into believing that he was actually purchasing the complainant's medicine would be infringing the complainant's trade mark". *See* also AIR 1941 All 87 : 42 Cr LJ 352.

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[1] The words "any false trade mark or" *omitted* by Act No. 43 of 1958. (w.e.f. 25th November, 1959).

•A property marks attached to the movable property of a person remains even if part of property goes out of his hands and ceases to be his property. AIR 1972 SC 2289 : 1972 Cr LJ 170 : 1973 SC Cr R 18. It does not require that the use of the mark not actually to defraud any one, the use must be reasonably calculated to cause the person to believe that the goods so marked or any goods contained in any such receptacle was of a nature or quality different from their nature. AIR 1962 Bom 29 : 63 Bom LR 563 : (1961) 2 Cr LJ 871 ; *see* also AIR 1931 Bom 45.

3. Cases.—The intention of the Legislature will be frustrated if it is held, that the owner of a trade mark can stand by for several years while his trade mark is being infringed continuously and then bring a criminal case in respect of some recent instance in which there has been an infringement. 12 Cr LJ 246 : 10 Ind Cas 787 : 4 Bur LT 83. A trade mark must be some visible concrete device or design affixed to goods to indicate that they are the manufacture of the person whose property the trade mark is. It may consist of a name impressed in some distinctive way. 17 CWN 227 : 18 Ind Cas 404 : 14 Cr LJ 68 : 40 Cal 281. Where the title page of the alleged piracy and the title page of the complainant's book are so different that no one is likely to have been misled a conviction under Section 482, 486, Penal Code, cannot be sustained. 7 MLT 304 : 6 Ind Cas 683 : 11 Cr LJ 393. Where the marks on the accused's bars constitute such an imitation as is sufficiently close to deceive an ignorant and unwary purchaser, the accused could be convicted under Section 482, IPC, which covers the case of using a false trade mark. 8 SLR 199 : 16 Cr LJ 230 : 27 Ind Cas 902. When the accused, who had opened a shop in close proximity to the shop of the complainant, sold rose water in bottles similar to those which contained the rose water sold by the complainant, but on closer examination great differences in the labels were discernible, *held*, that the accused was not guilty under Sections 482 and 486. 11 CWN 887 : 6 Cr LJ 151. A body corporate can be punished under Sections 482 and 486, Penal Code. The word "whoever" in those sections does not refer only to a definite individual or definite individuals and can apply to corporate body. 15 Cr LJ 337 : 23 Ind Cas 689 : 7 Bur LT 116. Where a manufacture of biris flagrantly and dishonestly imitated the label and slip of another with the object of causing it to be believed that the goods of one quality in far belonged to another ; *held*. that he was liable to be convicted under Section 582, IPC. AIR 1930 Oudh 350 : 7 OWN 598. Although a Criminal Court has a discretion in J cases of *bona fide* dispute or long delay to refer the matter to a Civil Court, it can refuse remedy to an aggrieved person. *Ibid.* For the purpose of establishing a case of infringement it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, but that the resemblance is such as not only to show an intention to deceive but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade mark belongs. In other words, the standard of the comparison is not that of the expert but of the unwary purchaser. 34 CWN 339 : 51 CLJ 477 : AIR 1930 Cal 274 : AIR 1939 Rang 145 : 40 Cr LJ 546. A body corporate such as firm may be prosecuted for an offence under Sections 480 and 482. AIR 1929 Cal 498 : AIR 1929 Rang 322. Test of an infringement is whether a purchaser would be deceived into believing goods of accused as those of the complainant from looking at the getup where no confusion is likely to be caused, either by having both, side by side or by the purchaser having recollection of the get-up of the complainant's goods, prosecution under Section 482 is not sustainable, especially where there is no evidence of any purchaser having been misled. AIR 1929 Rang 345 : 7 Rang 169 : 30 Cr LJ 882 : 118 Ind Cas 113. There is no registration of trade mark in India. Right of action is based on deceit. Complainant is to prove reputation of his trade mark. 20 Cr LJ 276 : 12 SLR 129 : 50 Ind Cas 165. Where accused has used a false trade mark but had no intent to defraud, he could not be convicted under Section 487. 19 Cr LJ 722 : 16 ALJ 476 : 46 Ind Cas 402. Where the accused has introduced a trade mark, which if used on cheroots is reasonably calculated to cause it to be believed that those cheroots are the cheroots of the complainant, the Criminal Court should try the case. 169 Ind Cas 880 : 38 Cr LJ 840 : AIR 1937 Rang 203.

Under Section 482, an intent to defraud is an ingredient of the offence but when it has been proved that a trade mark is a false trade mark then it is to be presumed that the accused had that intent unless he rebuts the presumption when only he is entitled to be acquitted. 118 Ind Cas 113 : 30 Cr LJ 882 : AIR 1929 Rang 345. Even though no case of purchasers having been deceived by the use of the false trade mark is proved this fact standing alone is insufficient to justify the contention that the accused acted without intent to defraud. The state of mind of persons responsible for the introduction of the trade mark is a most relevant fact which can be established by evidence. In the absence of such evidence, the accused cannot be held to have discharged the ones of proving want of intention which was upon him. AIR 1929 Rang 322. It is nowhere laid down by Legislature that under no circumstances could a dispute relating to the infringement of a trade mark be entertained by a Criminal Court and that it should always be adjudicated upon by a Civil Court. The only thing which can be said is that the Criminal Court may, in view of the peculiar circumstances of a particular case, stay its own hands and direct the complainant to establish his right in the Civil Court. 9 Lah 491 : 29 PLR 610 : 29 Cr LJ 425 : AIR 1928 Lah 186. For a conviction under Section 482, evidence of actual deception is not necessary. It is enough if the Court finds on a comparison of the two trade marks that the accused was likely to deceive. AIR 1925 Cal 149 : 81 Ind Cas 922 : 25 Cr LJ 1098. In a trades mark case issue of search warrant for searching a house and for production of account books is not proper. 17 Cr LJ 543 : 9 BLR 45 : 10 Bur LT 216 : 36 Ind Cas 591. Mere imitation is no offence where there is no infringement of patent or copyright and no attempt to pass off goods as being that of the others. 1933 Cr C 1423 : AIR 1933 Nag 344. Section 18 of the Merchandise Marks Act does not prevent prosecution under Section 482, provided infringement is within 3 years. 36 Ind Cas 168. In cases of prosecution under this section, the High Court will not pass any order in revision in respect of costs or confiscation of accused's goods. If the complainant has in fact suffered any damage, he must seek his remedy in Civil Court. AIR 1941 All 87 : 42 Cr LJ 352 : 193 IC 189 ; *see* also 1983 All LJ 753. Where there genuine dispute between the parties as to who used false trade mark, the case should be brought in Civil Court. AIR 1939 Rang 145 : 40 Cr LJ 546 : 181 IC 404.

The proper test is whether the general get-up is likely to deceive the unwary using a false trade mark. AIR 1961 Cal 240 : (1961) 1 Cr LJ 488. It is no answer to an offence of that a trade mark has been registered under the Trade Marks Act. AIR 1954 Pat 102 : 1954 Cr LJ 161 : ILR 32 Pat 515 ; AIR 1971 Pat 124 ; 1981 Cut LR (Cr) 170 (no evidence as to where from the counterfeit packet were obtained hence no conviction).

4. Procedure.—Not cognizable—Warrant—Bailable—Not compoun-dable— Triable by any Magistrate of the first class.

See 1962 MPLJ 708 (payment of costs of prosecution or defence) ; AIR 1961 Cal 240 : (1961) 1 Cr LJ 488 (nothing irregular in framing charge under Sections 482 and 485) ; AIR 1967 All 346 : 1967 Cr LJ 840 ; 1981 MPLJ 678 : 1981 Cr LJ 584.

5. Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the* accused) as follows ;—

That on or about the......day of......at........you used a certain trade mark (or property mark), to wit........ to denote that certain goods were the manufacture of AB whose manufacture they were not (or where the property of AB whose property they were not) in a manner reasonably calculated to cause it to be believed that such goods were the manufacture (or property) of AB and that you thereby committed an offence punishable under Section 482 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 483. Counterfeiting a property mark used by another.—Whoever counterfeits [1][* * *] property mark, used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with both.

Synopsis

1. Amendment.....2887
2. Notes.....2887
3. Procedure.....2887
4. Change.....2887

1. Amendment.—The words appearing at the asteriks marked place "any trade mark or property" were omitted by Act 43 of 1958, Section 135, and Schedule (with effect from 25.11.1959).

2. Notes.—Where in a case of alleged counterfeiting a trade mark similar to that of the complainant had been moulded in the glass of the bottles on which the name of the hair oil had also been moulded. *Held.* that according to Section 28, it must be presumed that the accused intended to sell that hair oil in those bottles and thereby cause deception. In this case the onus was on the accused to show that in making these bottles he had not fraudulent intention. AIR 1931 Cal 445. Where the accused is using similar label with additions and the case is not one of a dispute between complainant and accused who entitled to use the label which was introduced by the accused, the complainant should be tried by the Civil Court. AIR 1937 Rang 208 : 38 Cr LJ 340. If two labels are not so similar as to deceive ordinary person there can be no conviction under Section 483. 134 Ind Cas 477 : 1931 Cr C 637 : 32 Cr LJ 1117 : AIR 1931 Oudh 277.

3. Procedure.—Not cognizable—Warrant—Bailable—Not compoundable with Court's permission—Triable by any Magistrate.

4. Charge.—I (*name and office of Magistrate, etc.)* hereby charge you *[name of the accused)* as follows :—

That on or about the...... day of....... at.......you counterfeited a trade mark or property mark. Exhibit....... used by *A. B* and that you thereby committed an offence punishable under Section 483 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

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[1] The words "trade mark or" *omitted* by Act No. 43 of 1958, (w.e.f. 25th November, 1959).

[1]**[Sec. 484. Counterfeiting a mark used by a public servant.**—Whoever counterfeits any property mark used by a public servant, or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the property is of a particular quality or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Synopsis

1. Procedure 2888
2. Charge 2888

1. Procedure.—Not cognizable—Summons—Bailable—Not comp-oundable—Triable by a Magistrate of the first class.

2. Charge.—"I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*), as follows :—

That on or about the............day of...........at.........you counterfeited any mark (or property mark), to wit......used by a public servant, to wit.......to denote that some property was manufactured by a particular person, to wit..... (or at a particular time or place, to wit.......) (or that the property is of a particular quality, to wit.......) (or has passed through a particular office, to wit.....) (or that it is entitled to a certain exemption, to wit......) (or used as a genuine mark, to wit..... knowing the same to be counterfeit) and that you thereby committed an offence punishable under Section 484 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 485. Making or possession of any instrument for counterfeiting a property mark.—Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, or has in his possession a property mark for the purpose of denoting that any goods belong to a person to whom they do not belong, shall be punished with imprisonment, of either description for a term which may extend to three years, or with fine, or with both.

Synopsis

1. Amendment 2889
2. Notes 2889
3. Procedure 2889
4. Charge 2889

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[1] *Subs.* by Act 4 of 1889, Sec. 3, for the original Section 484.

1. Amendment.—The section was substituted by Act 43 of 1958, Section 135, and Schedule (with effect from 25.11.1959) for this original section reading as follows :—

> "*488. Making or possession of any instrument for the counterfeiting a trade mark or property mark.*—Whoever makes or has in his possession, any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that belong to person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both."

2. Notes.—A mark to be trade or property mark must be a mark used for denoting that the goods are the manufacture of the merchandise of a particular person. The mark in itself does not denote anything of the kind and it is necessary that it should do so, 27 Cal 776 : 4 CWN 423. Where a trade mark consists of an impression moulded in the glass of which the bottles are made together with label and the person is found in possession of the mould in question with the intention of counterfeiting that trade mark, although the apparatus for counterfeiting the label which would complete the trade mark has not been found, the person can be convicted under Section 485. AIR 1930. Cal 664 : 1930 Cr C 1104. For legality of convictions under Sections 485. 486 and Section 109 of the Penal Code, *Vide* AIR 1940 Cal 351 : 44 CWN 867 : 41 Cr LJ 836.

For onus, *see* AIR 1954 Cal 277 : 1954 Cr LJ 841 : 58 CWN 96. The elements of the offence charged do not require proof of any person having been actually deceived. It is enough if the circumstances proved are sufficient to establish that prospective buyers was likely to be deceived. AIR 1961 Cal 240 : (1961) 1 Cr LJ 488.

3. Procedure.—Not cognizable—Summons—Bailable—Not compo-undable—Triable by a Magistrate of the first class.

4. Charge.—"I (*name and office of the Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :—

That on or about the.........day of............at.............you made (or had in your possession) a certain die. Exhibit..... (or plate or instrument, to wit.....) for the, purpose of counterfeiting the trade mark (or property mark) of *A*, *B* for the purpose of denoting that certain goods, to wit.....are the manufacture (or merchandise) of the said *A*, *B* whose manufacture or merchandise they are not (or in the case of property mark) that they belong to the said *A*. *B* to whom they do not belong) and that you thereby committed an offence punishable under Section 485 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 486. Selling goods marked with a counterfeit property marked.—Whoever *sells*, or *exposes*, or has in his *possession for sale any goods* or *thing with a counterfeit property mark* affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves :—

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(b) that, on demand made by or an behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(c) that otherwise he had acted innocently,

be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Synopsis

1. Amendment 2890
2. Scope 2890
3. Burden of proof 2891
4. Sentence 2891
5. Procedure 2891
6. Charge 2892

1. Amendment.—The words in italics were substituted by Act 43 of 1958, Section 135, and Sch. with effect from 25.11.1959) for the words *"Selling goods marked with a counterfeit trade mark or property mark. Whoever sells, or exposes or has in his possession for sale or for any purpose of trade or manufacture any goods or thing with a counterfeit trade mark or property mark".*

2. Scope.—This section also applied to a retailer who connives with a fraudulent wholesales or manufacturer in palming off on unsuspecting public goods which purport to be other than what they are. But where there is no attempt to pass of the one as the other and no attempt at substitution there can be no conviction. 20 NLJ 183 : AIR 1937 Nag 347. The onus is upon the accused to show that he comes within the exception. 8 CWN 421 : 54 Bom LR 796, where it was held that if the accused can show that he had taken all reasonable precautions against committing the offence and that he had at the time of commission of the alleged offence no reason to suspect the genuiness of the mark on the article his case comes within clauses (a) and (b) of the section. 54 Bom LR 795. Section 486, casts upon the accused an onus which has to be discharged in compliance with provisions of the section itself. AIR 1956 Cal 260 : 1956 Cr LJ 736 : 1962 All LJ 1068 : 1962 All Cr R 458 (case of infringement of trade mark) 1962 All LJ 1038 : 1962 All Cr R 455 : 1963 (1) Cr LJ 282 : AIR 1963 All 133. The language of Section 486, by necessary implication leads to the inference that *mens rea* in its ordinary sense that is to say, in the sense of dishonest intention or on intention of deceiving or cheating does not form an essential ingredient for an offence under Section 486. AIR 1961 Bom 208 : ILR 1961 Bom 248 : 1961 (2) Cr LJ 66. Counterfeiting a label falls within this section. 16 Bom LR 78 ; *see* also 32 Cal 431 ; AWN 1987, 99 ; 32 PR 1902 Cr. No conviction under this section stands for the use of another firm's bottle nnocently and according to common practice. AIR 1928 Cal 873. Section 486. specifically confines the offence to selling a thing. The prosecution is within time if aunched within three years of specified offence contained against. The starting point for limitation is not terminations of three years from the date of the first of a series of offences. AIR 1928 Cal 495 ; AIR 1930 Cal 274 ; 22 M 482 ; AIR 1931 Mad 276 : 1930 MWN 1263 : 1931 Cr C 353. In a prosecution for an offence under Section 386, IPC, the est is not whether a person who is in the best on the alert and who knows the original well would have been deceived. The proper test is to consider the question from the point of view of the unwary purchaser. 34 CWN 524 : 128 Ind Cas 334 : 32 Cr LJ 137 : AIR 1930 Cal 728. For the purposes of this section the mark need not be the exclusive property of anybody. AIR 1940 Cal 351 : ILR (1940) 2 Cal 1 : 44 CWN 967 : 41 Cr LJ 336. Signature in a forwarding note does not show possession of the goods. AIR 1940 Mad 822 : 42 Cr LJ 28. The provisions of this section are meant for a retailer who onnives with a fraudulent wholesaler or manufacturer in palming off an unsuspecting public goods which purport to be other that what they are. Where, therefore, no attempt t substitution is made the accused cannot be convicted under this section. AIR 1937 Nag 341 : ILR 1938 Nag 192 : 39 Cr LJ 109.

Even in cases of goods which have no trade marks or in cases in which the trade mark has not been registered a person could have a cause of action both in civil and riminal Court for infringement of property mark. AIR 1969 Mad 94. For meaning of ounterfeit ; *see* AIR 1963 All 133 : 1962 AWR (HC) 821 : 1962 ALJ 1088. The olourable imitation of labels not being counterfeit, the accused can not be said to have ommitted offence under Section 486. AIR 1958 All 653 : 1955 Cr LJ 1102. Counterfeiting need not be an exact imitation. AIR 1960 SC 669 : 1965 Cr LJ 1017. For meaning of the word "innocently" *see* (1961) 2 Cr LJ 66 : AIR 1961 Bom 203.

3. Burden of proof.—(1) To establish that the accused marked the goods manufactured and sold by him (2) that he did so in a manner reasonably calculated to ause it to be believed that the goods contained in the packets so marked belonged to he complainant and (3) further that the accused has sold or exposed for sale of goods r has in his possession for sale of goods hand mark calculated to cause it to be elieved that the goods and the goods manufactured by and belong to the complainant. IR 1972 SC 2458.

The burden of proof under Section 486, IPC, is on the accused. It is true that roviso (b) to this section, as a defence available to accused, is linked with proviso (a) ut the fact that the accused did give all the information in his power with respect to he person from whom he obtained the spurious goods with the counterfeit trade-marks s admissible in evidence in considering whether he acted innocently or not. 20 NLJ 183 AIR 1937 Nag 341.

4. Sentence.—Ordinarily the infringement of a mark which is made punishable by ection 406, IPC, is rather a civil than a criminal wrong ; at best it is of a quasi criminal ature. In most cases of conviction under Section 486, therefore, unless the rcumstances warrant strongly to the contrary, a substantial sentence of fine would be ufficient to meet the ends of justice instead of imprisonment. 15 Mys LJ 272 (the case f infringement of trade mark).

5. Procedure.—Not cognizable—Summons—Bailable—Not comp-oundable with ourt's permission—Triable by a Magistrate of the first class.

6. Charge.—The charge should run thus :—

I (*name and designation of Magistrate, etc.*), hereby charge you (*name of th* *accused*) as follows :—

That you on or about..........(date)..........(time).........(place) ....sold (expose or had in your possession for sale or any purpose of trade or manufacture) the goods (o things), to wit......with a counterfeit trade-mark (or property mark) affixed to (o impressed upon) the same (or upon any case, packet or other receptacle in which suc goods were contained) and thereby committed an offence punishable under Section 486 IPC, and within my cognizance.

* * * *

Sec. 487. Making a false mark upon any receptacle containin goods.—Whoever makes any false mark upon any case, package or othe receptacle containing goods, in a manner reasonably calculated to caus any public servant or any other person to believe that such receptac contains goods which it does not contain or that it does not contain good which it does contain, or that the goods contained in such receptacle are a nature or quality different from the nature or quality thereof, shall unles he proves that he acted without intent to defraud, be punished wit imprisonment of either description for a term which may extend to thre years, or with fine or with both.

Synopsis

1. Notes.......................................2892
2. Procedure...................................2892
3. Charge......................................2892

1. Notes.—Where a trader having tins of *ghee* with false Agmark labels and t labels are also found in the shop the accused is found to have acted with intent defraud and must be convicted under Sections 488 and 487. AIR 1959 Cal 32 : I (1959) 1 Cal 63 : 1959 Cr LJ 38.

2. Procedure.—Not cognizable—Summons—Bailable—Not compo-undable—Trial by any Magistrate.

3. Charge.—The charge under this section or Section 488, should run thus :—

I (*name and office of the Magistrate, etc.*). hereby charge you (*name of the accus* *as* follows :—

"That on or about the.....day of........at......you made (or made use of) a false ma to wit.....upon a case, to wit.....(or package or other receptacle containing goods) in manner reasonably calculated to cause a public servant, to wit....(or any other person wit......), to believe that such case contains goods, to wit......which it does not cont (or that it does not contain goods which it does contain or that the goods containe such receptacle are of a nature or quality different from the real nature or qua thereof), and that you thereby committed an offence punishable under Section 487, Section 488) of the Indian Penal Code, and within my cognizance."

And I hereby direct that you be tried on the said charge.

* * *

Sec. 488. Punishment for making use of any such false mark.—Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished as if he had committed an offence against that section.

Synopsis

1. Procedure..2893
2. Charge..2893

1. Procedure.—Not cognizable—Summons—Bailable—Not compo-undable—Triable by a Magistrate of the first class.

2. Charge.—*See* form under Section 487.

* * * * *

Sec. 489. Tampering with property mark with intent to cause injury,—Whoever removes, destroys, defaces or adds to any property mark intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Synopsis

1. Procedure..2893
2. Charge..2893

1. Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by a Magistrate of the first class.

2. Charge.—The charge should run thus :—

"I (*name and office of the Sessions Judge, etc.*), hereby charge you (*name of the* accused) as follows :—

That on or about the..............day of............at............you removed (or destroyed, defaced or added) to a property mark, to wit....... (describe it), intending (or knowing it to be likely), that you may thereby cause injury to *AB*, and that you thereby committed an offence punishable under Section 489 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

* * * * *

OF CURRENCY NOTES AND BANK NOTES

Sec. 489-A. Counterfeiting currency notes or bank notes.—Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any currency-notes or bank-note, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—For the purposes of this section and of Sections 489B, 489C, 489D and 489E, the expression "bank-note" means a promissory note or engagement for the payment of money to bearer on demand issued by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or Soverign Power, and intended to be used by or under the authority of any State or Sovereign Power, and intended to be used as equivalent to or as a substitute for money.

Synopsis

1. Amendment..........2894
2. Scope..........2894
3. Evidence and proof..........2895
4. Procedure..........2895
5. Charge..........2895
6. Knowingly use of..........2895

1. Amendment.—Sections 489A to 489D, have been added by the Currency Notes Forgery Act, 1899, (Act 12 of 1899), Section 2. The words and figures in italics have been substituted by Act 35 of 1950, Section 3, and Sch. II for the words and figures "489C and 489D".

2. Scope.—A conviction under this section cannot stand unless it is proved that the accused were performing the process or part of the process of counterfeiting a note. Where no counterfeiting was done and where there was no part of any process which could have ended in producing a counterfeit worthy of the name and there was no intention of trying to counterfeit, the conviction under this section must be set aside. 38 Ind Cas 746. the words "as genuine" govern only the verb "use" and not any other verb. 7 Lah 80 : 27 Cr LJ 638 : 27 PLR 514. The object of the legislature in enacting the section is to stop the circulation of forged note by punishing all persons who knowing or having reason to believe them to be forged do any act which could lead to their circulation. 7 Lah 80 : 27 Cr LJ 638 : 94 Ind Cas 441. A person who knowingly sells a forged note to another is guilty under Section 489B, whether the purchaser knows it to be forged or not. 7 Lah 80 : 27 Cr LJ 638 : 44 Ind Cas 414. Under Section 489A of the Indian Penal Code, for the counterfeiting of a currency-note both ability and materials of a particular kind are required. and if either of them be absent, then there cannot be an attempt to counterfeit. AIR 1928 All 754 : 51 All 470 : 30 Cr LJ 690 : 1929 ALJ 127. In cases under this section the prosecution should prove the requisite guilty knowledge or intention of the accused. AIR 1933 Lah 596 : 34 Cr LJ 1156. Since no process as in known to Sections 463 and 464, is involved in making up of a made up note. the allegation of forgery is completely out in the process. 1982 Cr LJ 32.

In the case accused were charged with offence of indulging in counterfeiting by printing 2000 notes of 20 dollar denomination. Prohibition against counterfeiting currency notes applies to currency notes of all countries. *Held*, that High Court of Kerala was wholly wrong in exerting itself unnecessarily and bending backwards to order to hold that Sections 489-A to 489-E, were not applicable to currency notes other than Indian Currency Notes. View taken by the High Court was thoroughly unsustainable. Judgment and order of discharge rendered by the High Court reversed and set aside. 1987 Cr LJ 308 (SC).

Counterfeit currency notes and incriminating articles recovered from possession of accused and only counterfeit coins from possession of co-accused. It was held that persons in possession of counterfeit coins were having *mens rea* and were liable to be convicted under Section 489A/120B. The person possession printing machine were found rightly convicted under Section 489A and 489D. *Golo Mandha Ram Rao* v. *State*, 2004 Cr LJ 1738 (Jha) : 2004 AIR Jhar HCR 453 : 2003 (3) East Cri C 372.

3. Evidence and proof.—In a Supreme Court case where the evidence of accomplice was corroborated by the evidence of Investigating Officer and artist, it was held that the evidence of accomplice met the requirement of Section 114(b) in the background of Section 133, Evidence Act. *K. Hashim* v. *State of T.N.*, 2005 Cr LJ 143 (SC) : AIR 2005 (SC) 128 : 2005(52) All Cri c 802 : 2005(1) crimes 12 : 2004(9) Scale 290 : 2004(190) Supreme 579.

4. Procedure.—Cognizable—Warrant—Bailable—Not compoundable — Triable by Court of Session.

5. Charge.—I (name and *office of Magistrate, etc.*), hereby charge you *(name of the accused)* as follows :—

That on or about the.......day of...... at......you counterfeited (or knowingly performed a part of the process of counterfeiting, to wit.....) a currency-note or a bank-note) of the value of...rupees, and thereby committed an offence punishable under Section 489A of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

6. Knowingly use of.—The fact that the note was fake confirmed only after examining by five experienced persons in that field, will clearly go to show that there is no apparent sign in the note for any ordinary man to come to the conclusion that it is a counterfeit note. Admittedly the petitioner is an ordinary man, who is not in the field of examining the note everyday. Therefore, mere possession of the counterfeit note will have presumption of the knowledge of the note. In order to bring the offence under Section 489 (b) and (c) it should be established that note must be used knowing fully well that the note was counterfeit one, A petitioner to come into possession casually cannot be prosecuted unless there are materials that he was using the note knowing that it is counterfeit. *Abdul Majeed Rehaman, Sarkhot, v. State of Maharashtra*, 2002 Cri LJ 720 (Bombay) : 2002(4) All Cri LR 479 : 2001 All MR (Cri) 1311 : 2001(3) Bom LR 542.

Section 498A not only deals with complete act of counterfeiting but also cover the case where the accused performs any part of the process of counterfeiting. *K. Hashim* v. *State of Tamil Nadu*, 2005 Cr LJ 145 (SC).

* * * * *

Sec. 489-B. Using as genuine, forged or counterfeit currency-notes or bank-notes.—Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with *imprisonment for life*, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Amendment........2896
2. Object of Sections 489-A to 489-E, IPC........2896
3. Scope........2896
4. *Mens rea*........2898
5. Counterfeiting........2898
6. Sentence imitation counterfeit deception resemblance........2900
7. Procedure........2900
8. Charge........2900
9. Resemblance........2900

1. Amendment.—The words in italics were substituted for the words "transportation for life" by Act 26 of 1955, Section 117. and Schedule (with effect from 1.1.1956).

2. Object of Sections 489-A to 489-E, IPC.—Section 489-A to 489-E deal with various economic offences in respect of forged or counteffeit currency notes or bank notes. The object of Legislature in enacting these provisions is not only to protect the economy of the country but also to provide adequate protection to currency notes and Bank notes. The currency notes are, in spite of growing accustomedness to the credit cards system. Still the backbone of the commercial transactions by multitudes in our country. But these provisions are not meant to punish unwary possessors or users. *Umashanker v. State of Chattisgarh* 2001 Cr LJ 4696 (SC) : AIR 2001 SC 3074 : 2001(9) SCC 642 : 20001(8) JT 322 : 2001(7) Scale 37 ; See *also K. Hashim v. State of Tamil Nadu*, 2005 Cr LJ 143.

3. Scope.—To convict a man under this section for using a forged note as genuine, the possession of the note does not necessitate the explaining the fact of his possession but the prosecution must prove that he knew it to be forged when he passed it. 81 Ind Cas 551. No guilty knowledge or intention can be inferred from the mere circumstance that the accused found in possession of a counterfeit-note. 145 Ind Cas 1013 : 34 Cr LJ 1156 : 34 PLR 89 : 1933 Cr C 881 : A1R 1933 Lah 596. "As genuine" govern only the verb "uses" and not any other verb. AIR 1926 Lah 72 : 7 Lah 80 : 27 Cr LJ 638 : 27 PLR 514 : 94 Ind Cas 414. Knowingly selling a forged note is an offence whether purchaser knows it to be forged or not. *Ibid. see* also AIR 1929 Bom 128 : 53 Bom 344 : 31 Bom LR 148 : 30 Cr LJ 598 : 116 Ind Cas 243. No guilty knowledge or intention can be inferred from the mere circumstance that the accused was found in possession of a counterfeit currency note. 34 Cr LJ 1156 : 34 PLR 890 : 1933 Cr C 881 : A1R 1933 Lah 596. In a case under this section. Judge ought not to stop merely at according the verdict about accuse having uttered particular notes at particular places but should ascertain from them their opinion as to whether the said notes had been uttered with the knowledge of their being forged. AIR 1936 Oudh 164 : 37 Cr LJ 182 : 159 IC 919 :

see also (1976) 1 Cr LJ 228. Transportation of knowledge of notes being counterfeit if can be drawn from the possession of the note. (1979) 4 SCC 23.

In the instant case the accused from whose possession the fake notes were recovered pleaded that he had no knowledge that the notes were forged. The Court repelled the continuation and observed, "The collateral circumstances, such as the bulk of the fake currency notes, the mixture of fake currency notes with the genuine currency notes, the planing off such notes quickly and the fact that the accused by no stretch of an undedicated man, are sufficient to infer that the accused had reason to believe the currency notes with him were fake or counterfeit. There remains no doubt in my mind that the prosecution has established the case against the Appellant (Accused), that the Appellant (Accused) used as genuine the forged or counterfeit currency notes and that the Appellant was found in possession of the forged or counterfeit currency notes and that he had reason to believe that those were fake/counterfeit currency notes". *Abdul Fakirsaheb Mamtule v. State of Maharashtra* 2001 Cri LJ 3396 (Bom).

When a person in the usual course of business gets a currency notes which he finds to be suspicious and tries to get rid of it, he is not guilty either under Section 489. AIR 1961 Trip 46 : (1961) 2 Cr LJ 801. Where there are offences relating to matter to which the executive powers of the Government exists, the Government is competent to suspend or remit a convict. AIR 1974 SC 31 : 1974 Cr LJ 150.

Where there was counterfeit of American Dollar notes—Accused found in possession of such dollar notes—Not found to be sold to any one. It was held that offence will come under Section 489-B. *Y. Subba Reddy* v. State *of Andhra Pradesh.* (1994) 1 ALT (Cri) 502 (AP).

Mere possession or use of counterfeit currency notes is not punishable the accused must have knowledge or reason to believe that the notes were counterfeits or forged. (1988) 1 Crimes 73 (SN).

When recovery of bulk quantity of counterfeit currency notes from possession of accused for using them as genuine is corroborated by independent reliable witness stating entire facts and circumstances then conviction of accused just and proper. *Peer Mohammad* v. *State,* 2004 Cr LJ 45 (Mad).

The accused was found using fake currency notes in market. On search of her person fake currency notes of Rs. 500/- and Rs. 50/- were recovered. Later house searched of accused and her husband led to recovery of one side printed currency notes and other materials used for printing fake currency notes. The alleged currency notes recovered were fake as per opinion of Treasurer of Reserve Bank. The conviction of accused for offences under Section 489A, 489B, 489C and 489D was held proper. *Sou Bharti* v. *State*, 2003 Cr LJ 2583 (Bom) : 2003 All MR (Cri) 1285.

"The appellant was found carrying 250 fake currency notes on a public road in the city of Bhuj concealed in a *Thela* beneath cloth pieces as alleged in the charge. He was, therefore, transporting the said currency notes at the time when he was apprehended with them. Therefore, this is not a case of mere dormant possession, but, it is a case of active transportation of the currency notes, which would fall within the expression 'traffics in such currency notes.' Section 489-B of the Indian Penal code clearly contemplates the cases where the counter- feit currency notes are received from any other person as also the cases where a person traffics in such currency notes knowing or having reason to believe the same to be forged or counterfeit. In our opinion, these ingredients of the offence under Section 489-B are clearly established against the appellant. He was not only carrying 250 counterfeit currency notes on 9-4-1996 but he had concealed 101 other such counterfeit currency notes which he later discovered before the *panchas* on 12-4-1996. It is therefore, clearly established that the appellant was trafficking in these counterfeit currency notes which he had received from some source. The appellant is, therefore, rightly held guilty of the offences under Setcions 489-B and 489-C of the Indian Penal Code by the trial Court." *Rayab Jusab Sama* v. *State of Gujarat,* 1999 Cri LJ 942 (Guj).

In a case, the booking clerk was given a fake hundred rupee note to purchase the ticket. Though the booking clerk suspected the genuineness of the note he did not inform or ask the accused as to whether the note was a genuine note or not. On the contrary, he was simply called into his cabin and made him to wait there and upon his report the other witnesses came even at that time also the accused was holding the note in his hand. This conduct of the accused probabilised that the accused had no knowledge that it was a fake note. The accused was neither informed nor asked about the genuineness of the note. In the statement under Section 313, IPC, the accused categorically stated that he had given a genuine note but unnecessarily the booking clerk called him into his cabin and made him to wait. The accused had a strong feeling not only before the booking clerk, the police officers, but also before the Court that the note presented by him was genuine. The Court held that the accused had no knowledge or reason even belief that the note presented by him for purchase of ticket was forged one. Conviction of accused was held not proper. *Veera Swamy Shanmaugam Sundaram v. The State of AP* 2001 Cri LJ 3787 (AP).

4. *Mens rea.*—*Mens rea* of offences under Section 589-B and 489-C is "knowing or having reason to believe the currency notes or bank notes are forged or counterfeit" without the aforementioned *mens rea* selling, buying or receiving from another person or otherwise trafficking in or using as genuine forged or counterfeit currency notes or bank notes is not enough to constitute offence under Section 489-B of IPC. So also possessing or even intending to use any forged or counterfeit currency note or bank notes is not sufficient to make out a case under Section 489-C in the absence of the *mens rea. Umashanker v. State qf Chattisgarh* 2001 Cri LJ 4696 (SC) : AIR 2001 SC 3074 : 2001(9) SCC 642 : 20001(8) JT 322 : 2001(7) Scale 37

5. Counterfeiting.—Recovery of huge number of fake currency notes and implements to manufacture them from accused persons. It was submitted that none of the search/seizure independent witnesses of the locality were called. This submission is totally wrong. Every recovery memo and production of notes bears the signatures of independent witnesses.

Attesting witnesses were not stock witnesses. There is no reason why the Police Officers would prepare forged recovery memos. The huge quantity of notes recovered from the possession is self speaking evidence that the prosecution case is correct and no manipulation has been done. The learned trial Court has discussed in detail and has also rightly distinguished the cases cited before him and before this Court. The Investigating Officers of this case have done an excellent job of tracing the accused one after the other at the instance of the accused one by one. All of them are members of the criminal conspiracy. As a part of conspiracy, different accused have been assigned different jobs. Accused not falsely implicated as Investigating Officer and witnesses have no enmity with them.

In this case forged currency notes were recovered from every accused. Even if notes would have not been recovered from any accused then also he could not have said that as one of the conspirator's is not liable to be punished. It is totally wrong to say that one of the witness was shattered in cross-examination. It is proved beyond reasonable doubt that the police party went to Delhi and made recoveries. There is nothing to say that the attesting witnesses are stock witnesses. Simply given the name of stock witnesses does not affect the truthful and veracity of the statement. An imaginary argument which is usually meant in all criminal cases have been made that the accused were falsely implicated by the Investigating Officer. It is fantastic to say that so huge number of notes and implements to manufacture them could be placed by the police and make the accused liable. The Investigating Officers and the witnesses have no enmity with the accused.

Thus, wrong assertion has been made that the Indian Security Press report did not contain the number of counterfeit notes is deliberate wrong assertion of facts against the record leads to the inference that the accused is guilty of the offence charged. A complete conspiracy punishable under Section 120-B stand proved. For making a criminal conspiracy, it is not necessary that each of the accused fully participate in all the activities. Here is a case where Liyakat Ali used to manufacture fake and counterfeit notes. Huge amount of notes and all the implements and machines for preparing fake notes have been recovered from his possession.

According to India Security Press, Nasik, the notes produced before them suffered a number of defects, as such it should be held that they were prepared for fancy purpose. The argument is fantastic. The very existence of the fake notes amounting to lakhs and lakhs rupees indicate that all the accused under a criminal conspiracy are bent upon selling and introducing the fake notes in the market. This case is governed by the case *K. Hashim vs. State of Tamil Nadu*, reported in AIR 2005 SC 128 = 2005 (1) SCC 237 = 2005 CrLJ 143 (SC), the fact and ratio decidendi of the case of *K. Hashim* noted supra at verbatim with necessary changes in nomenclature applies to the facts of this case. By credible, cogent and reliable evidence tender the invertible conclusion is that the appellants have been rightly convicted and sentenced under various sections. The sentence as imposed do not warrant interference, particularly in view of the object for which the Sections 489-A, 489-B, 489-C, 489-D and 120-B of the IPC have been enacted.

From bare perusal of the statements of the prosecution witnesses mentioned above and the reasons mentioned above, it is clear that the prosecution has been able to prove the case against the accused appellants beyond reasonable doubt. From the accused appellants fake currency notes, and machinery used for preparing fake currency notes were recovered and they were found to be guilty of provisions of Sections 489-A, 489-B, 489-C and 489-D for which separately and collectively charged as mentioned above.

This Court has also gone through the findings arrived at by the trial Court on the question of sentence and I am in agreement with the view taken by the trial Court on this point. Arguments of the counsel for the appellants for releasing them for the period already undergone by them is also devoid of merit, hence rejected. The sentence of imprisonment imposed is just and proper, but I am of the considered opinion that in such types of heinous offences particularly relating to economic offences directly concerned with the State Exchequer, the accused appellants should serve sentence of imprisonment imposed upon them for full and no remission should be given to them, particularly when they were caught with huge fake currency notes and equipments used for preparing fake currency. *Liyakat Ali vs. State of Rajasthan*, 2010 (2) CrLJ 2450 (Raj).

6. Sentence imitation counterfeit deception resemblance.—Accused found guilty of manufacturing, selling and introducing fake currency notes in market. This Court has also gone through the findings arrived at by the trial Court on the question of sentence and I am in agreement with the view taken by the trial Court on this point. Arguments of the counsel for the appellants for releasing them for the period already undergone by them is also devoid of merit, hence rejected. The sentence of imprisonment imposed is just and proper, but I am of the considered opinion that in such types of heinous offences particularly relating to economic offences directly concerned with the State Exchequer, the accused appellants should serve sentence of imprisonment imposed upon them for full and no remission should be given to them, particularly when they were caught with huge fake currency notes and equipments used for preparing fake currency.

This Court may add that in such types of heinous offences the accused appellants should serve the full sentence imposed upon them without getting any remission. *Liyakat Ali vs. State of Rajasthan*, 2010 (2) CrLJ 2450 (Raj).

7. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

8. Charge.—"I, (*name and office of Session Judge, etc.*), hereby charge you (*name of the accused*) *as* follows :—

That on or about the....... day of...... at......you sold to AB (or bought from AB or trafficked in *(specify it) a* forged (or counterfeit) currency-note, to wit..... (or bank-note), knowing (or having reason to believe) the same to be forged (or counterfeit) and that you thereby committed an offence punishable under Section 489B of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

9. Resemblance—Making a counterfeit note exact imitation is not necessary. For making a counterfeit note the exact imitation is not necessary. Existence of the resemblance which might cause deception is enough to raise the presumption of intention to deceive. The three Judge Bench of the Hon'ble Supreme Court in *The State of Uttar Pradesh vs. Hafiz Mohd. Ismail, Hafiz Jawed Ali*, held that "*counterfeit — Meaning* — Colourable imitation" Exact imitation not essential — existence of resemblance which might cause deception is enough to raise presumption of intention to deceive". AIR 1960 SC 669. In *K. Hashim vs. State of Tamil Nadu*, AIR 2005 SC 128 = 2005 (1) SCC 237 = 2005 CrLJ 143, the Hon'ble Supreme Court held that "Section 28, IPC defines the word "counterfeiting" in very wide terms. The main ingredients of counterfeiting as laid down in Section 28 are :

(1) causing one thing to resemble another thing;

(2) intending by means of that resemblance to practice deception: or

(3) knowing it to be likely that deception will thereby be practiced.

"Counterfeit" in Section 28 does not cannot an exact reproduction of the original counterfeited. Explanation 2 of Section 28 is of great significance. It lays down a rebuttable presumption where resemblance is such that a person might be deceived thereby. In such a case the intention or the knowledge is presumed unless the contrary s proved. There is no necessity of importing words like "colourable limitation" therein. n order to apply Section 28, what the Court has to see is whether one thing is made to resemble another thing and if that is so and if the resemblance is such that a person might be deceived by it, there will be a presumption of the necessary intention or knowledge to make the thing counterfeit, unless the contrary is proved.

Plea that report of expert showing that notes recovered were not exactly similar to currency notes and there were marked difference as such they were not counterfeit notes but only fancy notes is not tenable. *Liyakat Ali vs. State of Rajasthan*, 2010 (2) CrLJ 2450 (Raj).

* * * * *

Sec. 489-C. Possession of forged or counterfeit currency notes or bank-notes.—Whoever has in his possession any forged or counterfeit currency note or bank note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Synopsis

1. Scope 2901
2. Procedure 2902
3. Charge 2902
4. Punishment 2903
5. Possession of counterfeit currency notes 2903
6. Resemblance 2905

1. Scope.—The onus lies on the prosecution to prove circumstances which lead clearly, indubitably and irresistibly to the inference that the accused had the intention to foist the notes on the public. 11 Lah 555 : 31 PLR 867 : 129 Ind Cas 494 : AIR 1931 Lah 24. The mere possession of forged notes is not an offence under the Penal Code. In order to bring a case within Section 489C, it is not only necessary to prove that the accused was in possession of forged notes but it should further be established (a) that at the time of his possession he knew the notes to be forged or had reason to believe them to be so, and (b) that he intended to use them as genuine or that they might be used as genuine. 11 Lah 555 : 31 PLR 867 : 129 Ind Cas 494 : AIR 1931 Lah 74. Where it is proved beyond doubt and admitted by the accused that the accused was in possession of 38 counterfeit currency-notes knowing them to be stolen, and the accused's explanation that he had them in order to foist them on someone else is not believed, it is impossible to conceive of any other intention on the part of the accus than the intention of using the notes as genuine or that they may be used as genuin The large number of notes is an important indication. The intention has to presumed. 1938 MWN 1121 : 48 LW 754 : AIR 1939 Mad 96. Interference fro possession of counterfeit notes and absence of any explanation if justified under Sectio 114. 5 DLR (Mys) 21 : AIR 1961 AP 213 (as regard intention required for an offenc under the section ; *see* also 1960 BLJR 242 : AIR 1960 Pat 405 : 1961 2 Cr LJ 536. case of notes being of such a nature, a mere look at them would convince that th accused had knowledge or reason to believe that the notes were counterfeit. AIR 197 SC 1705. The prosecution witness stated before the court that when the currenci were taken out and shown to him even at the first blush he was convinced that the were counterfeit, because there was difference in colour. The court held that th accused also had every reason to know that the currency notes possessed by him we counterfeit currencies. *Vijayan v. State of Kerala*, 2002 Cri LJ 187 (Ker) : 2001(2) Andh LT (CRI) Ker 241 : 2001(2) Ker LJ 236 : 2001(4) Rec Cri R 243. No explanation by th accused who was in possession of a large number of currency notes leads to convictio (1961) 1 Cr LJ 617; AIR 1951 Mys 34 ; 1971 MLJ (Cr) 400 : 1959 Andh LT 562. If th accused is convicted under Section 489B. that is not bad to convict him under Sectio 489C. AIR 1962 Mys 275 : (1962) 2 Cr LJ 768 ; 1971 MLJ (Cr) 400 : 1971 Mys LJ 508.

Where the currency notes in possession of the accused are found to be of such nature that a mere look at them would not convince any person of average intelligen that they are counterfeit notes, the presumption that the notes in his possession we counterfeit cannot be drawn. There is also nothing to show that he had any intention use the same as genuine. The prosecution could not bring out any transaction of th accused with any other person. Thus, the prosecution failed to establish that th accused was intending to use the same as genuine. Therefore the accused cannot convicted under Section 489-C IPC. The prosecution has to prove the *mens rea* require by Section 489C. *Karunakaran Nadan* v. *State*, 2000 Cri LJ 3748 (Kerala) : 2000(2) AL (Cri) 313 : 2000(2) Ker LT 210.

"Where the Court in framing charge had considered the available material an evidence particularly when recoveries were effected from the co-accused on th disclosure statement of the petitioner there was no infirmity in impugned orde *Subhash Chander* v. *State*, (1995) 1 CC Cases 363 (Del) : (1995) 1 Crimes 38 (Del).

2. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable b Court of Session.

3. Charge.—I (*name and office of the Sessions Judge, etc.*), hereby charge yo (*name of the accused*) as follows :—

That on or about the..........day of..........at......you had in your possession a forge (or counterfeit) currency-note (or bank note), to wit......knowing (or having reason t believe) the same to be forged (or counterfeit) and intending to use the same as genuin or that it may be used as genuine, and that you thereby committed an offenc punishable under Section 489C of the Indian Penal Code, and within the cognizance the Court of Session.

And I hereby direct that you be tried on the said charge.

Recovery of counterfeit currency notes—Framing of charges against the recovery counterfeit currency notes was held and petitioner was filed against no ready interference was finally warranted. *Subhash Chander* v. *State*, 1995 CC Cases 363 : (1995) 1 Crimes 38 (Del).

4. Punishment.—The mere recovery of counterfeit currency notes attract punishment under Section 489-C. It is attracted only if the person has the knowledge that the currency he possessed are counterfeit notes and that he intended to use them as genuine. Hence, conviction set aside. *T.J. Mohan* v. *State*, (1995) 1 LW (Cr) 75 (Mad).

There was no evidence that accused has knowledge that they were counterfeit and he intended to use them as genuine. The mere recovery of counterfeit notes cannot attract the punishment under Section 489-C, IPC when other elements required under the section are wanting. *T.J. Mohan* v. *State by Inspector of Police, Tiruvellore Police Station*, 1995 MLJ (Cr) 88 (Mad).

5. Possession of counterfeit currency notes.—The term 'possession' as used in Section 489-C of the IPC bears a sense at variance from that in civil law. It would amount to criminal possession if the possessor had knowledge or reason to believe that the notes that were forged and if his continued possession was with the intention of foisting it on the public. If the notes were of such a nature that a mere look at them would convince anybody that they were fake notes it can be presumed that he had knowledge or reason to believe that they were counterfeit *currencies. M. Mammutti v. State of Karnataka*, AIR 1979 SC 1705; 1979 Cri LJ 1383, is the authority for the proposition. In the circumstances, the possession of the currencies comes within the criminal possession contemplated in Section 489-C of the I.P.C. The accused, in the circumstances, has committed the offence under Section 489-C of the I.P.C. and he was rightly convicted. It appears, he had also suffered the full terms of imprisonment including default clause. *Vijayan alias Kochimon v. State of Kerala*, 2002 Cri LJ 187 : 2001(2) Andh LT (Cri) Ker 241 : 2001(2) Ker LJ 236 : 2001(4) Rec R 243.

The recovered currency notes in the instant case were obviously fake. They were fake even to the naked eye. The notes were photocopies as per the report of the Reserve Bank of India. The colour of notes was different and the notes were slightly shorter than that of genuine notes. It has held that possession of such poor quality of fake notes would not require any special type of *mens rea* for the purpose of conviction. *Pirthi Singh* v. *State*, 2006 Cr LJ 1393 (P&H).

Recovery of huge number of fake currency notes and implements to manufacture them from accused persons. It was submitted that none of the search/seizure independent witnesses of the locality were called. This submission is totally wrong. Every recovery memo and production of notes bears the signatures of independent witnesses.

Attesting witnesses were not stock witnesses. There is no reason why the Police Officers would prepare forged recovery memos. The huge quantity of notes recovered from the possession is self speaking evidence that the prosecution case is correct and no manipulation has been done. The learned trial Court has discussed in detail and has also rightly distinguished the cases cited before him and before this Court. The Investigating Officers of this case have done an excellent job of tracing the accused one after the other at the instance of the accused one by one. All of them are members of the criminal conspiracy. As a part of conspiracy, different accused have been assigned different jobs.

Accused not falsely implicated as Investigating Officer and witnesses have no enmity with them.

In this case forged currency notes were recovered from every accused. Even if notes would have not been recovered from any accused then also he could not have said that as one of the conspirator's is not liable to be punished. It is totally wrong to say that one of the witness was shattered in cross-examination. It is proved beyond reasonable doubt that the police party went to Delhi and made recoveries. There is nothing to say that the attesting witnesses are stock witnesses. Simply given the name of stock witnesses does not affect the truthful and veracity of the statement. An imaginary argument which is usually meant in all criminal cases have been made that the accused were falsely implicated by the Investigating Officer. It is fantastic to say that so huge number of notes and implements to manufacture them could be placed by the police and make the accused liable. The Investigating Officers and the witnesses have no enmity with the accused.

Thus, wrong assertion has been made that the Indian Security Press report did not contain the number of counterfeit notes is deliberate wrong assertion of facts against the record leads to the inference that the accused is guilty of the offence charged.

A complete conspiracy punishable under Section 120-B stand proved. For making a criminal conspiracy, it is not necessary that each of the accused fully participate in all the activities. Here is a case where Liyakat Ali used to manufacture fake and counterfeit notes. Huge amount of notes and all the implements and machines for preparing fake notes have been recovered from his possession.

According to India Security Press, Nasik, the notes produced before them suffered a number of defects, as such it should be held that they were prepared for fancy purpose. The argument is fantastic. The very existence of the fake notes amounting to lakhs and lakhs rupees indicate that all the accused under a criminal conspiracy are bent upon selling and introducing the fake notes in the market. This case is governed by the case *K. Hashim vs. State of Tamil Nadu*, reported in AIR 2005 SC 128 = 2005 (1) SCC 237 = 2005 CrLJ 143 (SC), the fact and ratio decidendi of the case of *K. Hashim* noted supra at verbatim with necessary changes in nomenclature applies to the facts of this case. By credible, cogent and reliable evidence tender the invertible conclusion is that the appellants have been rightly convicted and sentenced under various sections. The sentence as imposed do not warrant interference, particularly in view of the object for which the Sections 489-A, 489-B, 489-C, 489-D and 120-B of the IPC have been enacted.

From bare perusal of the statements of the prosecution witnesses mentioned above and the reasons mentioned above, it is clear that the prosecution has been able to prove the case against the accused appellants beyond reasonable doubt. From the accused appellants fake currency notes, and machinery used for preparing fake currency notes were recovered and they were found to be guilty of provisions of Sections 489-A, 489-B, 489-C and 489-D for which separately and collectively charged as mentioned above.

This Court has also gone through the findings arrived at by the trial Court on the question of sentence and I am in agreement with the view taken by the trial Court on this point. Arguments of the counsel for the appellants for releasing them for the period already undergone by them is also devoid of merit, hence rejected. The sentence of imprisonment imposed is just and proper, but I am of the considered opinion that in such types of heinous offences particularly relating to economic offences directly concerned with the State Exchequer, the accused appellants should serve sentence of imprisonment imposed upon them for full and no remission should be given to them, particularly when they were caught with huge fake currency notes and equipments used for preparing fake currency. *Liyakat Alī v. State of Rajasthan*, 2010 (2) CrLJ 2450 (Raj).

6. Resemblance—Making a counterfeit note exact imitation is not necessary. For making a counterfeit note the exact imitation is not necessary. Existence of the resemblance which might cause deception is enough to raise the presumption of intention to deceive. The three Judge Bench of the Hon'ble Supreme Court in *The State of Uttar Pradesh vs. Hafiz Mohd. Ismail, Hafiz Jawed Ali*, held that "*counterfeit — Meaning* — Colourable imitation" Exact imitation not essential — existence of resemblance which might cause deception is enough to raise presumption of intention to deceive". AIR 1960 SC 669. In *K. Hashim vs. State of Tamil Nadu*, AIR 2005 SC 128 = 2005 (1) SCC 237 = 2005 CrLJ 143, the Hon'ble Supreme Court held that "Section 28, IPC defines the word "counterfeiting" in very wide terms. The main ingredients of counterfeiting as laid down in Section 28 are :

(1) causing one thing to resemble another thing;

(2) intending by means of that resemblance to practice deception; or

(3) knowing it to be likely that deception will thereby be practiced.

"Counterfeit" in Section 28 does not cannot an exact reproduction of the original counterfeited. Explanation 2 of Section 28 is of great significance. It lays down a rebuttable presumption where resemblance is such that a person might be deceived thereby. In such a case the intention or the knowledge is presumed unless the contrary is proved. There is no necessity of importing words like "colourable limitation" therein. In order to apply Section 28, what the Court has to see is whether one thing is made to resemble another thing and if that is so and if the resemblance is such that a person might be deceived by it, there will be a presumption of the necessary intention or knowledge to make the thing counterfeit, unless the contrary is proved.

Plea that report of expert showing that notes recovered were not exactly similar to currency notes and there were marked difference as such they were not counterfeit notes but only fancy notes is not tenable. *Liyakat Ali vs. State of Rajasthan*, 2010 (2) CrLJ 2450 (Raj).

* * * * *

Sec. 489-D. Making or possessing instruments, or materials for forging or counterfeiting currency notes or bank-notes.—Whoever marks or performs any part of the process of making, or buys or Sells or disposes of, or has in his possession, any machine, instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for forging or counterfeiting any currency-note or bank-note, punished with *imprisonment for life*, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Amendment 2906
2. Scope 2906
3. Sentence imitation counterfeit deception resemblance 2906
4. Procedure 2907
5. Charge 2907

1. Amendment.—The words in italics were substituted for the words "transportation for life" by Act, 26 of 1955, Section 117, and Schedule (with effect from 1.1.1956).

2. Scope.—In order to establish a charge under this section what the prosecution has to prove in the first place, is that the machinery, instrument or material found in the possession of the accused person is such as would be used in the production of a counterfeit note, and it that is proved the next element which is to be proved is that the accused knew or intended that such article would be used for the purpose of counterfeiting currency-notes. 10 MLT 108; AIR 1939 Sind 190 : 40 Cr LJ 810. K *Hashim v. State of Tamil Nadu*, 2005 Cr. LJ 143 (SC). Posession of articles in sufficient in expert's opinion to be counterfeit, without explanation of the same by the accused raises a presmption of dishonest intention. AIR 1928 All 759. Under this section it is not necessary to prove that the accused had the ability to produce countrefeit currency-notes with materials in his possession. AIR 1928 All 754 : 51 All 570 : 30 Cr LJ 690 1029 ALJ 127 : 116 Ind Cas 797.

The burden is on the prosecution to show that the accused was occupying the home where the instruments for forging recovered and that he had joint possession or control over the instruments with other accused or at least they were brought there with his knowledge 53 Cr LJ 1249 : AIR 1953 TC 225 : 1959 Cut LT 307 (accused in possession of materials intended to be used for forging of counterfeiting currency or bank notes). Benefit of doubt to the accused where the recovery of litho stone from the possession of the accused did not establish a first link with the preparation of the forged currency notes. 1970 Cr LJ 1206 ; 1976 Cr LJ 288.

3. Sentence imitation counterfeit deception resemblance.—Accused found guilty of manufacturing, selling and introducing fake currency notes in market. This Court has also gone through the findings arrived at by the trial Court on the question of sentence and I am in agreement with the view taken by the trial Court on this point. Arguments of the counsel for the appellants for releasing them for the period already undergone by them is also devoid of merit, hence rejected. The sentence of imprisonment imposed is just and proper, but I am of the considered opinion that in such types of heinous offences particularly relating to economic offences directly concerned with the State Exchequer, the accused appellants should serve sentence of imprisonment imposed upon them for full and no remission should be given to them particularly when they were caught with huge fake currency notes and equipments used for preparing fake currency.

This Court may add that in such types of heinous offences the accused appellants should serve the full sentence imposed upon them without getting any remission. *Liyakat Ali vs. State of Rajasthan*, 2010 (2) CrLJ 2450 (Raj).

4. Procedure.—Cognizable–Warrant–Not bailable—Not compoundable—Triable by Court of Session.

5. Charge.—I (*name and office of the Session Judge, etc.*), hereby charge you (*name of the accused*) as follows :—

That on or about the.....day of.......at.... you made cor performed any part of the process of making, or bought, or sold, or disposed of, or had in your possession) an instrument (or material), to wit.....for the purpose of being used (or knowing or having reason to believe that it is intended to be used) for forging (or counterfeiting) a currency-note, to wit..... (or a bank-note, to wit.....) and that you thereby committed an offence punishable under Section 489D, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 489-E. Making or using documents resembling currency-notes or bank-notes.—Whoever makes, or causes to be made, or uses for any purpose whatsoever, or delivers to any person, any document purporting to be, or in any way resembling, or so nearly resembling as to be calculated to deceive, any currency-note or bank-note shall be punished with fine which may extend to one hundred rupees :

(2) If any person, whose name appears on a document the making of which is an offence under sub-section (1), refuses, without lawful excuse to disclose, to any police officer on being so required the name and address of the person by whom it was printed or otherwise made, he shall be punished with fine which may extend to two hundred rupees.

(3) Where, the name of any person appears on any document in respect of which any person is charged with an offence under sub-section (1) or on any other document used or distributed in connection with that document it may until the contrary is proved, be presumed that person caused the document to be made.

Synopsis

1. Amendment..........2907
2. Procedure..........2907
3. Charge..........2907

1. Amendment.—This section has been added by the Indian Penal Code (Amendment), Act, VI of 1943, Section 2.

2. Procedure.—The offence under this section is non-cognizable and bailable and it is triable by any Magistrate.

3. Charge.—The charge should run thus :

"I, (*name and designation of Magistrate, etc.*), hereby charge you (*name of the accused*), as follows :—

That you on or about..... (date)...... (time)..... (place)..... made (or accused to be made or used for any purpose whatsoever or delivered to any person) a document, t wit.......purporting to be (or resembling or so nearly resembling as to be calculated t deceive) a currency note (or a bank note) and thereby committed and offenc punishable under Section 489-E (1), IPC, and within my cognizance'.

'And I hereby direct that you be tried in this Court, on the said charge.'

"I, *(name and designation of Magistrate, etc.)*, hereby charge you *(name of th accused)*, as follows :—

That you on or about........(date).......... (time)............ (place).........refused withou lawful excuse to disclose to Shri.....a police officer, on being so required the name an address of the person by whom a document, to wit.,...was printed (or otherwise mad while your name appeared on the said document and the making of the said documen being an offence punishable under sub-section (1) of Section 489- E, IPC, an thereb committed an offence punishable under Section 489-E (2), IPC and within m cognizance.'

'And I hereby declare that you be tried in this Court on the said charge'.

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CHAPTER - XIX

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE

Sec. 490. Breach of contract of service during voyage or journey.—*Repealed by Act 3 of 1925, Section 2 and Sch.*

* * * * *

Sec. 491. Breach of contract to attend on and supply wants of helpless person.—Whoever, being bound by a lawful contract to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

Synopsis

1. Application 2909
2. Principle 2909
3. Procedure 2909
4. Charge 2909

1. Application.—This section does not apply to a person who is engaged only as an ordinary cook to a family not bound by a contract to attend on or to supply the wants of any helpless person. Rat Un Cr C 354 : Cr Reg 43 of 1987.

2. Principle.—"Persons who contract to take care of infants, of the sick, and of the helpless, lay themselves under an obligation of a very peculiar kind, and may with propriety, be punished if they omit to discharge their duty. The misery and distress which their neglect may cause, as such is the largest pecuniary payment would not repair. They generally come from the lower ranks of life and would be unable to pay anything. We therefore propose to add to this class of contracts the sanction of the penal law".—*Report of the Law Commissioners.*

3. Procedure.—It is non-cognizable and a summons should, ordinarily, issue in the first instance. It is both bailable and compoundable, and is triable by any Magistrate and may be tried summarily.

4. Charge.—I, *(name and office of the Magistrate)*, hereby charge you *(name of the accused)* as follows :—

That on or about the..... at.....you had entered into a lawful contract to attend or supply the wants of A who by reason of youth (or unsoundness of mind or of a disease or bodily weakness) (specify which out of the above may apply) was helpless and was incapable of providing for his own safety or of supplying his own wants and that you voluntarily omitted to do so ; and thereby committed an offence punishable under Section 491, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 492. Breach of contract to serve at distant place to which servant is conveyed at master's expense.—*Repealed by Act 3 of 1925, 2 and Schedule.*

* * * * *

CHAPTER - XX

OF OFFENCE RELATING TO MARRIAGE

Sec. 493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.—Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Scope 2911
2. Procedure 2912
3. Charge 2913
4. Complaint—Maintainability of 2913
5. Practice of deception 2913

1. Scope.—The offence here made punishable is committed when a man, whether married, or unmarried induces a woman to become, as she thinks, his wife, but in reality his concubine. The form of the marriage ceremony depends on the race or religion to which the persons contracting the marriage may belong. When the races are mixed as in India, and religion may be changed or dissembled this offence may be committed by a person falsely causing woman to believe that he is of the same race or creed as himself, and thus inducing her to contract a marriage, in reality unlawful, but which according to the law under which she lives, is valid. Suppose a person half English and half Asiatic by blood, calls himself a Mohammedan or a Hindu and by this deception causes a Mahommedan or a Hindu woman to go through the ceremony of marriage in a form which she deems valid and to cohabit with him, he has committed this offence. A man who deceives a woman into the belief that a certain ceremony which he causes to be performed by some accomplice, constitutes a valid marriage and thus induces the woman to cohabit with him, may be punished under this section".—*Morgan and Macpherson.* 433 ; (1971) 2 Andh WR 278 ; 1970 Cr LJ 1321 ; AIR 1957 Ori 198 : 1957 Cr LJ 981 (for essence of the offence). What is required is the deceitful means, an accused must induce a belief of a lawful marriage and then make the woman cohabit with him. (1971) 2 Andh WR 278 (also for the distinction of the offence under Sections 493 and 406, an offence under Section 493, in giving a false assurance of marriage while in Section 486, fraudulently going through the ceremony itself).

Where the accused is charged for an offence under Section 493, and during the pendency of the enquiry, the complainant dies, there is no abatement. AIR 1967 SC 933 : 1967 Cr LJ 943. The Sessions Judge had jurisdiction to try the offence where the committal Magistrate held an enquiry under Section 376, in the case of an accused summoned under Section 493, provided that the accused had opportunity to meet the charges framed. 1967 Cr LJ 1411 : *see* AIR 1969 All 409 : 1969 Cr LJ 1203 (in a charge under Sections 453, 376 and 417, in which the element of deceit is common).

The section envisages the case when a man deceitfully induces a woman to have sexual intercourse with him causing her to believe that she is lawfully married to him. In order to establish deception there must first be allegation that accused falsely induced her to believe that she is legally wedded to him. Though they were not married they had sexual union. What was alleged in the complaint was only a promise to marry in future. She was submitting to the petitioner even when he evaded registration of marriage. *Held*, that facts could not at any rate attract Section 493. 1987 Cri LJ 1106 (Ker).

The informant neither in the FIR nor in her statement given under Section 161, Cr.P.C. has alleged that she was induced by the petitioner and was made to believe that she was married at any time to the petitioner accused, nor it is the case of the informant that she ever believed that ceremony of marriage was performed between the informant and the accused. Thus the basic requirement of deception caused by a man on a woman in consequence of which she consented for sexual intercouse has not been made out. Further, it appears from the reading of the FIR that the sexual relationship between the informant and the accused was continuing right from 1996 whereas the FIR was loldged two years after *i.e.* in February 1998. As alleged by the informant, the petitioner refused to marry her and denied to be the father of the child conceived by her. In view of the legal position and the facts and circumstances of the case the Court quashed the charge under Section 493, IPC. *Dayanandhi Nayak v. State of Orissa* 2002 Cri LJ 371 (Orissa) : 2002(1) CCR 29 (Ori).

The evidence of the prosecution witnesses disclose that the petitioner by coming to the residence of the victim girl in the absence of her parents put vermilion on her forehead and induced her to believe that by such putting of vermilion on her forehead he has married her and thus obtaining consent caused sexual intercourse with her. Thus, the evidence on record amply proves that the prosecution has been liable to prove that the accused has practiced deceit and by that deceit made the PW2, who is not his wife, believe herself to be lawfully wedded to him and thereby she had sexual intercourse with the accused. *Suren Orang* v. *State of Assam*, 2005 Cr LJ 3402 (Gau) : 2006(1) DMC 65 : 2006(1) East Cri C 120 : 200(2) Gau LT 279.

It was alleged that the accused though already married, married the informant in temple but no evidence was brought on record to show that marriage had been solemnized with proper ceremonies in due form. The victim after marriage had allegedly lived with accused as his wife in a rented house and accused during this period had induced her to cohabit with him. It was held that accused could be convicted of neither under Section 493 nor under Section 494 as second marriage was not performed in due form including Saptpadi and accused had never induced her to cohabit by causing her to believe that she was lawfully married to him. Since she was a consenting party the charge of rape under Section 376 also could not be established. *Raj Kumar Narayan* v. *State*, 2003 Cr LJ (NOC) 207 (Jhar) : 2003 AIR Jhar HCR 1035 : 2002(3) East Cr C 338.

2. Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by a Magistrate of the first class.

3. Charge.—I *(name and office of Magistrate, etc.)*, hereby charge you *(name of the accused)* as follows :

That on or about the.......day of......at....you deceitfully caused a certain woman, to wit......who was not lawfully married to you, to believe that she was lawfully married to you, and in that belief, she cohabited or had sexual intercourse with you ; and that you thereby committed an offence punishable under Section 493, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

4. Complaint—Maintainability of.—Where there was complaint for the offence under Section 493, IPC, after 2 years of the occurrence of the alleged offence—indicating prosecutrix's knowledge about the marital status of the accused which was not stating the practice of any fraud upon her—Complaint was held to be not maintainable. *Sauraba Bank* v. *(Smt). Gouri Kaudi* alias *Gouri*, (1994) 1 East Cr C 470 (Ori) : 1994 Cr LJ 440.

5. Practice of deception.—In the case of *Sauraba Barik v. Smt. Gouri Kandi alias Gauri*, (1993) 2 Orissa LR 378; 1994 Cri LJ 440, the basic ingredients necessary to be established for bringing home the offence under Section 493, IPC are catalogued follows:

(i) The accused practiced deception:

(ii) Such deceit was to induce the woman to believe that she was lawfully married to him,

(iii) There was cohabitation or sexual intercourse as a result of the deception.

The same is the view in the case of *Raghunath Padhy v. The State*, AIR 1957 Orissa 198 : 1957 Cri LJ 989, *Janaki Kumar Das v. Gajendra Das*, (1990) 3 DCR 367 *and Amruta Gadtia v. Trilochan Pradhan*, (1993) 6 OCR 14 : 1993 Cri LJ 1022. The above view also finds support from a Full Bench decision of Kerala High Court in the case of *Moideen Kutty Haji v. Kunhikove*, AIR 1987 Kerela 184 : 1986 Cri LJ 1106 well as in the case.

Scrutinising the present case under the wide spectrum of the ratio laid down by the decisions the court observed that one of the ingredients mandatorily required to bring home the offence under Section 493, IPC is made out. The informant, neither in the FIR nor in her statement given under Section 161, Cr.P.C. has alleged that she was induced by the petitioner and was made to believe that she was married at any time to petitioner accused, nor it is the case of the informant that she ever believed that ceremony of marriage was performed between the informant and the accused. Thus, basic requirement of deception caused by a man on a woman in consequence of which she consented for sexual intercourse, has not been made out. Further, it appears from the reading of the FIR that the sexual relationship between the informant and the accused was continuing right from 1996 where as the FIR was lodged two years after i.e. in February, 1998. As alleged by the informant, the petitioner refused to marry her and denied to be the father of the child conceived by her. *Dayanidhi Nayak v. State of Orissa and others*, 2002 Cri LJ 371 : 2002(1) CCR 29 (Ori).

* * * * *

Sec. 494. Marrying again during life-time of husband or wife.—Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction.

Nor to any person who contracts a marriage during the life of a former husband or wife, is such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

STATE AMENDMENT

Andhra Pradesh.—Amended by A.P. Act No. 3 of 1992. Section 2 (w.e.f. 15.2.1992).

In A.P. the offence is cognizable, non-bailable, triable by the Magistrate of the first class and non-compoundable.

Synopsis

1. Essentials 2914
2. Scope 2915
3. Marries 2916
4. Abatement of bigamy 2917
5. Duty of Court to prevent abuse 2917
6. Cases 2917
7. Procedure 2922
8. Charge 2922
9. Conviction 2922
10. Evidence and Proof 2922
11. Cognizance of offence 2923
12. Section 494, and Hindu Marriage Act, 1955 2923

1. Essentials.—Where polygamy is not legal, the charge of bigamy requires to b supported by the following proofs ; (1) the first marriage of the accused must be proved ; (2) his second marriage must then be proved ; and (3) it must be shown that his first wife or husband was alive at the time of the second marriage".—*Morgan and Macpherson*, 434. Amongst the Hindus and the Mahommedans in the case of *males polygamy* is allowed ; hence bigamy is possible only in the case of a woman. In such a case it must be proved that the accused had a husband living : (2) that she married during the lifetime of the first husband : and (3) that such second marriage is void by reason of its taking place during the life of such husband. When the accused belonged to a caste, in which a second marriage is allowed, no such offence is committed. 7 CLR 354 : AIR 1942 Sind 92 : 43 Cr LJ 647. The causing of the publication of the banns of marriage is not an attempt to marry, but only a preparation or such an attempt. 1 All 316. Under this section no distinction is made between void and invalid marriages. AIR 1928 Lah 854. A penal statute requires *mens rea* even if it contains no express words to that effect. If a person charged with bigamy believed that he was legally free to marry again, it cannot be said that the crime was committed either intentionally or recklessly and the question whether the belief was unreasonable is irrelevant. AIR 1959 Ker 151 : 1959 MLJ (Cr) 262 : 1959 Cr LJ 591.

In a prosecution under Section 494, the prosecution has to prove that the first spouse was living at the time of the second marriage and further that the second marriage was void by reason of its taking place during the lifetime of the first husband or wife. In order to prove that the second marriage was void the prosecution must prove : (1) that there was a first marriage, (2) that the first marriage was not dissolved by law, (3) that the parties of the first marriage did not have the customary right of dissolution of marriage or that they did have the customary right of divorce but the marriage was not in fact dissolved by act of parties based on a customary right of divorce. 1961 (2) Cr LJ 469.

On a plain reading of Section 469, and consideration of the idea behind the legislature, it appears that what is prohibited is taking of the second spouse in the lifetime of the first spouse. AIR 1962 AP 446 : 1962, 1 ALT 91 : 1962 MLJ (Cr) 146 : 1962 (2) Cr LJ 596 ; AIR 1961 Punj 167 : 62 Punj LR 921 : ILR (1961) 1 Punj 153 : 1961 (1) Cr LJ 549. 1976 Cr LJ 1333 : (1983) 2 DVMC 286 ; 1981 Cr LJ 577 : 1980 MB test (Cr) 174 (for essential ingredients of the offence). The essential ingredients of the offence is the voidness of marriage under the personal law governing the partition ; AIR 1979 SC 713 : 1979 CR LJ 652 ; 1976 Cr LJ 1333 ; 1984 All LJ 652 ; 1982 Cr LJ 1005 : ILR 1982 ; 31 Raj 797 (difference between offence under Section 494 and 496).

The proof of "*satapadi*" an essential ceremony not established. Hence, factum of second marriage is not made out. *Laxmi Devi (Smt)* v. *Satya Narayan*, 1996 JIC 402 : (1995) 1 LW (Cr) : (1995) 1 East Cr C 415 (SC).

2. Scope.—The second marriage of a Hindu husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in terms of the provisions of Section 494, IPC, and the apostate husband would be guilty of the offence under Section 494, IPC. *Sarla Mudgal (Smt)*. v. *President Kalyani*. (1995) 3 SCC 635 at p. 651 : 1995 JIC 770 : 1995 (2) KLT 45 : (1995) 2 ALT (Cr) 50 : (1995) 2 East Cr C 50: 1995 MLJ (Cr) 496 : (1995) 3 CCR 12 : 1995 SCC (Cr) 569 : 1995 Cr R 772 (SC).

The statements recorded under Section 202, Cr PC, clearly established that '*P* has also solemnised marriage with petitioner interference Manju. A *prima facie* offence under Section 494, IPC, is made out. Hence, the impugned order does not warrant any interference. *Prakash Chand* v. *(Smt) Geeta*, 1995 Cr LR 269 (Raj).

When Muslim married under Special Marriage Act entered into second marriage under Muslim Law, he is liable to be prosecuted for offence of bigamy. *S. Radhika Sameena* v. *SHO Habibuagar,* 1997 Cri LJ 1655 (AP) : 1997(1) DMC 132 : 1997(3) Rec Cr R 427 : 1996(2) Hindu LR 358 : 1996(4) Andh LD 1 : 1996(4) Andh LT 73 : 1996(2) APL 293.

3. Marries.—The word "marries" used in Section 494, means marries by some form of marriage known to or recognised by the law Merely showing that some form of marriage ceremony was gone through is not sufficient. The section does not refer to a valid marriage. A bigamous marriage cannot be a valid marriage, and apart from the bar of the first marriage, it may be that there may be some other legal impediment to the validity of the marriage of the man or woman, some legal impediment personal to the man or woman, such as consanguinity ; yet if the second marriage be a form recognised by or known to the law, that would be sufficient to satisfy this particular provision of the section. 175 Ind Cas 461 : 39 Cr LJ 656 : AIR 1938 Sind 127 ; *see* also 159 Ind Cas 855 : 37 Cr LJ 161 : 1936 Cr C 35 : AIR 1936 Nag 13 ; AIR 1960 Bom 393 : 60 Bom LR 428 : ILR 1958 700 : 1960 Cr LJ 1189 ; 1962 Ker LT 487 : ILR (1962) 2 Ker 89 : 1962 Ker LJ 824 ; AIR 1955 Cal 522 : 1955 Cr LJ 1347 : ILR (1257) 2 Cal 249 (in case a Christian marrying again a Hindu woman according to Hindu rites—the marriage was held not be a marriage in the eye of law) ; *see* also 1965 (2) Cr LJ 544 : AIR 1965 SC 1564. Under Mohammedan law, in case of a contract between the husband and wife at the time of marriage, empowering the latter to divorce herself in specific contingencies, then it does not require any declaration from a law Court. The marriage with a girl after such divorce does not bring home offence under Section 494. 1953 Cr LJ 1504 : AIR 1953 Trip 6. The second marriage must be clearly proved.; 1962 Ker LT 487 : ILR (1962) 2 Ker 89 : 1962 Ker LJ 824.

It is incorrect to say that prior to the Hindu Marriage Act no Hindu could be punished for bigamy even as it is incorrect to say that no Muslim can be punished for bigamy. (1972) 1 Andh WB 294 (consideration of constitutional validity of Section 494). The bare fact of a man and a woman living as husband and wife does not. at rate. normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife. AIR 1965 SC 1564 : (1963) 2 Cr LJ 514 ; 1981 Cr LJ 833 ; AIR 1968 AP 117 ; 1969 AWR (HC) 469 (fact of a marriage has to be proved).

Mere exchange of garlands in between accused and alleged second wife will not amount to performing marriage as per Hindu rites. Admittedly, there was strained relationship between the complainant and the accused and several cases were pending between them including one of maintenance. In the circumstances, it was essential for the complainant to adduce cogent and reliable evidence in support of her case which she filed. Surprisingly her father, who was the most competent witness in the case, was withheld by the prosecution and not examined in the Court and there was no explanation for the same. In view of the facts and circumstances of the case the acquittal of all the accused persons of the charges was held proper. *Smt. Manju Devi* v. *State of Bihar* 2000 Cri LJ 3382 (Pat) : 2000(3) East Cri C 1901 (Pat).

In the absence of any evidence of Satpadi around the sacred fire at the time of marriage between the respondents none can be convicted for the offence of bigamy or for the offence of abatement to commit bigamy. *Surekha Murdangia* v. *Ramahari Murdangia*, 2005 Cr LJ 3847 (Orissa) : 2005(2) DMC 870 : 2005(2) Orissa LR 459.

The accused during the substance of earlier marriage had entered into second marriage with complainant. Complainant did not state as to how her marriage was performed and whether essential ingredients of *Satpadi* and *Homa* were performed or not. Evidence of witness also failed to prove the alleged second marriage of accused. Accused was held entitled to be acquitted. Admission of accused about his relationship under Section 50 of the Evidence Act was held not admissible in a bigamy case. *Gopal Lekharu* v. *State of Assam*, 2005 Cr LJ 4719 (Gau) : 2006 ALJ 163 N : 2005 (4) Gau LT 77

4. Abatement of bigamy.—In a case the complaint alleged that accused committed second marriage during subsistence of first marriage in presence of co-accused. As the record did not disclose any material relating to abatement on the part of co-accused in alleged second marriage, the complaint against the accused was held liable to be dismissed. *Tulsamma* v. *Jagnnath*, 2004 Cr LJ 4272 (Kant) : AIR 2004 Kant HCR 3111 : 2004(4) Crimes 252 : 2001(6) Kant LJ 43.

5. Duty of Court to prevent abuse.—Judges should be particularly careful to *see* that Sections 494, 497 and 498 are not abused for the purpose of private spite or prosecution. 175 Ind Cas 451 : 39 Cr LJ 656 : AIR 1938 Sind 127 ; AIR 1936 Sind 189. *Mens rea* is furnished by the knowledge of validity of the second marriage. AIR 1968 Cal 55. There is nothing in Section 494 or Section 495, for bidding a prosecution not proceeded by a declaration under the Hindu Marriage Act, 1955, that the second marriage is invalid. AIR 1958 Mys 147 : 1958 Cr LJ 1331 ; AIR 1959 Mani 20 : 1959 Cr LJ. There must be at the time of the second marriage a previously subsisting valid marriage and that the second marriage with proper ceremonies in due form took place. *Kanwal Ram* v. *H.P. Administration*, AIR 1966 SC 614 ; 1970 Cr LJ 838 ; AIR 1971 SC 1153 ; AIR 1969 Cal 55 ; AIR 1969 Assam 90.

6. Cases.—A native Christian having a Christian wife married a Hindu woman according to Hindu rites, without renouncing his religion. *Held*, that the second marriage of the accused should be treated in law as an adulterous union, and, therefore, void within the terms of Section 494, of the Code, by reason of its having taken place during the lifetime of the first wife. 30 Mad 550 : 2 MLJ 476 : 6 Cr LJ 338. It cannot be said that once a Hindu becomes a Christian, he has no right to relapse into Hinduism or any other alternative religion which he re-enters. Where a Hindu becomes a Christian to marry a Christian lady there is nothing to prevent him a re-conversion to Hinduism for marrying a Hindu lady and he will not be guilty of an offence under Section 494. 52 Cr LJ 1085 : AIR 1951 Mad 888 : (1951) 1 MLJ 691 (this was a case before the coming into force of the Madras Hindu Bigamy Prevention and Divorce Act). Where the divorce is invalid a wife commits an offence under this section by going through a second marriage. 6 Bom 126. A woman who contracts a *pat* marriage with another man during the lifetime of her first husband and without his consent is punishable under Section 494, of the Code. 12 CPLR Cr 19 ; *see* also 19 Bom LR 56 : 4 Corn Cr Cas 3. The accused, a Hindu convert to Christianity, married a Christian wife according to the rites of the Roman Catholic Church, subsequently he reverted to Hinduism, and during the lifetime of her Christian wife, married Hindu woman in accordance with Hindu rites. *Held*, the offence of bigamy was not committed. 3 MHC App 7 : 1 Weir 567.

The parties contracting a second marriage will not be held guilty of bigamy if the marriage is solemnised in their infancy and has never consummated by cohabitation. AIR 1950 Lah 133. An admission by this accused that he married the woman or the statement of witness that he was present at the marriage does not prove formal marriage so as to warrant a conviction under this section. 45 CWN 85. A *bona fide* belief that the authority of the caste made a second marriage valid, although it was not so according to law, is no defence to a charge under Section 494, IPC, but it may be taken into account in mitigation of punishment. 1 Bom 347. Marriage of a Mahommedan man and woman is rendered *ipso facto* void by apostacy of the former though there are certain methods by the marriage tie may be renewed. 15 CLJ 263 : 16 CWN 451 : 39 Cal 409 : 14 Ind Cas 641. Under Section 198, a husband can institute a complaint under this section as he is the person aggrieved. 7 ALJ 10 : 32 All 78 : 5 Ind Cas 167 : 11 Cr LJ 51 ; 13 Cr LJ 204 : 14 Ind Cas 204 ; Cr Reg 7 of 1886 ; 57 Ind Cas 459. Brother of the deceased wife has no locus standi under Section 198, Cr PC, to file complaint under Section 494, 1965 (2) Cr LJ 376 : AIR 1965 Mys 285. When the accused is convicted under Section 498, of the IPC, and it appears that the woman being not on good terms with her husband, went to accused of her own accord, a sentence of one year's rigorous imprisonment is too severe. 33 PLR 1910 : 24 PR 191 Cr : 8 Ind Cas 226 : 11 Cr LJ 597.

The section requires proof of a second contract of marriage in the lifetime of the husband or wife of the party as the case may be, and of the invalidity of such contract by reason of the husband or wife being alive. 1 Weir 565 (FB). The Hindu Law, which recognises the right of a Hindu husband to contract a valid second marriage notwithstanding the continuance of a former marriage does not recognised correlative right on the part of a Hindu wife. In a case under Section 494, the point for determination is whether there was a valid subsisting marriage at the date of the second marriage. 1 Weir 563. The effect of Section 17, of the Hindu Marriage Act, 1955 is to make Section 494, of the Penal Code, applicable to Hindus. There is nothing in the Act forbidding a prosecution" for an offence punishable under Section 494, not proceeded by a declaration obtained under the provisions of the Act that the second marriage is void, 1958 Cr LJ 1331 : AIR 1958 Mys 147 : 1958 MLJ (Cr) 424, It is clear for Section 7 (1), of the Hindu marriage Act that a Hindu marriage may be solemnised in accordance with customary *rites* and ceremonies of either party thereto. 1963 Mad LJ (Cr) 84 : 76 Mad LW 198 : (1963) 1 MLJ 66 (where it was held that non-performance of the *Saptapadi* would not render the first marriage null and void ; 1965 Kas LJ 125 : 1965 (2) Cr LJ 640 : AIR 1965 J & K 105 (AIR 1962 AP 311 dissented). But *see* ILR 1963 Cut 464. Where the evidence was held not be satisfactory to hold that a valid marriage took place according to ceremonies and persons, the offence under Section 494, was held not to be made out ; *see* also 1963 (1) Cr LJ 760 : AIR 1963 HP 16 Custom of caste authorising dissolution of marriage without husband's consent and second marriage is contrary to law and as such void in law. 2 BHC 117. But a conviction under Section 494, Penal Code, cannot be supported where there is evidence to show that, but the custom to the caste, *sagai or nikah* marriage was admissible and that the husband has relinquished his wife. 19 Cal 627 ; *see* also 7 Pat LT 443 : 96 Ind Cas 115. A *nikah* marriage fails within Sections 494 and 495, IPC. 6 WR Cr 60. The fact that a certain school of Mohammedan lawyer have declared that a woman is competent to marry again, if her husband has been absent for 4 years, will not bring a case under the exception to Section 494, IPC. 27 PR 1878 Cr. The *Jhingara* ceremony of marriage does not by custom constitute a valid marriage within the meaning of Section 494, IPC. 25 PR 1888 Cr. An apostacy of a Hindu wife does not dissolve marriage union. 30 PR 1870 Cr. Where a person, not governed by Mahommedan law, contracts, or otherwise celebrates, a valid marriage, in accordance with a system of law other than Mohammedan law, the marriage and its dissolution will be subject, in British India to the provisions of that other system of law, and not according to Mahommedan law, notwithstanding that one of the parties to the. marriage has after being so married become a convert to *Islam*. 26 MLJ 260 : 4 Bom 330 : 9 Mad 466 : 18 Cal 264 : 1 Lah 440 : 30 Mad 550 : 32 Cal 871 : 22 Cr LJ 1 : 1 Lah 440 : 59 Ind Cas 33. "Void" includes both classes "void" and "invalid" marriages under the Mahommedan law. AIR 1931 Lah 194 : 1931 Cr C 314. A conviction for bigamy by reason of second marriage is dependent upon proof of a first valid subsisting marriage. The prosecution must show that at the time of the second marriage there was the first valid subsisting marriage. Where the accused happens to be a Mahommedan girl who was married in her childhood it must be shown that after she had attained puberty she acquiesced in or ratified the first marriage. 165 Ind Cas 745 : 1936 Cr C 974 : AIR 1936 Sind 189. Remarriage by a Christian after conversion to *Islam* is an offence under Section 494, as the conversion does not dissolve the Christian marriage. 20 Cr LJ 3 : 5 PR 1919 Cr : 48 Ind Cas 493. Where the first marriage was made with the consent of legal guardian though he was in jail and as such valid a second marriage is bigamy. AIR 1927 Cal 480 : 28 Cr LJ 327 : 100 Ind Cas 711.

Where there was second marriage deposed by witnesses but "*Saptapadi*" ceremony could not be proved. It was held that since *factum* of second marriage not established and hence no offence of bigamy. However since respondent is living with other woman as husband and wife, appellant be granted compensation under Article 142, of Constitution. *Laxmi Devi* v. *Satya Narayan*, (1994) 3 Crimes 234 (SC).

In order to entitle the accused to the benefit of the exception of Section 494, IPC, it is not necessary to prove that the other party to the marriage has been continually absent from, and not been heard of as alive by the accused for the space of seven years, it being immaterial under such circumstances, whether or not the accused made any inquiries or had reasonable grounds for believing the other party to be dead. 1 PR 1900 Cr : PLR 1900 p. 16. Going through a form of marriage with a married girl under a mistake of fact that her earlier marriage had been declared void by a competent Court is not an offence. 19 Cr LJ 680 : 31 PWR 1918 (Cr) : 46 Ind Cas 40. Where a caste panch has no authority to dissolve a marriage subsequent to such alleged dissolution could amount to bigamy, 18 Cr LJ 468 : 19 Bom LR 56 : 39 Ind Cas 308. Where a person is unaware of prior secret marriage, he is guilty of bigamy. AIR 1933 Lah 164 : 33 PLR 1060 : 1933 Cr C 309 ; *see* also AIR 1931 Lah 194 ; AIR 1934 All 589 : 35 Cr LJ 1053. Where a Hindu male marries Christian woman in England and marries second time in Hindu form in India, no bigamy is committed. AIR 1932 Lah 116 : 33 PLR 339 : 136 Ind Cas 262 ; AIR 1950 Mys 26. Second marriage in first husband's lifetime without annulling first marriage is an offence which cannot be obliterated by subsequent divorce 138 Ind Cas 518 : 1932 Cr C 660 : 36 MLW 237 : 33 Cr LJ 647 : 1932 MWN 1082 : AIR 1932 Mad 561.

Under Muhammadan law a second marriage during period of *iddat* is not valid. 43 PR 1882 Cr. In a prosecution for bigamy, if proof of either marriage is unsatisfactory.

there ought not to be any conviction. 19 Cal 79. A decree of absolute nullity of marria though it has retrospective effect for certain purposes has no effect of making ceremony of marriage gone through by the wife after obtaining a decree *nisi* against th husband, but before the decree is made absolute a valid marriage. (1958) 1 WLR 101 Where marriage of the complainant with the accused was admitted and there wa nothing to show that the parties had recourse to Section 13, of the Hindu Marriage Ac or had secured valid divorce according to the custom the marriage must be considere to subsist. 30 Cut LT 294 : (1964) 6 Ori JD 160 : 1964 All Cr R 463. A Hindu fath giving his married daughter, who on account of her youth has not the knowledge an intelligence to commit an offence under Section 494, again in marriage to another in th lifetime of her husband, is guilty of the abetment of bigamy although the girl, herse cannot be convicted under Section 494. 6 CWN 343 ; *see* also Rat Un Cr C 876. Wher a widow, charged with bigamy, contended that her second marriage was invalid, as sh was married when she was a minor without the consent of her relation, *held*, that th marriage was legal. 2 PR 1869 Cr. To substantiate a charge of bigamy, the firs marriage of the complainant and his alleged wife must be strictly proved. Rat Un Cr 190. Consummation is not required to complete a marriage. 4 PR 1874 Cr. A Crimina Court is bound to decide the question of marriage when it is essential to the decision the question whether an offence has been committed or not. 27 PR 1878 Cr.

Where during the subsistence of a first marriage, a person goes through a form marriage recognised by law, he is guilty of bigamy, although the second marriage ma be void for other reasons than that of his being bigamous. 19 PR 1876 Cr. In arriving a a decision as to whether there has been a valid subsisting first marriage the Crimina Court is bound by the fact of the decision of a Civil Court for custody of the wife or b proceeding in execution of that decree. 18 PR 1881 Cr. In order to sustain th conviction of a woman under Section 494, it must be proved ; (1) that the accused has husband living ; (2) that he married during the lifetime of first husband ; and (3) tha such second marriage is void for reason of its taking place during the lifetime of suc husband. 17 CLR 354. A Hindu Christian convert relapsing into Hinduism an marrying a Hindu woman cannot be convicted of bigamy on the ground that he ha another wife living whom he married while professing Christianity. 3 MHC App 7. *A*, i her childhood, was with her parents baptised into the Roman Catholic Church, bu after her father's death, the family relapsed into Hinduism. *A* was then married to Hindu. The husband, after sometime discarded her on the ground of her forme baptism which was not known to him at the time of marriage. She was then re-admitte to the Roman Catholic Church by the second accused and was married by him to Roman Catholic Church. *Held*, that the woman was guilty of bigamy under Section 494 Penal Code, and the second of abetting the same. 10 Mad 218 : 1 Weir 566. The causing of the publication of the bans of marriage is not an attempt to marry, but only preparation for such an attempt. 1 All 316. It cannot be said that the only "person aggrieved" under Section 494, is the person with whom the second ceremony was gone through. The husband is also a person aggrieved" under Section 198, Cr PC, and the Court should, therefore, take cognizance of an offence under Section 494, Penal Code on a complaint by the husband. 26 Cal 336 : 7 ALJ 10 : 32 All 78. The brother of a lunatic whose wife is charged with having committed bigamy is not a person aggrieved by such offence within the meaning of Section 198, Cr PC. 10 Bom 340 ; *see* 32 All 78.

Where *A* and *B* was tried for offence of bigamy on complaint made by wife of *B*—*A* nd *B* were convicted. There was second trial conducted at the instance of husband of A itiated trial was barred. *Vijaylakshmi* v. *Kunnath Kumaran*, (1994) 4 SCC 656.

A *Mona Sikh* can validly perform his marriage under the *Anand Karay* rites ; and in spect of the same, the offence of bigamy can be committed. 82 Ind Cas 277 : 25 Cr LJ 269. Under the Criminal Procedure Code, as amended in 1923 a first class Magistrate n try an offence of bigamy without committing it to the Sessions. 25 Cr LJ 39 : 75 Ind as 727 : 1925 Oudh 60. The *Ahamdiya* faith is within the pale of *Mahommedanism* nd a *Mussalman*. who embraces the *Ahamadiya* faith does not become an apostate. here a Mahommedan husband becomes an *Ahamadiya* and therefore the wife treating m as an apostate marries another she is guilty of bigamy. There is no question of *ens rea*, in the case of an offence under Section 494. 71 Ind Cas 75 : 24 Cr LJ 17.

Although a marriage brought about by fraud by the mother of a minor girl without e father's knowledge might be declared invalid, it is not a nullity and is binding until is set aside by a competent Court. Consequently unless it is declared invalid a person arrying the girl again is guilty of bigamy and the father who gives the girl in marriage abetment. 2 Lah 288. Where the first complaint under Section 494, IPC, was smissed on the ground that the complainant had not proved that the woman was his wfully wedded wife, held, that he could not lodge a fresh complaint on the same facts. IR 1928 Lah LJ 197 : 1929 Cr C 87. A person who marries a woman, who is emarrying' during the lifetime of her husband, cannot be convicted under this section. t the most he could be charged with abetment of the offence only. LR 6 All 209 Cr.

In a prosecution under Section 494, the prosecution has to prove that the first ouse was living at the time of the second marriage and further that the second arriage was void by reason of its taking place during the life time of the first husband wife. 1961 (2) Cr LJ 469.

When paternity of the child was alleged to be born out of the second marriage hich cannot be decided in such proceedings. *Gomathi* v. *Vijayaraghavan*, 1995 Cr LJ (Mad).

The mere fact that the complainant wife had stated in the complaint that no *farkati* eed of divorce) had been passed by her cannot be treated as an admission that there as a customary right of divorce by *farkati* in her community. 1961 (2) Cr LJ 469. Even lmission of marriage by the accused is no evidence for proving adultery or bigamy. 978) 80 Punj LR 52.

In case exercise of *prima facie* offence is made out, court should not interfere under ection 482, Cr PC. 1987 Cr LR 466 (Guj).

Nikah falls within the definition of marriage. AIR 1965 SC 1564 : *See* AIR 1973 Ker 76. Proof of second marriage validly performed has got to be proved for a conviction nder the section. *Ibid*. *See* AIR 1960 Bom 393 : 1960 Cr LJ 1189 : AIR 1969 Cal 55 : R 1979 SC 848 : 1979 Cr LJ 849 : 1971 Cr LJ 939 : AIR 1971 SC 1153 ; AIR 1966 SC 4 : 1966 Cr LJ 472. In the calcutta case in AIR 1955 Cal 533 : 1955 Cr LJ 1347, it is ld that the second marriage is to be valid according to law, but it does not take notice the earlier case reported in AIR 1918 Cal 136 : ILR 45 Cal 641 where it is stated that hether the marriage stands proved in fact legal and valid or illegal and invalid. This view was differed in AIR 1961 Punj 167, which held that the section does not require that the second marriage must otherwise be valid. *See* also AIR 1963 HP 16 : 1973 Cr LJ 1710.

7. Procedure.—Not cognizable — Warrant — Bailable — Compoundable — Triable by Magistrate of the first class.

8. Charge.—"I *(name and office of the Magistrate, etc.)*, hereby charge you (*name of the* accused) as follows :

That on or about the...........day of..........at...........you having a wife (or husband), to wit.........living having been validly married and that you married again *AB* during the lifetime of A, she's said second marriage also being duly performed, and that you thereby committed an offence punishable under Section 494, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Where no material for offence under Sections 498 and 496, Penal Code, was found and on the basis of material on record found *prima facie* case against the accused, it was held that no error to warrant interference with order of lower court. 1987 Cr LR 27 (MP).

9. Conviction.—Where there was allegation of second marriage during subsistence of first valid marriage was still wife alive. There was burden of proof of second valid marriage. It was held an essential factor to base conviction—Accused in his statement admitting second marriage under Section 313, Cr PC case was not sufficient for conviction as burden is on first wife to prove second valid marriage. *Masina Kusuma Kumari* v. *Yeramati Venkatalakshmi*, (1994) 1 ALT (Cri) 562 : (1994) 2 ALT 4 (AP).

10. Evidence and Proof.—The law is well settled that to bring home the offence under Section 494, IPC, the first as well as the second marriage alleged should be proved in accordance with the legal requirements under Hindu Law and under caste custom of the particular accused. Absence of proof of solemnisation of marriage would automatically defeat the charge under Section 494 of the IPC. *D. Vyayalakshmi* v. *D. Sanjeeva Reddy*, 2001 Cri LJ 1583 (A.P).

The question was as to who will prove the second marriage of the husband for his conviction under Section 498, IPC. It was held that burden of proof shall be upon the first marriage. *Masina Kusuma Kumari* v. *Yeramati Venkatalakshmi*. (1994) 2 ALT 4 (NRC) : (1994) 1 ALT (Cri) 562.

In the absence of proof of ceremony, the *factum* of second marriage cannot be said to have been made out but Court can exercise powers under Article 142, of Constitution and grant compensation to appellant. *Laxmi Devi* v. *Satya Narayan*. (1996) 1 LW (Cr) 8 : 1995 JIC 492 : (1995) 1 East Cr C 415 (SC).

For providing the offence of bigamy both the marriages should be proved to have been performed by observing the necessary ceremonies. *Bira Dang* v. *Dhyana Dang*, (1995) 8 OCR 481 Ori).

In *Shanta Deb Barma* v. *Smt. Kanchan Prava Devi* AIR 1991 SC 816 : 1991 Cri LJ 660 Supreme Court said that in the absence of plea that the marriage was performed as per custom, oral evidence and letters to the effect that accused and his alleged second wife were living as husband and wife would not be sufficient to draw inference as to the performance of ceremonies essential for valid marriage.

In *Sridhar G. Jengode* v. *Stayavathi*, 2000 Cri LJ 2862 : 2000(4) Kant LJ 156 : 2000(2) DMC 541 (Kant) the complainant had not only given the particulars as to the place, day, date and time of the marriage but also gave the names of persons who attended the marriage in the list of witnesses. He also stated that the marriage was celebrated according to the religious ceremonies followed by the parties. The *purohits* spoke that the marriage was solemnised by observing religious ceremonies that prevailed in the cerminity of both the parties. It was held that the offence of bigamy under Section 494, IPC was proved.

Where there was allegation of bigamy and valid marriage to be proved in case of first marriage as well as in case of second marriage. *Manjula Nayak* v. *Rama Chandra Nayak*. OLR 520 (Ori).

Where there was allegation of solemnization of second marriage by accused husband of complainant—Complaint was dismissed and appeal for same was filed. Since there were no evidence that essential ceremonies of *Anand Karaj* were performed, hence lower court rightly dismissed the complaint. *Manjit Kaur* v. *State of Punjab*, (1994) 2 Crimes 164 : (1994) 2 Recent Cr R 303 (P & H).

Unless *Saptapadi* is performed the marriage is not complete. Unless there is proof of second valid marriage the offence under Section 494, IPC, is not complete. *Smt. Urmila* v. *State of U.P.*, 1994 UP Cr R 382 (All).

For purpose of proving the offence of bigamy or adultery the prosecution has to prove that the necessary ceremonies of second marriage has been performed. Even an admission by an accused is no evidence of marriage. *Smt. Urmila* v. *State of U.P.*, 1994 UP Cr R 382 (All).

When husband admitted that he married second wife after first wife deserted him. prosecution is still to prove their second wife was taken after solemnization of ceremonies of Hindu Marriage. *P. Satyanarayana* v. *P. Mallaiah*, 1997 Cri LJ 211 (SC).

11. Cognizance of offence.—Offence was under Section 494, IPC and there was cognizance of the offence. It was held that offence can be taken only upon the complaint by person mentioned under Section 198, Cr PC. *Sharat Chandra Sahoo* v. *State of Orissa*, (1995) 9 OCR 563 (Ori).

Where there was complaint by wife against husband—Magistrate ordering police investigation which was held to be not valid. Under Section 198 (1), Cr PC. Magistrate can take cognizance only on complaint after according sworn statement of complain and witnesses if he finds material for the same. *Karakiappa* v. *Smt. Renuka*. (1995) 3 Kar LJ 303 (Karn).

12. Section 494, and Hindu Marriage Act, 1955.—Section 17 of the Hindu Marriage Act, 1955, recognizes the principle of monogamous marriages amongst Hindus. Provisions of Section 17 have to be read in harmony and conjunction with the provisions of Section 494, IPC as Section 17 clearly provides that Sections, 494 and 495, IPC shall apply accordingly. The voidness of marriage under Section 17 is in fact essential ingredient of Section 494, IPC, because the second marriage will become void only because of the provisions of Section 17 of the Act. *Gopal Lal* v. *State of Rajasthan*

AIR 1979 SC, 713 : 1979 Cri LJ 652; *Priya Bala Ghosh* v. *Suresh Chandra Ghosh* AIR 1971 SC 1153 : 1971 Cri LJ 939; *Bhanurao Shanker Lokhande* v. *State of Maharasthra* AIR 1965 SC 1564 : 1965 Cri LJ 544. A complaint by a Hindu wife against her husband for the offence of bigamy punishable under Section 494, IPC is maintainable as the effect of Section 17 of the Act is to make Section 494, IPC applicable to Hindus. *Durga Charan* v. *State of Delhi* 2000 Cri LJ 3530 (Delhi) : 2000(86) DLT 795 : 2000(2) Chand Cri C 270 : 2000(3) Cur Cri R 681 (Del).

Section 17. of Hindu Marriage Act is to be read in harmony and conjunction with Section 494. AIR 1979 SC 713 : 1979 Cr LJ 652 ; (1982) 1 Bom CR 507 : 1982 Cr LJ 546 : 1984 All LJ 609.

Since under the Hindu Marriage Act a bigamous marriage is prohibited and has been constituted as an offence under Section 17 of the Act, any marriage solemnized by the husband during the subsistence of that marriage, in spite of his conversion to another religion, would be an offence triable under Section 17 of the Hindu Marriage Act read with Section 494, IPC. Since taking of cognizance of the offence under Section 494 is limited to the complaints made by the persons specified in Section 198 of the Code of Criminal Procedure, it is obvious that the person making the complaint would have to be decided in terms of the personal law applicable to the complainant and the respondent (accused) as mere conversion does not dissolve the marriage automatically and they continue to be 'husband and wife'.

Change of religion does not dissolve the marriage performed under the Hindu Marriage Act between two Hindus. Apostasy does not bring to an end the civil obligations or the matrimonial bond, but apostasy is a ground for divorce under Section 13 of Hindu Marriage Act as also a ground for judicial separation under Section 10 of the Hindu Marriage Act. Hindu law does not recognise bigamy. The Hindu Marriage Act, 1955 provides for "Monogamy". A second marriage during the lifetime of the spouse, would be void under Ss. 11 and 17 of the Hindu Marriage Act, besides being an offence. If the person feigns to have adopted another religion just for some wordly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a scared institution. Under Hindu Law marriage is a sacrament. Both have to be preserved. *Lily Thomas* v. *Union of India*, 2000 Cri LJ 2443 (SC) : 2000 Luck Cri R 375 : 2000(1) An LT (Cri) 363 : 2000 SCC (Cri) 1056.

In *Bhaurao Shanker Lokhande* v. *State of Maharashtra* (1965) 2 SCR 837 : AIR 1965 SC 1564; 1965) 2 Cri LJ 544 the apex Court held as under:—

> "Section 17 provides that any marriage between two Hindus solemnized after the commencement of the Act is void if at the date of such marriage either party had a husband or wife living and that the provisions of Sections 494 and 494, IPC shall apply accordingly. The marriage between two Hindus is void in view of Section 17 if two conditions are satisfied; (i) the marriage is solemnized after the commencement of the Act; (ii) at the date of such marriage, either party had a spouse living. If the marriage which took place between the appellant and Kamlabai in February, 1962, cannot be said to be solemnized, that marriage will not be void

by virtue of Section 17 of the Act and Section 494, IPC, will not apply to such parties to the marriage as had a spouse living."

This decision was followed in *Kanwal Ram* v. *H.P. Administration* (1966) 1 SCR 539: IR 1966 SC 614: (1966 Cri LJ 472). The matter was again considered in *Priya Bala hosh* v. *Suresh Chandra Ghosh* (1971) 3 SCR 961; AIR 1971 SC 1153:1971 (1) SCC 64; (1971 Cri LJ 939 In *Gopal Lal* v. *State of Rajasthan* AIR 1979 SC 713 : 1979 (2) CR 1171: 1979 (2) SCC 170: (1979 Cri LJ 652) *Murtaza Fazal Ali J* speaking for the ourt observed as under:—

> "Where a spouse contracts a second marriage while the first marriage is still subsisting the spouse would be guilty of bigamy under Sec. 494 if it is proved that the second marriage was a valid one in the sense that the necessary ceremonies required by law or by custom have been actually performed. The voidness of the marriage under Section 17 of the Hindu Marriage Act is in fact one of the essential ingredients of Section 494 because the second marriage will become void only because of the provisions of Section 17 of the Hindu Marriage Act."

It was contended in *Sarla Mudga's* case (1995) AIR SCW 2326 : AIR 1995 SC 531:1995 Cri LJ 2926 that making a convert Hindu liable for prosecution under the enal Code would be against Islam, the religion adopted by such person upon onversion. Such a plea raised demonstrates the ignorance of the petitioners about the enets of Islam and its teaching. The concept of Muslim Law is based upon the edifice of hariat Muslim Law as traditionally interpreted and applied in India permits more than ne marriage during the subsistence of one and another though capacity to do justice etween co-wives in law is condition precedent. Even under the Muslim Law plurality of arriages is not unconditionally conferred upon the husband. It would, therefore, be oing injustice to Islamic Law to urge that the convert is entitled to practice bigamy otwithstanding the continuance of his marriage under the law to which he belonged efore conversion. The violators of law who have contracted the second marriage cannot e permitted to urge that such marriage should not be made a subject-matter of rosecution under the general Penal law prevalent in the country. The progressive utlook and wider approach of Islamic Law cannot be permitted to be squeezed and arrowed by unscrupulous litigants, apparently indulging in sensual lust sought to be uenched by illegal means, who apparently are found to be guilty of the commission of he offence under the law to which they belonged before their alleged conversion. *Lily homas* v. *Union of India* 2000 CriLJ 2433 (SC) : 2000 Luck Cri R 375 : 2000(1) An LT Cri) 363 : 2000 SCC (Cri) 1056.

For apostacy and conversion resulting in divorce *see* 1971 Ker LT 64 : ILR 33 Mad 42 : AIR 1939 Cal 417 : AIR 1950 Mys 26 : AIR 1951 Mad 888 : 18 Cal 264 : 4 Bom 83 : 10 Mad 218.

Sub-sec. (2) of Sec. 2 of the Hindu Marriage Act, 1955 has the effect of laying down hat persons belonging to the scheduled tribe will in matters of marriage continue to be overned by the personal law which was hitherto applied to them and not by any of the rovisions of the Act unless the central government by notification directs that any uch provisions should be applicable to them. *Durga Charan* v. *State of Delhi* 2000 riLJ 3530 (Del) : 2000 (86) DLT 795 : 2000 (2) ChandCriC 270 : 2000 (3) CurCriR 681 Del).

* * * * *

Sec. 495. Same offence with concealment of former marriage from person with whom subsequent marriage is contracted.—Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.

STATE AMENDMENT

Andhra Pradesh.—Amended by A.P. Act No. 3 of 1992, Sec. 2 (w.e.f. 15.2.1992), in Andhra Pradesh.

The offence is cognizable, non-bailable, triable by the Magistrate of the first class and non-compoundable.

Synopsis

1. Object 2926
2. Ingredients 2926
3. Procedure 2927
4. Charge 2927
5. Complaint 2927

1. Object.—The act which, in the English Law, is designated as bigamy is always, an immoral act. But it may be one of the most serious crime that can be committed. It may be attended with circumstances which may excuse, though they cannot justify it.

"The married man who, by passing himself off as unmarried, induces a modest woman to become, as she thinks, his wife, but in the reality his concubine. and the mother of an illegitimate issue is guilty of one of the most cruel frauds that can be conceived. Such a man we would punish with exemplary severity.

"But suppose that person arrives from England and pays attention to one of his country woman at Calcutta. She refuses to listen to him on any other terms than those of marriage. He candidly owns that he is already married. She still presses him to go through the ceremony with her. She represents to him that if they live together without being married she shall be an outcaste from society, that nobody in India knows that he has a wife, that he may very likely never fail in with his wife again and that she is ready to take the risk. The lover accordingly agrees to go through the form of marriage. It cannot be disputed that there is an immense difference between these two cases".—*Report of the Law Commissioners.*

Under Sections 494 and 495, a complaint may be made by the person aggrieved but if the wife knew that the husband was married already, she cannot complain. 1967 MLJ (Cr) 550. For abetment of second marriage if an offence. *See* 1982 Cr LJ 11362 : 1982 Mad LJ (Cr) 19. Complaint can be filed by the first wife and not by the second wife. 1984 Hindu LR 65.

2. Ingredients.—An offence under Section 495, IPC, is committed only when the offence of bigamous marriage under that section is committed by concealing the fact of former marriage from the person with whom subsequent marriage is performed. (1988) 15 Reports 24 (Guj).

3. Procedure.—Not cognizable — Warrant — Bailable — Not compoundable — Triable by a Magistrate of the first class.

4. Charge.—The charge should run thus :

I (*name and designation of Magistrate, etc.*), hereby charge you (*name of the accused*) as follows :

'That on or about the....(date)...at...(time)....(place)....having a wife (or husband), namely......living, married again Smt/Sri.....which marriage is void by reason of its taking place within the lifetime of such wife (or husband), namely....... and you having concealed from Smt/Sri.....with whom the subsequent marriage was contracted the fact of the former marriage and thereby committed an offence punishable under Section 495, IPC, and within my cognizance.

And I hereby direct that you be tried on the said charge.

5. Complaint.—The trial Court took cognizance of offence on the basis of *prima facie* evidence on record. The petitioner is legally competent to file the complaint and it cannot be quashed on ground of delay. *Balbir Singh* v. *Amarit Kaur*, (1995) 1 CC Cases 428 (P & H).

* * * * *

Sec. 496. Marriage ceremony fraudulently gone through without lawful marriage.—Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for .a term which may extend to seven years, and shall also be liable to fine.

STATE AMENDMENT

Andhra Pradesh.—Amended by A.P. Act No. 3 of 1992, Section 2 (w.e.f. 15.2.1992), in A.P.

The offence is cognizable, non-bailable, triable by the Magistrate of the first class and non-compoundable.

Synopsis

1. Scope 2927
2. Procedure....................2928
3. Charge 2928

1. Scope.—"A person, who by deceit, causes a woman to co-habit with him under the belief that she is his wife is punishable under Section 493. Where there is deceit or not as between the man or woman, if there is a dishonest or fraudulent intention on the part of those or other of those who go through the marriage ceremony knowing the marriage is not a lawful one, the present section is applicable. As in the case of a pretended lawful marriage, to enable the parties to obtain property so settled to come to one of them on marriage or as if a man wishing to obtain money, jewels or other property belonging to a woman, should deceive her into going through an invalid marriage ceremony, in order that he may obtain them. The mere abuse of the formalities of marriage where there is no deceit practised on the woman, and no 'dishonest or fraudulent' intention, is not an offence punishable by this Code whether the ceremony partakes of a religious character or not".—*Morgan and Macpherson*, 437.

A conviction under this section for falsely undergoing a marriage ceremony must be supported by proof of fraudulent or dishonest intent. The fact of permitting an illegal marriage to take place in one's house does not constitute the abetment thereof, as the law construes abetment. WR 1864 Cr 13. Section 486 of the Penal Code, applies to cases in which a ceremony is gone through which does not constitute, but it is believed by one of the parties to constitute a marriage. Rat Un Cr C 77. To establish a charge under Section 496, IPC, it is not enough to show that the marriage may be set aside on the ground of fraud or declared a nullity ; it is incumbent on the prosecution to go further and to prove that the accused knew that there was no valid marriage and he has gone through a show of marriage with a fraudulent or ulterior object in view. Where the accused who was a low class *Brahmin* falsely represented himself as a high class *Brahmin* to the complainant who was a high class *Brahmin* and induced her to give her daughter in marriage to him. *Held*, that the accused was not liable to be convicted of the offence under this section. 41 CWN 540 : ILR (1937) 2 Cal 221 : 167 Ind Cas 708 : 38 Cr LJ 577 : AIR 1937 Cal 214 (FB). Where the accused is charged with the principal offence under Section 496, and for abetment thereof there must be a complaint under Section 198, Cr. Pro. Code. AIR 1931 Mad 247. Where the parties were Mahommedans and all that alleged was that the complainant objected to the marriage on account of its being within prohibited decrees and the parties went to another place and got married. *Held*, that an offence under Section 496, was not committed. AIR 1931 Mad 247. No offence under this section has been committed where the act does not amount to going through the ceremony of being married, knowing that he is not thereby is lawfully married. 48 Cr LJ 842.

The necessary ingredients of the offence under the section are (1) that the accused want through the ceremony of marriage (2) that when he went through such ceremony, the accused knew that notwithstanding those ceremonies, he was not thereby lawfully married to the complaint and (3) that he went through the ceremony with a fraudulent intention and dishonestly. 1982 Cr LJ 1005.

2. Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by a Magistrate of the first class.

3. Charge.—"I (*name and office of Magistrate, etc.*), hereby charge you (*name of the accused*), as follows :

That on or about the..........................day of...................... at.................you dishonestly (or fraudulently) went through the ceremony of being married to *AB* knowing that you were not thereby lawfully married, and that you thereby committed an offence punishable under Section 496, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge. .

* * * * *

Sec. 497. Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

Synopsis

1. Scope 2929
2. Object 2930
3. If void as Contravening Act 14 & 15 of the Constitution 2930
4. Cases 2930
5. Legal complaint 2933
6. Procedure 2933
7. Charge 2933
8. Notes 2933
9. Limitation 2934

1. Scope.—"The offence of rape has been defined by Section 375. When the sexual intercourse does not amount to that offence, and when it takes place between a stranger and a woman who is and whom the offender knows or has reason to believe to be, the wife of another man, the offence of adultery is committed. In support of a charge of adultery, there must be proof ; (1) that the woman is married ; (2) that there was sexual intercourse ; and (3) that there were the circumstances which tended to show that the accused person at the time knew, or had reason to believe, that the woman was the wife of another man. If appears that the intercourse was by reason or connivance of the husband, this offence has not been committed. The character of both husband and wife, and the terms on which they live together, should be regarded".—*Morgan and Macpherson*, 438. Actual fact of marriage must be proved. 17 Bom LR 75. Desertion of the husband by the wife for one year does not *ipso facto* dissolve the marriage tie. 18 Cr LJ 321 : 38 Ind Cas 433. In all prosecution, under this section the marriage must be strictly proved. 4 Bur LJ 107 : AIR 1925 Rang 328 : 27 Cr LJ 651 : AIR 1928 Pat 481. In a prosecution under Section 497 or Section 498, it must be proved to the satisfaction of the Court that there is existence of legal marriage, before conviction can take place. 28 Cr LJ 311 : 100 Ind Cas 535 : AIR 1927 Oudh 140. Section 61, of the Divorce Act does not forbid the Crown to prosecute and punish an alleged adulterer under Section 497, when moved to do so by the injured husband. AIR 1928 Lah 50. In cases of adultery direct fact need not be proved. Fact is to be inferred from circumstances. 1928 Pat 375. Every intercourse amounts to an offence. AIR 1928 Bom 530. To constitute connivance within the meaning of Section 497, Indian Penal Code, the facts established must lead to a direct and necessary inference that adultery would be committed by the person charged. They may not go to prove privity to the actual commission of adultery, but they must show that the husband acquiesced in by wilfully abstaining from taking any steps to prevent that adulterous intercourse which, from what passes before his eyes or within his knowledge he cannot but believe or reasonably think is likely to occur. LR 6 All 209 Cr. To sustain conviction under Section 497, the complainant must not only prove that the accused had sexual intercourse with his wife but also that it was done without his consent or connivance. AIR 1953 Mad 422 : (1953) 1 MLJ 236 : 1953 Cr LJ 765 : 1965 MPLJ (Notes) 339. To constitute connivance something more than mere negligence by his husband is necessary. (1962) 4 Ori JD 359 ; 1963 (1) Cr LJ 312 : AIR 1963 Ori 60 (case of abandonment by husband). Absence of consent on connivance to be inferred from facts and circumstances of each case. Strick proof not necessary. 1965 Raj LW 157 : ILR (1965) 156 Raj 522 : AIR 1965 Raj 191. Enticement or detention is not the ingredient of an offence under this section. AIR 1951 HP 25. Successive prosecution against the accused should not be encouraged. 1941 MLJ 606. It is wrong to think enticement or detention are ingredients of an offence under Section 497. AIR 1951 HP 25. In order to make out an offence either under Section 497 or Section 498, it must be proved that the accused had sexual intercourse with or enticed a woman who is and whom he knows or has reason to believe to be the wife or another man. 1951 AWR (HC) 312.

2. Object.—This section is intended for the protection of husbands who alone can institute prosecution for offence under it. 1 Weir 569. Adultery must be without consent or connivance of husband. AIR 1964 Mys 67.

3. If void as Contravening Act 14 & 15 of the Constitution.—Section 497 does not contravene any of the fundamental rights laid down in the constitute and cannot therefore be held to be had or void under Article 13, of the Constitution. It cannot be said that Section 497, does not operate equally upon all persons as required by Article 14, in that women are absolved from any punishment under the section. Nor can it be said that the section offends against Article 15 (1), in that in enacting the section the legislature discriminated in favour of woman and against men on ground of sex. There is no such contravention. But assuming it to be such the alleged discrimination in favour of women is saved by Article 15 (3). 53 Bom LR 736 : AIR 1951 Bom 470. Sex is a sound classification and although there can be no discrimination in general on the ground, the constitution itself provides for special provisions in the case of women and children by clause (3), of Article 15. Articles 14 and 15, thus read together validate the last sentence of Section 497, which prohibits the women from being punished as an abetment of the offence of adultery. AIR 1954 SC 321 : 1954 SCJ 385 : 1954 SCR 930 : 1953 SCA 398 : 1934 Cr LJ 886 (affirming AIR 1951 Bom 470) ; AIR 1985 SC 1618 (no violation also of Article 21, of the Constitution because of no provisions in the section for leaving wife).

4. Cases.—Where the husband of a woman preferred a complaint of offence under Sections 494 and 408, of the Penal Code, *held*, that the complaint did not include an offence under Section 497, and that the Magistrate had no jurisdiction to try the accused for such offence. Rat Un Cr C 531 : AWN 1881, 112. Where after a decree had given an option to the wife to return to her husband or to pay him money the accused contracted, its marriage with the woman, after payment of the money mentioned in the decree. *Held*, that the accused could not be convicted for adultery, as it could not be held that the accused and the woman did not believe that the latter was at liberty to re-marry. 5 BH Cr C 17. Where a husband omits to take any steps against the accused for six or seven years, *held*, that the offence under the section has been condoned by the husband and the accused cannot be convicted under the section. 1 CWN 498. Evidence of adultery must be satisfactory in order to convict a person under this section. AWN 1833, 129. Section 497 and 498, are evidently, intended for the protection of husband who alone can institute prosecution for offences against him. 1 Weir 569 : 2 MHC 331. Where the accused was discharged for want of a proof of marriage, retrial for the examination of the wife cannot be allowed. 11 Cal 81. The question of validity of the marriage is vital to the commission of an offence under Chapter XX of the Penal Code. The proof of a *de facto* marriage is not sufficient for a conviction under Sections 497, 998, Penal Code. 7 CWN 143. A conviction under Section 498, on a complaint by the husband of an offence under Section 497, IPC, was set aside by the Chief Court. 18 PR 1873 Cr. In a prosecution for adultery, the marriage of the complainant with his alleged wife must be strictly proved. Rat Un Cr C 539 : *see* also 5 All 233 : 5 Cal 566 : 5 CLR 597 (FB). It is not necessary to make a marriage complete that there should be cohabitation. 4 PR 1874 Cr. In a case of adultery, sexual intercourse must be proved, the sexual intercourse required for adultery being there as identical thing as the sexual intercourse required for rape. The difference lies in the mode of proof ; in rape no presumption of sexual intercourse can be made ; in adultery, it can be from evidence pointing strongly to an inference of guilt. It is not necessary, therefore, that there should be direct evidence of an act of adultery, not that the adulterer should know whose wife the woman is provided he knew she was a married woman. 21 WR Cr 13. It is very difficult to get actual eye-witness of the commission of adultery or sexual intercourse and the Court has to rely upon the circumstances and conduct of the persons concerned. 1961 (2) Cr LJ 459 : 1964 (1) Cr LJ 250 (wife along with her grown up daughters lying in accused's home for long time—no evidence to show occupation of same room by wife and accused—no reference of sexual intercourse can be drawn).

In a criminal case adultery must be proved in the same decree as in a divorce suit. 1 PR 1874. *Sagai* marriages, that is, the custom of marriage of widows, prevails among certain low castes of Bihar, and is legal and valid. Persons committing adultery with a *sagai* wife are punishable. 3 CLR 410. Where a prisoner accused of adultery sets up in defence a *natra*. marriage contracted with woman with whom he is alleged to have committed adultery, in accordance with the custom of his caste, the question the Court has to determine is whether or not the accused honestly believed at the time of contracting the *natra* marriage that the woman was the wife of another man. 5 BHCC 17 ; 2 BHC Cr 117. Adultery with a Mahommendan's sixth wife is no offence, as a Mohammedan can enter into a legal marriage with four wives only. 1 PR 1875 (Cr). The offences of adultery and marrying again during the life time of the husband should not be tried together. Rat Un Cr C 4. If a man, who has been convicted of adultery with another man's wife, continues his adulterous intercourse, he will be liable to a second conviction and punishment for the fresh act notwithstanding that the woman had not returned to her husband's protection after the conviction of her paramour. Rat Un Cr C 150. If a criminal charge of adultery is to be preferred a formal complaint of that offence must be instituted in the manner provided by law, and if it is not. the provision of law will not have been satisfied. 5 All 233 : AWN 1833, 129 ; *see* also 24 WR 18 Cr : 4 MHC App 55. A minor husband cannot be represented by another in a prosecution for adultery. 2 Weir 235. A prisoner need not be convicted both for adultery and enticing away the woman. 2 WR Cr 35. An adultery being an act which requires the consent of both the parties, it is not sufficient in order to convict a man of an attempt to commit adultery, that he was found in a place in which adultery might have been committed and he was minded to commit it. 1 Weir 569. A conviction under the section cannot stand where the husband has condoned the offence. 4 WR Cr 31. Desertion of the husband by the wife for one year does not *ipso facto* dissolve the marriage tie. complaint under Section 496, should not be summarily dismissed on the ground tha the man and woman had been lying a part for a year especially. 18 Cr LJ 321 : 38 In Cas 433.

Section 497, IPC, is not restricted in its application and applies to ail classes o persons, including Europeans. The accused took up his abode in the house of anothe man's wife and there was evidence that for 15 days he and she slept in the same be and there was considerable attachment between them. *Held*, that the evidence although circumstantial, was amply sufficient to hold that sexual intercourse had take place and accused was guilty of an offence under Section 497, IPC. 24 PLR (A) 419 : 6 Ind Cas 231. Where in a case of a charge for adultery the only evidence was a lette written by the complainant's wife to the accused, which was not proved to have bee received nor read by the accused. *Held*, that the conviction on such evidence must b set aside. AIR 1928 Cal 248. In a prosecution under this section, the question o marriage must be proved strict and any inference, tacit or otherwise, *e.g.* a taci admission on the part of the accused that the woman was the wife of the complainan will not avail the prosecution if they fail to prove strictly the marriage between the complainant and the woman whose chastity has been violated. AIR 1928 Pat 481 Adultery *per se* is not an offence in India. To come under this section the adultery must be without consent or connivance of the husband. 9 Pat LT 397 : A1R 1928 Pat 375. presumption of valid marriage between a husband and woman arises from their living together as husband and wife even though they belong to different class which ough not to intermarry. AIR 1927 Rang 261 : 6 Bur LJ 122 : 21 Cr LJ 868 : 104 Ind Cas 708 ; but *see* AIR 1934 Sind 20 : 35 Cr LJ 816. Where validity of marriage is challenged, *factum* of marriage as well as strict observance of custom or law applicable must be proved. AIR 1933 Cal 880 : 145 Ind Cas 874. It is not necessary, however, that any particular number of witnesses should be examined to prove the fact of marriage. The evidence of husband and wife is sufficient for the purpose. The law does not also require that the fact of marriage should be proved in some particular way. No presumption against the validity of the marriage can be raised unless there is at least some suggestion that a particular part of the ceremony essential to its validity is lacking. 166 Ind Cas 338 : 38 Cr LJ 213 : 18 PLT 166 : AIR 1937 Pat 219. Complaint by husband is necessary in an offence under Section 497 or Section 498. AIR 1933 Oudh 163 : 10 OWN 107 : 1933 Cr C 318 : 34 Cr LJ 496 ; *see* also 36 PLR 209 : 1934 Cr C 1333 : AIR 1934 Lah 945. The conversion of a Hindu wife to Mahommedanism does not *ipso facto* dissolve the marriage tie with her husband, and she cannot during his lifetime, enter a valid marriage contract with another person. She continues to be the wife of her former husband inspite of her conversion, and if any one has sexual intercourse with her, he commits an offence under Section 498, without her consent. AIR 1947 Nag 121 : 48 Cr LJ 43.

What is essential for the offence of adultery is proof of sexual intercourse. But it can be rarely proved by direct evidence so that must be circumstance which could be the guarded discretion of a reasonable and just mind to the conclusion. 1970 Cr LJ 1441 : AIR 1970 Delhi 224 : AIR 1970 Cr LJ 1447 : 1977 Cr LJ 134 : 1978 Cr LJ 942 (strict proof that woman was married). It is clear that the finding as to absence of consent or connivance on the part of the husband has to be arrived at on the facts and cumstances of individual cases and there should be undue strictness in arriving at a ding. AIR 1969 Raj 193 : AIR 1963 Ori 60 : ILR 1963 Cut 911 (if abandonment of wife nstitutes connivance of the husband) : AIR 1963 SC 51 (on the principle of *violent nfit injuria*, a person cannot complain of any act, he passively assents to). 1973 Cr LJ 41.

The gist of the offence under this section is the deprivation of the husband of his stody and proper control over the wife with the object of the accused having illicit ual intercourse with her. AIR 1959 SC 436 : 1959 Cr LJ 527. (If therefore without taking or enticement, a woman leaves her husband and goes to the offender who reafter prevents her by allurement or blandishment from returning to the husband offender must be held to have concealed or detained her within the meaning of the tion).

Mere fact that parties were living together as husband and wife and giving birth to ir progeny is not sufficient proof of marriage between them. *Brij Lal Bishnoi* v. *State.* 96 Cri LJ 4286 (Del).

5. Legal complaint.—Where a complaint alleges that a certain married woman is tting up with the accused, and he proposes to elope with her and marry her, that her is likely to be ruined and that it is dangerous to allow her to remain with the cused and absolutely necessary to rescue her before it is too late, there is no legal nplaint of the offence of adultery under Section 497, IPC. In the absence of any tement that adultery has been committed there cannot be said to be any legal nplaint, the necessary averments must be present. ILR 1937 Bom 244 : 39 Bom LR : 169 Ind Cas 526 : 38 Cr LJ 769 : AIR 1937 Bom 186. Report to police by husband d his subsequent statement before Court in support of police case cannot be treated complaint. 1965 (2) Cr LJ 455 : AIR 1965 All 508. Complaint must be complaint as fined in Section 4 (1) (h), Cr PC, *Ibid.*

6. Procedure.—Not cognizable—Warrant—Bailable—Compoundable — Triable by a urt of a Magistrate of the first class.

7. Charge.—I (*name and office of Magistrate, etc.*), hereby charge you (*name of the cused*) as follows :—

That on or about the.......day of........at....you committed adultery by having sexual ercourse with *AB*, the lawful wife of *CD*, whom you knew (or had reason to believe) to the wife of *CD*, without the consent or connivance of the said *CD*, and that you ereby committed an offence punishable under Section 497, of the Indian Penal Code. d within my cognizance.

And I hereby direct that you be tried on the said charge.

8. Notes.—In a charge for adultery it is not necessary to specify the date when the ence was committed. It is enough if the charge specifies the dates between which the ence was committed. AIR 1951 Kut 17 AIR 1965 MP 269 (an invasion of the right of husband over his married wife).

No Court will take cognizance of this offence except upon the complaint of the sband of the woman or in his absence with the leave of the court by same person, o had care of such person *see* AIR 1965 All 503 (complaint must be as defined in ction 2 (d), Cr. P. Code.

The section was valid together with the last sentence as two Articles 14 and 15, the Constitution are read together. AIR 1954 SC 321 : 1954 SCJ 385 : 1954 Cr LJ 88 The husband can compound the offence under Section 497, or Section 498, AIR 196 Ori 60.

9. Limitation.—Where there was delay in lodging FIR, and consent of connivanc For filing a complaint no limitation is provided except as provided under Section 45 Cr PC. Panchayat was held subsequent to the commission of offence. Which was not t fall in category of consent. It was held that offence was compoundable and n interference with the decision of lower appellate court. *Bharatlal* v. *Topsingh*, 1995 (LR 139 (MP).

* * * *

Sec. 498. Enticing or taking away or detaining with criminal inten a married woman.—Whoever takes or entices away any woman who is an whom he knows or has reason to believe to be the wife of any other man from that man, or from any man, with intent that she may have illic intercourse with any person, or conceals or detains with that intent an such woman, shall be punished with imprisonment of either description fo a term which may extend to two years, or with fine, or with both.

Synopsis

1. Scope 2934
2. Proof of marriage 2940
3. Detain 2940
4. Such women 2941
5. Proof and evidence 2941
6. Procedure 2941
7. Charge 2941
8. Jurisdiction 2941
9. Acquittal 2942

1. Scope.—The offence which the present section punishes is the taking o enticing away for the unlawful purpose mentioned, a married woman from her husban or from those who have the care of her on his behalf. It is a matter whether the wife i shown to be a consenting party or not. Her consent is not in question. To support charge under this section, it must be proved : (1) that the woman is married and tha fact is known to the offender, or that he has reason to believe it ; (2) that she has bee taken away or enticed from her husband, or from her relatives or friends with whom sh may be living in her husband's absence ; (3) that the woman may have illicit sexua intercourse with himself or some other person. Persons who conceal or detain a woma who has been taken away knowing the circumstances and having the guilty intentio above mentioned, are also punishable under the present section. It is this intentio which is the main ingredient in the offence. A person, who, being a relative of a marrie woman would take her away from her husband's house or would conceal or detain he from her husband on account of the misconduct or cruelty of the husband or for an other cause, but without any intention that she should have illicit intercourse with any person, commits no offence".—*Morgan and Macpherson*, 439.

The two essential ingredients of an offence under this section are that the woman enticed away is the wife of the complainant and that the fact of the marriage is known to the accused. 15 Ind Cas 813 : 10 All 580 : 1 Weir 569 : 9 PR 1889 Cr : 1 Weir 571 : 16 PR 1891 Cr : 61 Ind Cas 652 : 22 Cr LJ 412 : AIR 1931 Lah 194 : 141 Ind Cas 40 : 10 OWN 833. The fact and the legality of the marriage is a material element in such a case. 11 ALJ 994 : 9 Mad 9 : 20 All 166 : 3 OC 342 : 17 PR 1893 Cr ; 2 PR 1879 Cr : 2 SLR 22 Cr : 5 PR 1894 : 6 Mad 374 : 26 Cr LJ 1376 : 5 Cr R 252 : 78 PR 1866 Cr : 13 CLR 125 : AWN 1898, 186 ; AIR 1925 Oudh 300 : 26 Cr LJ 1376 : 89 Ind Cas 464. Where the marriage is disputed there should be strict proof of the same. 145 Ind Cas 874 : 34 Cr LJ 1092 : 38 CWN 113 : AIR 1933 Cal 880 : 1933 Cr C 1530. The word "conceals or detains" must be taken to extend to the enticing or inducing a wife to withhold or conceal herself from her husband and assisting her to do so, as well as to physical restraint or prevention of will or action. 28 SLR 140 : 151 Ind Cas 175 : 35 Cr LJ 1254 : 1934 Cr C 625 : AIR 1934 Sind 72.

In order to constitute detention for the purpose of Section 498, Penal Code, there must be evidence to show that the accused did something which had the effect of preventing the woman from returning to her father. AIR 1951 Kut 17. The enticement of the wife must be from the control of the husband before the entice can be convicted under this section. AIR 1934 Sind 10 : 27 SLR 482 : 35 Cr LJ 816 : 148 Ind Cas 753. The gist of that offence under Section 498, IPC, is in depriving the husband of his proper control over the wife for the purpose stated in the section. Although any deposition of the woman or any consent or willingness on her part would be perfectly immaterial to the guilty of the accused there must be some influence from the accused operating on the woman or co-operating with her inclination at the time final step is taken which causes a severance of the woman from her husband, for the purpose of causing such step to be taken. It is not enough to constitute the offence that the woman left her husband's house or that she was afterwards seen passing along with the accused. There must be evidence that the woman was not acting as a free agent throughout or that any allurement or inducement or encouragement was held out to her by the accused to stay away from her husband. 65 CLJ 421 : 41 CWN 931 : 170 Ind Cas 903 : 38 CLJ 986 : AIR 1937 Cal 460 ; *see* also 168 Ind Cas 607 : 38 Cr LJ 576 : 39 PLR 488 : AIR 1937 Lah 317. A person cannot be held guilty of an offence under Section 498, IPC, if it is not proved beyond all reasonable doubt that he abducted the woman from the custody of her husband with the intention of having illicit intercourse with her. 39 PLR 191. In the absence of any improper intention an accused should not be charged under this section. 1944 AMLJ 53. There need not be any enticement. Taking away of another's wife with necessary intention constitutes offence. AIR 1950 Mad 13 : 4 DLR (Mad) 215 : (1949) 1 MLJ 610. The taking of a girl from the care of her mother with her mother's consent is not taking or enticing away within the meaning of Section 498, IPC, 165 Ind Cas 497 : 37 Cr LJ 1155 : 39 CWN 1055. Where the intention necessary to constitute an offence punishable under this section has not been proved, and the accused is in fact the real uncle of the woman alleged to have been enticed away, his conviction is liable to be set aside. 38 PLR 570. The word "taking" is intended to mean something different from enticing. It cannot mean taking by force, because this would amount to abduction. A case under Section 498, is sufficiently established, if it can be shown that the accused personally and actively assisted the wife to get away from her husband's house or from the custody of any person who was taking care of her on behalf of the husband. Of course the taking must be with the "intention", stated in the section. 159 Ind Cas 140 : 39 CWN 1280 : 1935 Cr C 1069 : AIR 1935 Cal 677 ; 1955 All WR (HC) 679 : 1956 All LJ 895.

It must be proved that the accused enticed the complainant's wife from her husband's or father's house with intent to have illicit intercourse with her. 1 CWN 498 : 13 ALJ 251 : 4 WR Cr 50 : 15 PR 1883 Cr : 22 WR Cr 72. The Chief Court declined to interfere with a conviction in a case where the husband charged a wife with bigamy and has father and mother with abetment—these latter being convicted under Section 498, because the facts complained of as constituting an offence under Section 494, Penal Code, were held sufficient to bring the proceedings under Section 498, Penal Code, within the Magistrate's jurisdiction. 19 PR 1882 Cr. The offence contemplated by Section 498, is complete if it appears that the accused went away with the woman in such a manner as to deprive her free which does not diminish the criminality of the act. 4 Bom LR 435 : 159 Ind Cas 140 : 39 CWN 1280 : 1935 Cr C 1069 : AIR 1935 Cal 677.

It is not necessary to inflict a severe sentence on an accused person convicted under Section 498, IPC, when the husband did not take care of his wife, and took no action for a number of months against the accused after he was informed of the abduction. 26 PLR 429. In a prosecution under this section when it appears that the woman is an active abettor in her own abduction, the sentence should be a light one. 27 PLR 642. The object of Section 498, IPC, is not so much to protect a husband as inflict punishment on those who interfere with the sacred relation of marriage. A severe sentence is justified in the absence of extenuating circumstances. 1952 Cr LJ 705 : AIR 1952 Mys 34. The wife's complicity in the transaction is no more material on a charge under this section than it is on a charge of adultery. 1952 MWN 604 : (1952) 2 MLJ 212.

The provision of Section 428, like those of Section 497, are intended to pretest the rights of the husband and not those of wife. The gist of the offence under Section 498, appears to be the deprivation of the husband of his custody and proper control over his wife with the object of having illicit intercourse with her. The consent of the wife to deprive her husband of his proper control over her would not be material. It is the infringement of the rights of the husband coupled with the intention of illicit intercourse that is the essential ingredient of the offence under Section 498. AIR 1959 SC 436 : 1959 SCJ 457 : 1959 All Cr R 243 : SCJ 457 : (1959) 2 SCA 116 : 1959 Cr LJ 527. The word "detains" means by deprivation and according to the ordinary use of language "keeps back". But there may be various ways of keeping back. It need not necessarily be by physical force, it may be by persuasion or by allurements and blandishments. 35 Bom LR 1046 : AIR 1933 Bom 389 ; *see* also Oudh 256. "To detain" means to keep back from somebody or to restrain. Where the woman was willing to live with another and there was nothing to show that she was in any way restrained, *held*, that she was not "detained" within the meaning of this section. 103 Ind Cas 559 : 38 Cr LJ 703 : AIR 1927 Oudh 318. Detention is a continuing offence. Previous acquittal on a charge of detention on one occasion is no bar to subsequent trial. AIR 1921 Lah 186 : 4 LLJ 535 : 73 Ind Cas 524. Acquittal on a charge of abduction is no bar to a trial on a charge of detention. AIR 1924 Lah 330 : 24 Cr LJ 780 : 74 Ind Cas 444. The omission to state in a charge sheet the accused had knowledge or reason to believe that the person abducted was married woman would not by itself affect the prosecution under this section. 28 Cr LJ 419 : AIR 1927 Lah 432 : 101 Ind Cas 451. Where two persons are living as husband and wife the Court may draw a presumption of a valid marriage and a person who misbehaves with the wife during that period is liable to be convicted of an offence under this section. 6 Bur LJ 122 : 104 Ind Cas 708 : 28 Cr LJ 868 : AIR 1927 Rang 261. Where a woman lives with a man of her own free will and refuses to go back to her husband, the man with whom she thus lives is not guilty under this section. AIR 1928 All 194 : *see* also 149 Ind Cas 228 : 35 Cr LJ 932 : 11 OWN 672 : AIR 1934 Oudh 258 : but *see* AIR 1934 Sind 72 : 35 Cr LJ 1254 : 151 Ind Cas 165 : 28 SLR 140. Where a Mahommedan marriage is voidable being performed during a girl's minority, mere non-consummation of marriage after she had attained puberty is not sufficient to give rise to the inference that she exercised the option under Mahommedan Law. 1928 Lah 898. Where the accused is of neighbouring village and of the same brotherhood as that of the girl, he may be presumed to have necessary knowledge that she is the lawful wife of her husband. 1928 Lah 898. Where a wife was in charge of her mother and there was no quarrel between the husband and the wife, *held*, that the charge of the mother could only be on behalf of the husband and a person who took the woman away from the mother would be guilty under Section 498. 1 Weir 573. A marriage between a *Banya* and a woman born of a *Brahman* father and *Bama* mother, which is recognised by the caste to which her husband belongs, is valid and a person who entices away such a woman is guilty of an offence under Section 498, of the Penal Code. 34 All 589. Where a Mahommedan wife renounces religion and is then taken away by accused, marriage being dissolved, no offence is committed. 145 Ind Cas 156 : 1933 Cr C 739 : 1933 ALJ 733 : 34 Cr LJ 869 : AIR 1933 All 433. Where the prosecution and charge are under Section 376A, conviction under Section 498, without complaint by husband in respect of that offence is bad. 145 Ind Cas 922 : 1933 ALJ 701 : 1933 Cr C 1005 : AIR 1933 All 626. Imprisonment for one month and 12 days is not adequate punishment for aggravated form of offence under Section 498. Nor is sentence of six months, rigorous imprisonment excessive. 1933 Cr C 1391 : AIR 1933 Lah 932.

If no complaint is made by any person of an offence under Section 498, proceedings cannot be initiated on a police charge-sheet. 2 Weir 235 : 39 PLR 1911 : 12 Cr LJ 50. In a case under Section 498, Penal Code, a light sentence is sufficient to meet the ends of justice where the abducted woman is an active abettor. 20 PWR 1914 Cr : 123 PLR 1914 : 15 Cr LJ 529. As *Khatiks* are low class *sudras* they do not follow strict Hindu Law, consequently there was no prohibition among them of driving wife by a written deed. 31 PWR 1914 Cr : 181 PLR 1914. Enticing on taking away wife temporarily living alone, constitutes an offence under this section. 5 WR Cr 50. But the case is quite different where the husband turns his wife out of doors. 15 PR 1883 Cr : 5 PWR 1915 Cr : 16 Cr LJ 216 : 27 Ind Cas 840 : 129 PLR 1915. A woman cannot be convicted of abetting the offence described in Section 498, of the Penal Code. 11 PR 1883 Cr : 26 Mad 463 : but *see* 17 PR 1868 : confra. A conviction by a Magistrate under Section 498, Penal Code, while the husband made a specific complaint under Section 497, was held to be untenable. 18 PR 1873 Cr : 23 PR 1895 Cr. Where a husband has driven his wife before making a complaint under Section 498, Penal Code, an order of acquittal of the offence under that section was held valid. 27 PR 1879 Cr. Where the woman went to the accused of her own accord a sentence of one year's imprisonment is to severe. 33 PLR 1910 : 24 PR 1910 Cr : 8 Ind Cas 226. In a charge under Section 498, of the Penal Code, the proof that the woman and a man, other than the accused, were living together, is sufficient to throw the burden of proof on the accused that they were not husband and wife. 8 Bom LR App 63 : 17 WR Cr 5. In a case of abduction of a woman admittedly of bad character married to an immature boy, the accused is to be treated very leniently, even if all the ingredients of an offence under Section 498, are technically proved. 12 Cr LJ 500 : 12 Ind Cas 220. Where a man keeps a woman under his protection in a house provided by him, with the knowledge and intent specified under Section 498, he detains her within the meaning of the said section. 14 Cr LJ 595. The mere fact that the girl is living in the same house with the accused does not prove that she was enticed away by any or all of them. 149 Ind Cas 1106 : 35 Cr LJ 1032 : AIR 1934 Lah 86. In cases under Section 498, consent is immaterial. But is essential to *see* that there is evidence that the accused took or enticed away the woman, within the meaning of the section. The mere fact that the wife went away of her own accord from her husband's house, and was accompanied a part of the way by the accused, is not sufficient to show that the accused took or enticed the woman away within the meaning of the section. There must be some tangible evidence of taking or enticing. AIR 1935 Cal 345 : 159 Ind Cas 314 : 1935 Cr C 494. During husband's absence, the woman was living with her father-in-law. If enticed by the accused during her temporary residence in her father's house, a complaint by father-in-law is competent. AIR 1942 Oudh 434 : 43 Cr LJ 643. To constitute an offence under this section it must be shown that she left by reason of any act or assistance proceeding from the accused. AIR 1937 Cal 360 : 41 CWN 931 : 38 Cr LJ 986. In a criminal case under this the factum of marriage need not be proved strictly. 42 Cr LJ 653 : AIR 1941 Pat 526 : 195 IC 126. The words "any such woman" in this section refer to a woman "who is and whom is knows or has reason to believe to be the wife of any other man". AIR 1940 Cal 477 : ILR (1940) 2 Cal 93 : 44 CWN 702 : 41 Cr LJ 954 : 190 IC 632 : AIR 1937 A11 353 : 38 Cr LJ 621 : 168 IC 333. In a complaint under this section, the first necessity is a complaint by the husband or otherwise as specified in this section and secondly that a competent Court should take cognizance of the offence. 233 IC 44 Cr LJ 325 : AIR 1946 Cal 493.

A complainant is incompetent to prosecute another man under Section 498, Penal Code, for enticing away a woman, unless he establishes that he is her lawful husband. 22 PWR 1909 Cr : 12 PLR 1210 : 4 Ind Cas 1042 : 11 R LJ 155 ; *see* also AIR 1943 Bom 179 : 44 Cr LJ 534. If an offence under this section be compromised before the police it cannot be prosecuted subsequently. 22 PLR 1910 Cr : 6 Ind Cas 497 : 11 Cr LJ 366. In order to convict an accused under this section the case for the prosecution must be strictly proved. 100 PLR 1916. Where on a charge under Section 366, Penal Code, the police took up the proceedings in which the husband of the woman appeared as a witness, and he asked the Magistrate to drop the proceedings thereunder but said that he intended to prosecute the accused under Section 498, Penal Code, and get him punished, held, that there was a complaint inasmuch as he made an allegation before the Magistrate that the offence should be enquired into. 14 ALJ 233 : 38 All 276 : 32 Ind Cas 664 : 17 Cr LJ 72 ; *see* also 64 Ind Cas 134. For the purposes of conviction under Section 498, Penal Code, there must be an intention that the woman should leave her husband's control without any definite intention that she should return to him or an intention that she should remain away indefinitely. .145 PLJ 1917. A nviction under Section 498, Penal Code, cannot be said to be illegal on the ground at the only evidence before the Court was not subjected to cross-examination. 18 Cr 1016 : 42 Ind Cas 760. In a case under this section, the trying Magistrate is mpetent to issue a warrant instead of issuing a summons for the attendance of the oman alleged to have been enticed away. 50 PLR 1918 : 44 Ind Cas 917. A complaint ıder Section 498, Penal Code, for detaining a married woman for the purpose of illicit tercourse can be enquired into only in the District where such detention occurs: 51 .R 1918 : 44 Ind Cas 966. By custom among *Rathis*, one of the lowest sub divisions of *ijput* of the Kangra District, a marriage with a widow is valid. The accused who had oducted a woman, so married, with knowledge of the marriage, was guilty of an offence ıder Section 498. 10 PR Cr 1919 : 51 Ind Cas 842. When a complaint has been made the husband, the prosecution does not abate by death of the husband. 4 Lah 7 : 71 d Cas 77 : 24 Cr LJ 29.

It is clear that to constitute an offence under this section, it is not necessary that e woman should be physically restrained or that she be actually prevented from the ercise of her free will or action. 69 Ind Cas 458 : 23 Cr LJ 730 : 1923 Lah 45 ; 55 Ind as 863 : 21 Cr LJ 383. Where the complaint was of kidnapping and theft of jewels, and ere was no allegation that the purpose was to have illicit intercourse, held that the onviction under Section 498, was illegal. 45 MLJ 543 : 74 Ind Cas 949 : 24 Cr LJ 837. ere statement of the complainant is not sufficient to prove marriage. 42 All 401 : 55 d Cas 736. A conviction under this section is not bad merely because the husband onnived at the taking away or concealing of the wife. 54 Ind Cas 619 : 21 Cr LJ 139. here the wife of the complainant is living with the accused of her own free will, the cused cannot be convicted under the section. 18 ALJ 211 : 56 Ind Cas 09 : 21 Cr LJ 17. To sustain a conviction under Section 498, IPC, the first essential to be proved is at the complainant and the enticed woman were legally married. 107 Ind Cas 98 : 22 LJ 210 : AIR 1928 Lah 165. In order to prove marriage, evidence of marriage remony must be given, 34 CWN 524 : AIR 1830 Cal 447. There may arise a esumption the cohabitation for a period of 13 years marriage took place but persons nnot be convicted on presumption of that kind. 30 PLR 643 : 119 Ind Cas 332 : 30 Cr 1051. Where the evidence on a charge of abduction showed that no complaint was ade for some days after the event, that no steps were taken to trace her and she rself behaved as if she acquiesced in the movements of her abductors. the case is one elopement and not of abduction. 26 PLR 517 : 26 Cr LJ 1500 : 90 Ind Cas 156. Mere egligence or inactivity does not prove connivance. There must be proof that the isband acquiesced in by wilfully abstaining from taking steps to prevent adultery. AIR 926 All 189 : 24 ALJ 155 : 27 Cr LJ 101 : 91 Ind Cas 533. Only the husband can mpound an offence under Section 498. AIR 1924 Lah 330 : 24 Cr LJ 780 : 74 Ind Cas 4. In case of complaint under Section 498, by a person other than husband, Court's ave must be obtained. Absence of such leave is not cured by Section 537, Cr PC. 145 d Cas 874 : AIR 1933 Cal 880 : 1933 Cr C 1530 : 38 CWN 113 : 34 Cr LJ 1092 : *see* so AIR 1933 Cal 144 ; 34 Cr LJ 290 : 142 Ind Cas 150 : AIR 1933 All 626 : 1933 ALJ)1 : 145 Ind Cas 922 : AIR 1934 Lah 122 : 1934 Cr C 239.

Section 498, is intended to protect the husband and not intended for the benefit of e wife. It cannot be said that in a case where a woman is willing to live with her ısband, may be even for good reasons and she comes and lives with another person as husband and wife, the other person should not be held to have taken the wife withi the meaning of Section 498. 1952 MWN 604 (2) : (1952) 2 MLJ 212. Even if marriag and offender's knowledge of it be taken as proved by the prosecution yet, unles detention or intention to have illicit intercourse with the woman detained has bee established the offender can not be convicted under Section 498. AIR 1954 HP 39 1954 Cr LJ 845. In the State of Kashmir an elopement which was the result of the joi adventure of a married woman with a lover would in view of the addition to Section 49 RPC, that in such cases the woman would be guilty as abettor, certainly come withi the mischief of Section 498. RPC AIR 1955 J&K 18 : 1955 Cr LJ 1188.

If the willingness of the wife is immaterial as defence under the first thre categories mentioned in Section 498, it can not be treated as a material fact in dealin with the last category of delinquencies mentioned in this said section. AIR 1959 SC 43 : (1959) 1 SCR Sup 464 : 1959 SCJ 527.

The term "detention" means keeping back a wife from her husband or any perso having care of her on behalf of a husband with the requisite intention. *Ibid.* Woman' willingness or consent or disposition to stay away the company protection and care her husband is perfectly immaterial to the guilt of the accused. 1977 Cr LJ 1735.

2. Proof of marriage.—No hard and fast rule can be laid down as the proof of valid marriage. It depends upon the custom of the people to which the lady belongs. AI 1949 All 237 : 50 Cr LJ 359.

3. Detain.—The word "detain" in Section 498, has its ordinary meaning of "keepin back". There are various ways of "keeping back". It need not necessarily be by physica force but there should be something in the nature of control or influence which ca properly be described as a keeping back of the woman. It cannot properly be said that man detains a woman if the latter has no desire to leave him and on the contrar wishes to stay with him. ILR 1937 Bom 244 : 169 Ind Cas 526 : 38 Cr LJ 769 : 39 Bo LR 61 : AIR 1937 Bom 186 ; AIR 1949 All 23 : 50 Cr LJ 82 : AIR 1940 Cal 477 : 41 C LJ 954 ; AIR 1939 Lah 295 ; AIR 1938 Pat 482 : 1953 Cr LJ 1802 : AIR 1953 Punj 263 AIR 1955 Pat 258 : 1956 BLJ 184 : ILR 35 Pat 93 : 1957 Cr LJ 653 (affirmed in AI 1959 SC 436) AIR 1954 HP 39 : 1954 Cr LJ 845. It is true that the word 'detains' ma denote detention of a person against his or her will but to the context of the section it i impossible to give this meaning of the said word. Detention in the context must mea back a wife from her husband or any other person having the care of her on behalf o her husband with the requisite intention such keeping may be by force or b persuasion, allurement or blandishments, which may have caused the willingness o the woman or may have encouraged or co- operated with her initial inclination to leave her husband. AIR 1959 SC 436 : 1959 Cr LJ 527 (over rulling 48 CWN 980 : ILR 1939 Lah 148 : AIR 1939 295 : 40 Cr LJ 760). Providing shelter to a married woman is such inducement as to amount to detention within the meaning of this section. 177 Ind Cas 706 : 19 Pat LT 795 : 1938 PWN 817 : 39 Cr LJ 952 : AIR 1938 Pat 432. The word "detain", must be construed *ejusdem generis* with enticement and concealment, some definite meaning must be attached to it. 40 CWN 996 : AIR 1936 Cal 450. There must be something in the nature of control or influence which can properly be described as a keeping back of a woman in question. 1936 AMLJ 11.

4. Such woman.—The words "such woman" in Section 498, IPC, do not mean such a woman as has been so enticed as mentioned in the section, but mean such woman whom the accused knows or has reason to believe to be the wife of another man. The language of the section can bear no other meaning. 1937 AWR 203 : 168 Ind Cas 833 : 1937 PLR 547 : 38 Cr LJ 621 : 1937 PLR 417 : AIR 1937 All 353. The words "any such woman in the expression" conceals or detains with that intent any such woman do not mean any woman taken or enticed away as described in the first part of the section but refer to woman who is and whom the offender knows or has reason to believe to be the wife of another. If therefore without any taking or enticement a woman leaves her husband and goes to the offender who thereafter prevent her by allurement or blandishment from returning to her husband, the offender must be held to have concealed or detained her within the meaning of the section. AIR 1959 SC 436 : 1959 Cr LJ 527 : *see* also 1968 Cr LJ 1352 : 1982 Cr LJ (NOC) 179.

5. Proof and evidence.—It can not be held that in a case of enticing a married woman with intent to have illicit intercourse with her, the uncorroborated evidence of the enticed woman is insufficient to base a conviction upon. AIR 1952 Mys 34 : 1952 Cr LJ 705. The intention has to be gathered from the surrounding circumstances. 1952 Cr LJ 705 : AIR 1952 Mys 34.

For a conviction under Section 498, there should be a proper complaint by the husband. AIR 1958 All 76 : 1958 Cr LJ 11 : 1982 All Cr R 392 (proof that the woman was a married woman, that she was taken or enticed concealed or detained and that it was with the intention that the accused or some one may have illicit intercourse with her) ; (1966) 32 Cut LT 5 : AIR 1980 SC 1729 : 1980 Cr LJ (NOC) 176 (imperently improbable that a first census would harbour evil design).

Where a finding completely required cogent consistent and reliable evidence, it was held that the High Court rightly relied upon such testimony and convicted accused. *K.R. Soorachari v. State of Karnataka*, AIR 2005 (SC) 2674 : AIR 2005 SCW 2940 : 2005(2) Crimes 128 : 2005(2) JT 252 : 2005(3) Supreme 414 : 2005(4) Scale 200 : 2005(4) KantLJ 444 : 2005(3) East Cr. C 75 (SC).

6. Procedure.—Not cognizable — Warrant — Bailable — Compoundable — Triable by any Magistrate.

7. Charge.—I *[name and office of Magistrate, etc.]*, hereby charge you (*name of the accused*), as follows :

That on or about the......day of.......at.......you took away'(or enticed away or concealed or detained) *AB*, the wife of *CD*, whom you then knew (or had reason to believe) to be the wife of the said *CD*, from the said *CD*, (or from *EF*), who has the care of the said *AB*, might have illicit intercourse with some person (*if known, name* him), and that you thereby committed an offence punishable under Section 498, of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

8. Jurisdiction.—A complaint evidenced commission to an offence by the accused. Held, the Magistrate as competent to take cognizance of the offence. (1986) 2 Crimes 435.

9. Acquittal.—Main ingredient being enticing away married woman from husband with criminal intent—non-examination of that woman, a material witness entitled accused to be acquitted. *Natarajan* v. *Ramanujam,* 1997 Cri LJ 389 (Mad).

In a Jharkhand case, a married woman was allegedly allured and enticed to get her married with the wealthy person. The statement of victim was not corroborated by independent witness. According to village witnesses she used to flee away from her parents house without informing them and used to move with other person. Her parents also stated that they had no knowledge of their daughter being allured or enticed away by the accused. The evidence also showed that she had deserted her husband after living with him for 14-15 days. Conviction of accused was held improper. *Abdul Latif* v. *Latif Mian,* 2004 Cr LJ (NOC) 175 : 2004 AIR Jhar HCR 640.

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[1]CHAPTER - XXA

OF CRUELTY BY HUSBAND OR RELATIVES OF HUSBAND

Sec. 498-A. Husband or relative of husband of a woman subjecting er to cruelty.—Whoever, being the husband or the relative of the husband f a woman subjects such woman to cruelty shall be punished with nprisonment for a term which may extend to three years and shall also be able to fine.

Explanation.—For the purposes of this section, "cruelty" means—

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman—Where such harassment is with a view to coercing her or any person related her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

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1. Procedure.—Cognizable—Not bailable—Triable by a Magistrate of the first class.

2. Constitutionality of Section 498A—Mere possibility of abuse—Effect.—The object of the provision is prevention of the dowry menace. But as has been rightly contended by the petitioner many instances have come to light where the complaints are not *bona fide* and have been filed with oblique motive. In such cases acquittal of the accused does not in all cases wipe out the agnomy suffered during and prior to trial. Sometimes adverse media coverage adds to the misery. The question, therefore, is what remedial measures can be taken to prevent abuse of the well-intentioned provision. Merely because the provision is constitutional and *intra vires*, does not give a licence to unscrupulous persons to wreck personal vendetta or unleash harassment. It may, therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with. Till then the Courts have to take care of the situation within the existing frame work. *Sushil Kumar Sharma v. Union of India*, 2005 Cr LJ 3439 (SC) : AIR 2005 SC 3100 : 2005 AIR SCW 3569 : 2005 AIR Jhar HCR 2108 : 2005(5) Supreme 137.

Possibility of misuse. It is well settled that mere possibility of abuse of a provision of law does not per se invalidate a legislation. It must be presumed, unless the contrary is proved, that administration and application of a particular law would be done "not with an evil eye and unequal hand". See A. *Thangal Kunju Musaliar v. M. Venkatichalam Potti.*, 1955 (2) SCR 1196 : AIR 1955 SC 191 : AIR 1956 SC 246. *Satish Kumar Batra* *and Ors. v. State of Haryana*, AIR 2009 SC 2180 : 2009 (5) SCR 451 (SC) : 2009 (12) SCC 491 : 2009 (5) JT 403 (SC) : 2009 (5) Scale 280 (SC) : 2009 (3) SLT 379 (SC) : 2009 CrLJ 2447 (SC) : 2009 (2) JCC 1341 (SC).

3. Scope.—When husband suspecting fidelity of wife, illtreating her, calling her prostitute, forcing her to state of being half-fed or left over and wife driven to commit suicide, it can be said that the offence proved against husband. *Sarojakasan Shankaran Nayar* v. *State of Maharashtra*, (1995) 2 Bom CR 47 (Bom).

Husband and in-laws set on fire after pouring kerosere. It was argued that Tahsildar has not obtained the certificate from the Medical Officer regarding condition of the deceased, that itself is not sufficient to discard the dying declaration. What is essential required is that the person who recorded the dying declaration must be satisfied that the deceased was in a fit state of mind. The certification by the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of the declaration can be established otherwise. The evidence of doctor clearly shows that the deceased was in a sound state of mind while giving the statement before the Tahsildar. In such circumstances, we are of the view that such a dying declaration has got due weight in the evidence. Further, as stated earlier, the doctor has explained that though the deceased sustained 100% burn injuries, she was in a position to talk. In such circumstances, her statement cannot be rejected on the ground that she sustained severe burn injuries. Normally, the person on the verge of death will not implicate somebody falsely. Even if we accept some contradiction in complaint, in the light of dying declaration coupled with the evidence of eye-witnesses, there is ample evidence on record to hold that the appellants ill-treated the deceased and subjected her to cruelty by giving both mental and physical torture and in furtherance of their common intention only to commit the murder of the deceased, poured kerosene and set fire on her who ultimately succumbed to the injuries on the same day in the District Hospital.

The analysis of the prosecution witnesses and Taluk Executive Magistrate who recorded the dying declaration of deceused clearly proves the involvement of appellants in the commission of offence as charged and they were rightly awarded sentence of life imprisonment. *Govindappa & Ors. vs. State of Karnataka*, 2010 (3) CriLJ 3439 (SC).

Offence under Section 498-A, IPC, is a continuing offence and does and abate for charge or place of marital residence nor does the offence lapse for the lapse of time. *Motahar Hossain* In re (1995) 3 CCR 245 (Cal).

Cruelty by husband or his *relative — Improvements in evidence*. It is to be noted that in the first information report the thrust of allegations was primarily directed against the acquitted accused persons. They have been acquitted by the High Court. So far as the evidence of witnesses is concerned, it is true as noticed by the High Court, that there were lots of improvements. But the High Court found that even if these improvements are kept out of consideration, the evidence was sufficient to hold the present appellants guilty. It is to be noted that these improvements primarily related to relatives i.e. appellant Nos. 2 and 3. Therefore, in our considered opinion the acquittal as directed qua the co-accused persons should have also been done in the case of appellant relatives. However, the evidence is clear and cogent so far as the husband is concerned.

In the instant case the evidence of witnesses clearly establishes the accusations so far as the accused/husband is concerned and therefore we find nothing infirm in the judgment of the High Court in upholding the conviction of husband. The sentence imposed was two years. It is on record that he has undergone sentence of more than 13 months. He has been released on bail pursuant to order. Therefore, while upholding the conviction, sentence is reduced to the period already undergone. So far as the relatives are concerned, the prosecution has not been able to establish the accusations so far as they are concerned. Their appeal is accepted and the conviction is set aside. *Satish Kumar Batra and Ors. v. State of Haryana.*, AIR 2009 SC 2180 : 2009 (5) SCR 451 (SC) 2009 (12) SCC 491 : 2009 (5) JT 403 (SC) : 2009 (5) Scale 280 (SC) : 2009 (3) SLT 379 (SC) : 2009 CrLJ 2447 (SC) : 2009 (2) JCC 1341 (SC).

Scanty evidence of relatives proving. So far as Section 498-A is concerned according to learned Counsel for the appellants the evidence is scanty but it is to be noticed that both the trial Court and the High Court having regard to the evidence of relatives concluded that the dowry demand was made. We do not find any infirmity with the conclusions arrived at more particularly in view of the evidence of witnesses and therefore, there is no scope for interference with the conclusions relating to Section 498-A IPC. *Syed Hakkim vs. State*, 2009 (4) SCC 324 : 2009 CrLJ 1891 : 2009 (3) JT 443 : 2009 (2) SCR 1060 : 2009 (3) Scale 277 : 2009 (2) SLT 632.

For proof of cruelty there must be reasonable nexus between cruelty and suicide. *Ravindar Pyarelal Bidhan.* v. *State of Maharashtra.*, 1993 Cri LJ 3019 (Bom).

Cruelty is not mere harassment or mere demand for property etc. *Ravindar Pyarelal Bidhan* v. *State of Maharashtra*, 1993 Cri LJ 3019 (Bom).

Section 498-A, of the IPC, extends protection to the woman from the whims and caprices of man. This section was incorporated in the statute to fill in the lacuna in the existing law, so that if the wife commits suicide, the 'guilty' does not escape 'Cruelty' as defined in Section 498-A, means any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical of the woman, or harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or, any person related to-her to meet such demand. The expression 'cruelty' takes within its sweep both mental and physical agony and torture. The concept of cruelty varies from place to place and individual to individual and according to the social and economic status of the person involved. The question whether the act complained of was an act of cruelty has to be determined from the whole fact and relationship between the parties. The cultural and temperamental state of the life among them are factors from where the cruelty has to be inferred and will depend on the facts on each case. The expression cruelty postulates such a treatment as to cause reasonable apprehension in the mind of the wife that her living with the husband will be harmful and injurious to her life. Therefore, to decide the question of cruelty the relevant factors are the matrimonial relationship between the husband and wife, their cultural and temperament status in life, state of health, their interaction in their daily life which dominate the aspect of cruelty. *Sarojakshan Shankaran Nayar* v. *State of Maharashtra*, (1995) 2 CR 47 (Bom).

It is obvious from the perusal of the explanation given under Section 498-A, IPC that 'cruelty' means a willful conduct of such a nature and of such a magnitude so as to drive a woman to commit suicide or to cause grave injury or danger to life or limb or health of the woman. Seeking divorce on the ground that she was suffering from virulent disease like cancer, cannot be said by any stretch of imagination that it would lead to such a situation where she would prepare to commit suicide. The explanation further says that the harassment of woman shall be with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security. This has to be considered with reference to the legal principles enunciated by the Court in the judgment referred to 1989 Cri. LJ NOC 52) that the element of *mens rea* shall be there. *Ch. Narender Reddy* v. *State of A.P.*, 2000 Cri LJ 4068 (A.P.). The case reported as State by *Rural Police* v. *Siddaraju* 2000 Cri LJ 4220 (Kant).

Concerned predominantly the important aspect of law as to whether the contracting of second marriage by a husband during the pendency of the first one and at a time when the first wife has living with the husband in the same house would constitute cruelty within the meaning of Section 498-A, IPC and secondly, as to whether in a case where the wife committed sucide shortly thereafter and the facts established that the wife was driven to the act of suicide due to the cruelty of the accused, a conviction under Section 306, IPC *i.e.* abetment of sucide was tenable. In this case the accused contracted second marriage within two years of earlier marriage. The first wife was ill-treated and was not given even food when the deceased agreed to return to the matrimonial home because of the assurances given by the accused before the *panchayat*, it was not because she had forgiven and forgotten or because the accused had remedied the situation but because she was left with no option having regard to the economic status of her parents. There was no change in the domestic set up after her return. The deceased was subject to both physical and mental cruelty of the extreme levels and there was a direct inter relation between the high gravity of cruelty to which she was subjected and her committing suicide. There was nothing on record to indicate that the deceased was suffering from ill health or that there were any other facts that could have provoked a suicide. The evidence conclusively established a direct nexus between the cruelty and the suicide. The accused was convicted of the offences punishable under Section 498-A and Section 306, IPC

In the suicide note the deceased made a serious castigation against her husband for being an addict to narcotic drugs. Then she made a general allegation against her mother-in-law and in a lesser degree towards the sister-in-law. But unfortunately she did not advert to any concrete instance which could be termed as cruelty as defined in Section 498-A of the Indian Penal Code. The utterance said to have been made by the sister-in-law towards the deceased were to her chagrin and she had taken them very seriously in the suicide note she described such utterances as not worthy of reproduction. It was held that "it is not enough that the deceased left those words hurting, it must be subjected to judicial scrutiny and the Court must be in a position to hold that those words were sufficiently hurting enough as to amount to "cruelty" falling within the parameters fixed in Section 498-A of the Indian penal Code. The area remains grey and vague. Not a single word said to have been spoken by the appellant as against the deceased had been put on record by the deceased in the suicide note in spite of the fact that the said note is a very lengthy letter running into sevreal paragraphs. The tenor and language of the suicide note would reflect that she was not an illiterate lady. As the Court is rendered helpless to judge whether the words which deceased heard from the appellant would amount to cruelty, it is far from possibility for the Criminal Court to hold that she is guilty of the offence of cruelty as envisaged in the section. It is also to be pointed out that the deceased did not mention a single deed which the appellant would have done against her. All that is said against the appellant were that she spoke some thing which she took objectionable. The sister-in-law of deceased was not guilty of "cruelty" and hence acquitted. *Smt. Raj Rani* v. *State of Delhi Admn.*, 2000 Cri LJ 4672 (SC) : 2000(10) SCC 662 : 2000(7) JT 458 : 2000(6) Supreme 570 : 2000(4) Crimes 104 (SC).

Where a wife is educated and never wanted to leave her husband and matrimonial home and she having high respect for her husband and not tolerating any one speaking ill of him. No evidence to show that there was such harassment, conviction under Section 498A, on the basis of an isolated incident is not justified. 1987 Cr LR (Guj) 165.

The offences under Section 498-A, IPC and Sections 3 and 4 of the Dowry Act are distinct and it cannot be said that if one fails other will also go. *Krishna Kant Pathak* v. *State of U.P.*, 1995 (32) ACC 14 (All).

Mental torture and cruelty by husband. The concurrent findings were found against the appellant, however, in the interest of justice, we again carefully examined the entire evidence and documents on record. The evidence of Sushmna PW. 6 (neighbour of the deceased), Vidhya PW. 7 (sister of the deceased) and Vasant PW. 8 (father of the deceased) clearly lead to the only conclusion that this was a case of extreme mental cruelty which was perpetuated from the point of marriage and lasted till the deceased had committed suicide. There cannot be any iota of doubt that the extreme mental cruelty and torture compelled the deceased to put an end to her life. The appellant was wholly responsible for creating all the circumstances which led the deceased to take an extreme step of putting an end to her life.

The letter written by the deceased to her parents immediately before she had committed suicide, gives graphic description of the number of instances of extreme mental torture, day in and day out. This letter gives the impression that the appellant was deriving sadistic pleasure in causing extreme mental torture to the deceased. He would leave no stone unturned to ensure that the maximum mental torture and agony is caused to the deceased. We do not find the slightest doubt that the circumstances which have been enumerated in letter and the testimony of witnesses lead to a situation where the deceased virtually was left with no option except to take an extreme step of putting an end to her life. *Milind Bhagwanrao Godse vs. State of Maharashtra*, AIR 2009 SC 1828 : 2009 (3) SCC 699 : 2009 CrLJ 1736 : 2009 (1) Crimes 439 : 2009 (2) JT 574 : 2009 (2) SCR 39 : 2009 (2) Scale 621 : 2009 (2) Supreme 94 : 2009 (2) SLT 207 : 2009 (2) JCC 948.

When wife (deceased) and her family members subjected to harassment in order to meet the demands of dowry. There was culmination of harassment and torture into death and evidence on record, established harassment to torture soon before her death such harassment amounts to cruelty and cruelty was fully established. *Mohd. Nizamuddin* v. *State of Bihar*. (1995) 1 East Cr C 602 (Pat).

In a AP case, the husband had developed illiest intimacy with another woman and deserted her wife and minor child. There was no evidence to show that such conduct of accused has affected the health of wife physically and mentally. It was held that the said conduct of the accused was not sufficient ground to induce the wife to commit suicide. *Basai Venkata Ramana Murthy* v. *State*, 2003 Cr LJ 4708 (AP) : 2003(3) ALD (CRL) 33 : 2003(2) Andh LT (Cri) AP 367 : 2003(4) RecCriR 597

Where married woman committing suicide in her in-law's house soon after marriage. Deceased was subjected to abuses, humiliation and mental torture from the day of marriage leading to her suicide established. Offence under Section 498-A was made out. *State of West Bengal* v. *Orilal Jaiswal*, 1994 SCC (Cri) 107 : 1994 Mad LJ (Cr) 187 : 1994 (1) SCC 73 : 1994 JIC 22 : 1994 (1) ALT 193 : (1994) 3 Recent Cr R 186 : (1994) 2 East Cr C 262 : 1994 Cr LJ 2104 : AIR 1994 SC 1418.

Where there was frequent quarrels between husband and wife over money matters and husband not giving any money to his wife even to clear her dues the case was held that it does not fall within the ambit of Section 498-A. *Patasnam* v. *State of Maharashtra*. (1995) 4 Crimes 344 (Bom).

Provisions under Section 498-A, was not intended to be used as weapon for false implication. Further held, Courts must deal with the persons responsible for false implication with iron hand. *Choudhury Surendranath Mishra* v. *State of Orissa*. (1995) 9 OCR 57 (Ori).

There was no evidence on record to indicate that the deceased was meted out any ill-treatment or there was any dowry demand. The only grievance made in the dying declaration was that she wanted to live separately but her husband was not prepared and on that score, the husband had beaten her in the afternoon on the previous day. It was then stated that her grandmother disliked her. These statements in the dying declaration were held not sufficient to substantiate the prosecution case that deceased was meted out with ill treatment, an offence punishable under Section 498A, IPC. *Paparambaka Rosamme* v. *State of A.P.*, 1999 Cri LJ 4321 (SC) : 1999 (4) Crimes 150 (SC) : 1999 (2) JCC (SC) 479 : 1999 (5) Scale 451 : 1999 (6) JT 585 : 1999 (7) Supreme 640.

Where there was leaving the bride at Rohtak on account of non- fulfilment of the dowry demand. It was held that the accused can be tried for offence under Section 498-A, at Rohtak courts. *Vipin Kumar* v. *State of Haryana*. 1995 (XXII) Cr LT 276 (P&H).

When *prima facie* case made out against accused, mere fact that details of demand of dowry and cruelty not made in divorce petition of complainant, not a ground to quash complaint. *Chandra Prakash* v. *State*, 1996 Cri LJ 3443 (Del).

Order of discharge of accused at stage of framing of charge is not proper. *Ajit Singh* v. *State of Haryana*. 1997 Cri LJ 659 (P&H).

4. Evidence.—It is not every harassment or every type of cruelty that would attract Section 498-A. The cruelty must be of such nature so as to coerce the wife to meet illegal demands or commit suicide. The evidence of demand and ill-treatment must be cogent and reliable. *Ravindra Pyarelal Bidhan* v. *State of Maharashtra*. (1994) 1 Mah LR 553.

Once evidence is admissible, i.e., statements made by the deceased to her relatives for the purposes of Section 304-B of the IPC, then surely, it could be used for the purposes of Section 498-A of the IPC. *Sanjay vs. State*. 2010 (3) Cri LJ 3214 (Del).

The delay in giving police report in such cases cannot be a ground to reject testimony of prosecution witnesses. The court has to scrutinise their evidence with more than ordinary care. *Public Prosecutor. High Court of A.P., Hyderabad* v. *Ayinampudi China Apalaraju*, (1995) 2 ALT (Cr) 189 (AP).

Fail to prove Cause of death. This Court wish the expert would have been forthright in her view in regard to the cause of death. A different conclusion was required to be arrived at keeping in view the fact that a large number of symptoms were absent which ordinarily point out to the cause of death of asphyxia by smothering. Most of the symptoms noticed by Modi should have remained present.

There was frothy fluid discharge of blood from mouth and nose. However, no frothy fluid blood was found on the pillow. It may not be imperative but that could have been a lead to a fairly definite opinion. It is in the aforementioned situation, the learned Sessions Judge opined that death might not have been caused by asphyxia.

The learned Judge noticed that witness was specific in her statement that paleness in the brain could not have been noticed as it had liquefied by that time. It was also found that witness had deviated from her earlier opinion and stated that it was not correct to say that no opinion of cerebral anoxia could be given or arrived at in the case of liquefaction of the brain. No saliva, blood and tissue cells were found in the pillow; no scratches, distinct nail marks, or laceration of the soft parts of the victim's face was noticed. It was not brought to notice that pillow was a soft one or not. No bruising or laceration was found in the lips, gums and tongue. The conduct of the accused that he had all along been present and the opinion of the Doctor did not satisfy the tests laid down in the authoritative book of Modi.

The High Court, on the other hand, while noticing only a part of the said tests proceeded on the premise that those symptoms spoken to by her in her evidence were not noted by her in the post-mortem report. Apart from the fact that the quotation from Modi does not take into consideration all the symptoms noted therein, a wrong test was applied that all the features in a given case would not be available where the body is burnt after killing, which is not the case herein. Despite noticing that some of the usual symptoms that would be available in the case of death due to asphyxia by smothering were necessary still a purported formal opinion was arrived at that the prosecution had definitely established the cause of death. *Subramaniam vs. State of Tamil Nadu*, 2009 CrLJ 3002 : 2009 (3) Crimes 140 (SC) : 2009 (7) JT 403 : 2009 (7) Scale 317 : 2009 (4) Supreme 788 : 2009 (4) SLT 384 : 2009 (9) SCR 725.

Circumstantial evidence. The evidence of witnesses clearly establish that the body was found in the matrimonial home of the deceased with injuries noticed by them which fit in with the evidence of the Autopsy Surgeon. The evidence of PWs. 2, 4, 7 and 8 throw considerable light on the controversy. The death took place within one year and four months of the marriage in the house of the accused persons and the dead body was found with injuries. At the relevant time the accused persons were absconding which is of considerable importance. The plea of alibi set up by the present appellant has been discarded because there was no material to substantiate such plea. The trial Court and the High Court have analysed this aspect in great detail. From the evidence of PWs. 2. 4. 7 and 8 it is seen that the accused persons were absconding since the date of incident when the dead body of the deceased lay in her matrimonial home. PW-14 the

Investigating Officer's evidence was to that effect. The High Court has rightly noted that the conduct of the accused appellants before it had a striking feature in the absence of any reasonable explanation and is an inculpating circumstance against them. The injuries on the dead body were noticed by several witnesses e.g. PWs. 1, 2, 4, 7 and 8.

According to the doctor the death was due to asphyxia resulting from throttling which was ante mortem and homicidal in nature. Above being the position we find no merit in this appeal which is accordingly dismissed. *Krishna Ghosh vs. State of West Bengal*, AIR 2009 SC 2279 : 2009 CrLJ 2820 : 2009 (2) Crimes 102 (SC) : 2009 (12) SCC 413 : 2009 (4) JT 658 (SC) : 2009 (5) Scale 124 : 2009 (5) SCR 333 : 2009 (3) Supreme 39.

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When accused was discharged by Sessions Judge under Section 227, Cr PC, as no case was made out—Revision petition was held for the same. The lower Court committed error in discharging the accused. It should have found charge and after recording evidence should have finally decided the case acquitting or convicting the accused. Hence revision is allowed and matter is sent back to Sessions Judge to decide afresh. *State of U.P.* v. *Bai Mukund*, (1995) 2 CCR 261 (Alld).

Where there was conviction under Section 498-A—Revision petition was filed against the same.—There was found no evidence regarding cruelty and ill-treatment. Hence no case is made out under Section 498-A, IPC. *Ran Mal* v. State *of Rajasthan*, 1995 Cr LR 250 (Raj).

When evidence showed that deceased wife—committed suicide undergoing mental sufferings and unhappiness largely due to incompatibility of temperament and attitude and there was no evidence of cruelty on the part of accused persons, conviction under Section 498-A was held not proper. *State of Karnataka* v. *Dr. H.A. Ramaswamy*, 1996 Cri LJ 2628 (Kant).

Insufficient material for Dowry death.—It is of significance that Dr. Balbir Singh Randhawa in the cross examination had categorically stated that the history sheet of the patient Exh. DA was written by Dr. Bhupinderjit Kaur in Ex. PA. He also stated that the treatment was prescribed by him. It was entered in the bed head ticket made by doctor Bhupinderjit Kaur who was on duty on that day. He also stated that though the patient was in shock but she was not unconscious. He stated that he identified the signatures of Dr. Bhupinderjit Kaur and handwriting in the bed head ticket. In the FIR, reference was made to a letter purportedly to have been written by the deceased. This letter has been marked as an exhibit.

A bare reading of the letter clearly shows that there is not even a whisper about demand but the deceased had categorically stated that she had asked for the money and the articles on her own. The trial Court erroneously held that in the letter there was reference to demand of dowry. Strangely, the High Court held that even though the letter was inconsequential but the evidence of the relatives about the harassment for dowry cannot be brushed aside. As rightly submitted by learned Counsel for the appellant there were improvements in the statements recorded in Court. The two new witnesses introduced certain aspects for the first time. Significant statement in this regard is that of Sham Lal (PW-6). In Court he stated that the deceased told him in the hospital that kerosene oil was poured on her by the accused. He accepted during his examination that no such allegation was made in his statement recorded in terms of Sec. 161 of CrPC. Similarly, Surinder Kanta in Court stated that the deceased informed her about the demand of Rs. 1,00,000/- by her-in-laws and about her giving Rs. 20,000/-. This was not stated during investigation under Sec. 161 of Code as is evident from Exh. DA. In Court Surinder Kanta stated that the deceased was beaten and mistreated but no such statement was made during investigation. Additionally, no such allegation was made by PW-8 the complainant about this aspect in the FIR.

In the statement in Court Surinder Kanta stated that the deceased had told him that A-1 and A-2 caught hold of her and A-1 poured oil over her body and set her on fire by throwing match stick. No such statement was made during investigation. Similarly, that is not also the version of PW-6. In Court Surinder Kanta stated that all the accused persons *i.e.* the present appellant and the acquitted accused persons maltreated her. No such allegation was made while the witness was examined.

The High Court's judgment is not only sketchy but also devoid of reasons. Various factors highlighted above would go to show that the prosecution has squarely failed to establish the accusations so far as the appellant is concerned. Therefore, the appeal deserves to be allowed which we direct. The appellant is to be set at liberty forthwith unless to be required in connection with any other case. *Raman Kumar vs. State of Punjab*, 2009 CrLJ 3034 : 2009 (6) SCR 933 : 2009 (8) JT 422 : 2009 (6) Scale 335 : 2009 (3) JCC 1840.

Shoddy investigation cannot be a foundation for the accused persons to take advantage of shoddiness. But in the instant case, there was no material brought on record by the prosecution to establish the accusations so far as the present appellant is concerned. It is to be noted that there was a dying declaration recorded by the Executive Magistrate, Chandigarh who was present at PGI Hospital. The authenticity of the dying declaration has not been questioned. It is the stand of the prosecution that police officer should have recorded it. But that cannot be a ground to discard the dying declaration recorded by the Executive Magistrate. Additionally, the prosecution laid great emphasis on the letters purported to have been written by the deceased to her relatives. Here again, handwriting expert's report clearly shows that the letters were not in the handwriting of the deceased.

Above being the position, there is no evidence brought on record by the prosecution to establish the accusations. That being so, the appeal deserves to be allowed which we direct. *Rakesh Kumar vs. State of Haryana*, 2009 CrLJ 1895 : 2009 (2) Crimes 119 (SC) : 2009 (11) SCC 81 : 2009 (3) JT 377 : 2009 (3) SCR 1190 : 2009 (3) Scale 567 : 2009 (2) Supreme 459 : 2009 (3) SLT 153.

Where the statement of witnesses could not stand the test of cross-examination and there was material contradiction as to time of demand, the conviction of accused was set aside. *Sakatar Singh v. State of Haryana*, 2004 Cr LJ 2076 (SC) : AIR 2004 (SC) 2570 : 2004(4) Scale 529 : 2004(3) Supreme 661 : 2004(3) Crimes 1 : 2004(2) Hindu LR 182.

There were overtones of subsequent demands and that there were some incidents such as leaving the girl at her parent's place and the like which were relied on by the prosecution as incidents of cruelty of a serious nature. There was also a charge that the accused was friendly with the girl and that this is also one of the aspects of cruelty *vis a vis* the wife who had reacted seriously to this. That allegation was only in the form of a suggestion and the girl who was even cited as a witness was not examined. More importantly, what was found on a very minute evaluation of the record was that a review of the incident would undoubtedly disclose some level of unhappiness to the deceased, but in order to establish the criminal offence under either or both of the charges the incidents gravity and the volume of the cruelty would have to be much higher. All that could be held was that material came dangerously close, but that in its totality it was not good enough to sustain a conviction under either of the two charges. *State* v. *Sridhar* 2000 Cri LJ 328 (Karnataka).

The evidence as to harassment to the wife to meet any unlawful demand for money is necessary to constitute cruelty in criminal law. It is the requirement of the offence cruelty defined under Section 498-A, of Penal Code. The demand for dowry is prohibited under law. That amounts to cruelty entitling the wife to get a decree for dissolution of marriage. (1988) 1 CCC 105.

The reading of the letters of the deceased unmistakably indicated that deceased was being subjected to humiliation and harassment. She was taunted as coming from a poor family. There was expectation of payment from time to time by her brothers and sisters. It also appeared that she felt great embarrassment in asking money for furniture, and on other counts, but was compelled to meet the said expectations while she was at her matrimonial home. It was abundantly clear from the letters that deceased was in constant and acute mental agony, on account of the circumstances prevailing in her matrimonial home. It was also apparent from her last letter written shortly before her death that she had decided not to continue to live in her matrimonial home with the accused. The statement of her sister indicated that the accused had illicit affair with a girl. He used to drink and insist that deceased should also give him company by taking drinks with him. On her refusing to do so, appellant would beat her. He would come late in the night. He taunted her that dowry given in their marriage was inadequate. He would also caste aspersion on the character of deceased. In the foregoing circumstances, there appeared to be no doubt that the accused treated her with cruelty within the meaning of explanation (a) of Section 498-A of the Indian Penal Code. Presumption under Section 113A, Evidence Act was attracted and the accused would be guilty of abatement of suicide. Conviction under Section 304-B was altered to one under Section 306 and Section 498-A IPC. *Anoop Kumar* v. *State of M.P.*, 1999 Cri LJ 2938 (M.P.).

When evidence was full of discrepancies there was failure to give details regarding second marriage on the part of the complainant and cruel treatment was not made out—Trial also found not proper but was held rather illegal—No error in the judgment of the trial Court resulting in patent injustice. Revision against the said judgment was held to be dismissed. *Deokabai* v. *Namdeo Dhoke*, (1995) 2 Crimes 443 (Bom).

The deceased died an unnatural death within 2 years of their marriage and that before her death she was subjected to harassment by the accused because she was not bringing from her parents the remaining amount of dowry promised to him. As regards the demand of dowry and harassment both the Courts below thought it fit to accept the evidence. According to evidence of eye witness sometime before the incident which led to her death, there was a quarrel between husband and the wife and, therefore, she wanted to leave his house but because of pursuation by neighbours not to leave at mid-night, she had agreed to remain there till next day morning. Their evidence further proved that ten minutes after deceased had returned to her room the witnesses again heard more noise coming from the appellant's room and therefore, both of them again went there. At that time they found that some other neighbours had also gathered there. The accused then opened the door. It was noticed that the deceased was sitting under a tap with her body fully burnt. Conviction of accused under Section 304-B and 498-A was held proper. *Venugopal* v. *State of Karnataka*, 1999 Cri LJ 29 (SC) : 1998(3) Crimes 116 : AIR 1999 (SC) 146 : 1998 SCC (Cr) 1592 : 1998(4) Scale 375 : 1998(5) JT 307 : 1998(6) Supreme 221 : 1998 SCC (Cr) 1592.

In an AP case, the prosecution relied on evidence of mother and sisters of deceased, who were not the direct witnesses of alleged cruelty. Their evidence was based on their communication with the deceased, who complained of additional dowry demand by husband. It was held that the statement of deceased to her mother and sisters was a weak piece of evidence, as the deponent could not be subjected to cross-examination and that such statement being hearsay was inadmissible in evidence. Conviction of accused was set aside. *Sanganagari Narasimulu* v. *State of AP*, 2005 Cr LJ 4168 (AP) : 2005(2) ALD (CRL) 387 : 2005(3) Andh LT (Cri) AP 290.

Evidence of Doctor showed that deceased died natural death and not suicide. Hence, case falls under Explanation (b) and (a) of Section 498-A, IPC, under which it is not every harassment of a woman by a relative that amounts to cruelty. *Alamuri Lalitha Devi* v. *State of A.P.*, (1995) 1 ALT (Cr) 139 (AP) : 1995 Cr LJ 2127 : 1995(2) CCR 362 : 1995(1) Andh LT (Cr) 139 (AP).

Each and every aspect of cruelty inflicted on victim need not be mentioned either in FIR or spoken by every witness. *Shanmuga Sundaram v. State*, 1997 Cri LJ 499 (Mad).

In *Kans Raj* v. *State of Punjab*, 2000 Cri LJ 2993 (SC) where the evidence disclosed that accused nos. 3 to 5 were roped in the case only on the ground of being close relations of the husband of deceased, the Court held that for the fault of the husband, the in-laws or the other relations cannot, in all cases, be held to be involved in the demand of dowry. In cases where such accusation are made, the overt acts attributed to person other than husband are required to be proved beyond reasonable doubt. By mere conjectures and implications such relations cannot be held guilty for the offence relating to dowry deaths. A tendency has, however, developed for roping in all relations of the in-laws of the deceased wives in the matters of dowry deaths which, if not discouraged, is likely to affect the case of the prosecution even against the real culprits. In their over enthusiasm and anxiety to seek conviction for maximum people, the parents of the deceased have been found to be making efforts for involving other relations which ultimately weaken the case of the prosecution even against the real accused.

In *Shaik Chuna Buda v. State of AP*, 2002 Cri LJ 526 (AP) the medical evidence opined that the deceased died due to organophosphate insecticide poison. The blanket averment of the prosecution witnesses was that all the six accused harassed the deceased, but the father of the deceased categorically admitted that the deceased was liking the deceased. The evidence of all witnesses were full of controversies. As all other accused were acquitted the main accessed was also held entitled to the benefit of doubt.

Hearsay statement. In the present case, except the evidence of mother and aunt of the deceased, regarding treating the deceased with cruelty by husband and also regarding his illicit relations with other accused there is no other legal evidence on record to connect the appellant with commission of offence punishable u/S. 498A. When the appellant and other accused persons were acquitted of the charges framed u/Ss. 304-B and 306, IPC, this evidence of mother and aunt would be categorized as Hearsay evidence, for the purpose of S. 498-A and the conviction of the appellant based upon such evidence being not legal evidence cannot be sustained in the eye of law. More over, after telling like this, the deceased resided for two years in her parents place and thereafter when she went to her in-laws place in the second round then after residing there for about two years more, she committed suicide. There appears to be absolutely no legal evidence against the appellant in this matter and the conviction based upon only such evidence of mother and aunt liable to be set aside. *Goverdhan Shobnath Bind v. State of M.P.*, 2008 CriLJ 529 (Chattisgarh).

5. Bail—Grant of.—The deceased was a lady of sensitive nature and she committed suicide for that reason. Section 498-A, contemplate such a conduct besides being wilful to result in likelihood of driving the woman to commit suicide. Hence it was fit case to grant bail. *Dinesh Kumar Singh* v. *State of U.P.* 1995 UR Cr R 22 (All).

When police investigation going on for offence under Section 498- A—Bail was granted—Subsequent addition of offence under Section 304-B there was—Distinct and separate offence and—Former bail order was cancelled— Expert report making out a case of poisoning—No valid reason was found to grant. pre-arrest bail—Anticipatory bail petition was held. to be dismissed. *Deepak Kumar Goyal* v. *State of Rajasthan*. 1995 Cr LR 453 (Raj).

Committal of suicide was by pouring kerosene oil on her body and setting fire and report was made to police by husband immediately—Complaint by father of deceased against A-1 and A-2 for committing the suicide could fulfil dowry demand—Conviction was challenged in appeal. It was held that considering the earlier versions given by PW 1, 2 and 8 *i.e.*, the father, brother and sister of deceased, there is no hesitation in holding that A-1 and A-2, were not responsible for causing death of the deceased. Appeal allowed and acquittal recorded. *J. Yadamma (Smt.)* v. *State of Andhra Pradesh*, (1995) 1 ALT(Cr) 102 (AP).

The deceased never informed her father during her life time about alleged harassment. There was no proof that he harassed and beat the deceased. Hence no ground to interfere. *Public Prosecutor, High Court of A.P., Hyderabad* v. *Ayinampudi China Apala Raju*, (1995) 2 ALT (Cr) 189 (AP).

When deceased died within short time after marriage—Husband A-1, convicted under Section 198-A, for harassment—A-2 was acquitted—State appeal against acquittal appeal against conviction. It was finally held that evidence of deceased's older sister showed that deceased told her that she was happy. The deceased was patient of jaundice before marriage. Defence of accused that deceased might have committed suicide being fed up with decease cannot be brushed aside. The prosecution has failed to prove that deceased was subjected to cruelty. Hence conviction set aside and State appeal dismissed. *Pappala Venkataramana* v. *State of A.P.*, (1995) 1 Andh LT (Cr) 396.

The prosecution did not lead any evidence that deceased was subjected to mental and physical torture by appellants for not bringing dowry. The deceased was in the habit of writing suicidal notes. No offence was therefore, made out under Section 498-A, against appellant. Hence conviction and sentence set aside. *Rishiram* v. *State of M.P.*, (1995) 1 CCR 835 (MP).

6. Acquittal.—When cruelty was properly established—Injuries were found on the body of the deceased acquittal was not justified. Conviction justified under Section 498-A, not under Section 306, IPC. *State of West Bengal* v. *Orilal Jaiswal*, 1994 JIC 22 (SC) : 1994 Mad LJ (Cr) 187 : 1994 SCC (Cr) 107 : 1994 (1) SCC 73 : 1994 (1) ALJ (Cr) 193 : 1994 Recent Cr R 186 : 1994 (2) East Cr C 262 : 1994 Cr LJ 2104 : AIR 1994 SC 1418.

Revision against acquittal. The accused respondents were charged for causing death of the deceased for dowry and subjecting her to cruelty and harassment, but there is no evidence to evince such cruelty and harassment. In the facts and circumstances of the instant case, no presumption can be drawn about the dowry death and thus, the prosecution is found to have failed to bring home the accusation so far as they relate to offences punishable under Sections 304-B and 498-A of IPC.

There is no direct evidence with regard to cruelty or demand for dowry on record. Prosecution has miserably failed to furnish satisfactory and reasonable explanation of delay in filing FIR. Acquittal of accused respondents is proper. *Krishan Lal Sharma vs. The State of Rajasthan*, 2010 (2) CrLJ 2316 (Raj).

Where there was sentence to rigorous imprisonment for one year and also to pay fine of Rs. 1,000/- revision petition challenging of the same was filed. There was no allegation of demand of dowry or that the accused driving deceased to commit suicide. The allegation of unlawful demand of property was found without any basis. Section 498-A, is not attracted. Conviction held illegal and liable to be set aside. *H. Shanker* v. *State of A.P.*, (1994) 2 AP LJ 60 (AP).

Acquittal—Insufficient evidence. The only evidence to bring home charge under

Section 498-A, IPC, is that of brother of deceased. In their deposition brother of deceased stated that their sister told them that accused was torturing her as he wanted that her brothers arrange a job for him or the house at Ganj Basoda is given to him or a cash of Rs. 1 lac is given to enable him to do some business. They deposed that as and when their sister come to their house, she would tell them that accused used to insert cloth in her mouth and give beatings for dowry. The trial Court as well as the High Court relied on the evidence of brothers of deceased and held that charge under Section 498-A, IPC, against the accused was proved. Apart from the statement attributed to the deceased, none of the witnesses had spoken anything which they had seen directly insofar as torture and harassment to Ranjana Rani @ Raj Kumari was concerned.

The moot question is : whether the statements attributed to the deceased could be used as evidence for entering upon a finding that the accused subjected Ranjana Rani @ Raj Kumari to cruelty as contemplated under Section 498-A, IPC. In our considered view, the evidence of brothers of deceased about what the deceased Ranjana Rani @ Raj Kumari had told them against the accused about the torture and harassment is inadmissible under Section 32(1) of the Evidence Act and such evidence cannot be looked into for any purpose. Except Section 32(1) of the Indian Evidence Act, there is no other provision under which the statement of a dead person can be looked into in evidence.

What has been deposed by brother of deceased has no connection with any circumstance of transaction which resulted in her death. The death of Smt. Ranjana Rani @ Raj Kumari was neither homicidal nor suicidal; it was accidental. Since for an offence under Section 498-A simpliciter, the question of death is not and cannot be an issue for consideration, we are afraid the evidence of brothers of deceased is hardly an evidence in law to establish such offence. In that situation Section 32(1) of the Evidence Act does not get attracted.

Section 6 of the Evidence Act, in the facts and circumstances of the case, insofar as admissibility of a statement of brother of deceased about what the deceased had told them against the accused of the treatment meted out to her is concerned, is no at all attracted.

We hold, as it must be, that there is not an iota of evidence which can be admitted in law to be used against the appellant for the offence punishable under Section 498-A, IPC. Consequently, the appeal has to be allowed and is allowed. *Bhairon Singh vs. State of Madhya Pradesh*, AIR 2009 SC 2603 : 2009 CrLJ 3738 : 2009 (3) Crimes 199 (SC) : 2009 (7) JT 495 : 2009 (9) SCR 875 : 2009 (8) Scale 634 : 2009 (5) Supreme 153 : 2009 (4) SLT 793 : 2009 (3) JCC 2114.

No evidence to cruelty. In order to sustain conviction under Sec. 306, IPC, it must, therefore, be proved by the prosecution that there was abetment of suicide. According to the allegations of the complainant and the case of the prosecution, the deceased was instigated to commit suicide by constant harassment in connection with demand of Rs. one lac and motorcycle by the appellant and his mother. In the present case the prosecution has failed to prove that deceased was subjected to cruelty or harassment by the appellant in connection with the demand of dowry. The statements of prosecution witnesses are inconsistent, contradictory and unreliable. It would be pertinent to mention here that presumption under Sec. 113A of the Indian Evidence Act cannot be taken as the marriage of the deceased was not solemnized within a period of seven years before her death. Accused not liable to be convicted for offences under Ss. 304B, 306 and 498A. *Suresh Kumar alias Sushil and etc. v. State of Rajasthan*, 2006 CriLJ 116 (Raj).

The husband, his mother and brother took the bride to the hospital. This proved their good conduct. The presumption of dowry death cannot be drawn on mere testimony of deceased's brother. The offence is not proved beyond reasonable doubt and appellant entitled to benefit of doubt. *Devinder* v. *State of Haryana*, (1994) 3 Recent Cr R 78 (P&H).

Bare reading of Sec. 378 of the Code (appeal in case of acquittal) quoted above, makes it clear that no restrictions have been imposed by the legislature on the powers of the appellate Court in dealing with appeals against acquittal. When such an appeal is filed, the High Court has full power to reappreciate, review and reconsider the evidence at large, the material on which the order of acquittal is founded and to reach its own conclusions on such evidence. Both questions of fact and of law are open to determination by the High Court in an appeal against an order of acquittal.

During cross-examination he accepted that all this was not stated during investigation. He also accepted that it was not mentioned in the FIR that gifts and other articles were given as dowry. He accepted that his father in law Udai Singh had settled the marriage between the accused and the deceased. Interestingly Udai Singh (DW. 1) has stated that there was no demand from the side of the accused at the time of marriage. The deceased and her parents had never complained to him that the accused or any member of his family was raising any demand of any kind when confronted with the statement made during investigation, PW. 5 accepted that he had not stated many vital things during investigation which for the first time he was speaking in Court. Similar is the position with PW. 7 the brother of the deceased. He also accepted on being confronted with the statement made during investigation that he had not stated particularly certain relevant aspects. Similar is the position with the evidence of mother of deceased (PW. 6).

As was rightly noted by the trial Court there was no evidence towards the claim regarding any demand of dowry. That being so the High Court ought not to have interfered with the well reasoned judgment of the trial Court directing acquittal. The reasoning of the High Court that something must have happened and otherwise deceased would not have committed suicide is clearly indefensible. That certainly could not have been a reason to set aside the trial Court's judgment of acquittal. *Nepal Singh vs. State of Haryana*, AIR 2009 (SC) 2913 : 2009 (12) SCC 351 : 2009 (7) JT 172 : 2009 (6) SCR 982 : 2009 (6) Scale 555 : 2009 (4) SLT 2.

Acquittal of husband of deceased-wife—When valid. The prosecution examined six witnesses including Shrirang, the father of the deceased, Vimal, the mother of the deceased and Smt. Nirmala, the elder sister of the deceased. The trial Court found that demand of gold ring by mother-in-law and cruelty to deceased on account of non satisfaction of the demand was proved only against mother-in-law. It was found that Anita had committed suicide. Accordingly, mother-in-law was convicted as afore-noted and rest of the accused persons were acquitted. As noted above, Suman challenged the conviction whereas the State challenged the acquittal of rest of the accused persons.

Learned Counsel for the appellant submitted that the trial Court had rightly held that in letter there was nothing to implicate the present appellant. Therefore, his acquittal was correct, but the High Court on erroneous reading of the document has directed conviction.

Learned Counsel for the State on the other hand supported the order. In the letter on which both the trial Court and the High Court have relied upon to conclude one way or the other, reference is made to several earlier letters. It specifically refers to the demand by mother-in-law of a gold ring. There is no reference to the present appellant in the letter.

The evidence of father, mother and sister is also relevant. Father has stated that except above letter he had not received any letter and the statement in the letter to the effect that the deceased had earlier sent 2/3 letters is correct. If on one hand he says that he had not received any letter, the question of not replying to them does not arise. Similarly, mother has stated that she cannot say whether there was any demand of in letter. Elder sister has accepted that deceased had written to her father that mother-in-law Suman was demanding gold ring in the letter.

Learned Counsel for the State submitted that there is some reference to money in the letter. The sentence is being read out of context. The deceased had written in the letter that she may have to get a gold ring but wherefrom will she get the money for buying it. Therefore, there is no reference to any demand of money by the present appellant. That being so, the High Court was not justified in upsetting the judgment of the trial Court. The impugned judgment of the High Court is set aside and that of the trial Court is restored. *Vijay vs. State of Maharashtra*, AIR 2009 (SC) 1217 : 2009 (2) SCC 87 : 2009 (1) Crimes 178 (SC) : 2009 (16) SCR 890 : 2009 (1) SLT 313 : 2009 (1) JCC 113.

Where there was no evidence showing that demand of dowry was made or deceased was subjected to cruelty or harassment by accused husband and in law soon before her death or in connection with demand of dowry, conviction of accused under Section 498A or 304B was liable to be set aside as no presumption against accused persons could be drawn under Section 113 of Evidence Act. *Mukesh* v. *State*, 2003 Cr LJ 2598 (Uttranchal).

There were conflicting versions with regard to the demand for additional dowry and there was no evidence of victim having been harassed for the same. None of the prosecution witnesses had alleged the cruel treatment. It was held that conviction under Section 498A was not proper as no presumption under Section 113A of Evidence Act could be invoked. *Penchala Sadaiah* v. *State*, 2003 Cr LJ 3827 (AP) : 2003(2) ALD (CRL) 332 : 2003(2) Andh LT (Cri) AP 562.

When demand of dowry is proved but allegations of cruelty and harassment not established, accused acquitted of offence under Section 498-A, IPC but convicted under Section 4 of Dowry Prohibition Act. *Public Prosecutor* v. *V. Jaya Prakash*, 1997 Cri LJ 196 (AP).

When allegations regarding demand of dowry put forward after due deliberations and lapse of time and version of accused husband about deceased wife suffering from psychiatic depression is supported by documentary evidence acquitted proper. *State of Haryana* v. *Shivnath Rai*, 1997 Cri LJ 404 (P&H).

When material on record not sufficient to proceed against father in-law and 3 others out of 9 persons of in-law's family of deceased order discharging them not illegal. *(Smt) Anita* v. *State of M.P.*, 1997 (3) Scale 473.

Where the deceased-wife while staying at her parents house never stated about alleged ill-treatment or harassment, but dying declaration mentioned ill-treatment. It was held that the dying declaration was not reliable as the same was made in unconscious state of mind and, therefore, the accused was entitled to acquittal. *S. Tripat Patra* v. *State*, 2003 CrLJ 1591 (Ori) : 2003 (1) Crimes 571 : 2003 (1) Ori LR 13.

In an Orissa case, it was alleged by the parents that their daughter was tortured on account of demand of dowry. In the dying declaration the victim did not utter even a single word with regard to any torture or harassment by accused persons. She rather attributed the cause of death to her parents. There was no cogent evidence of any neighbour or near relations about cruelty or harassment meted out to deceased in relation to demand of dowry. Conviction under Section 498A and Section 406 of Dowry Prohibition Act was held improper. *Benumadhab Padi Mohapatra* v. *State*, 2004 Cr LJ 615 (SC) : AIR 2004 (SC) 503 : 2004(1) Crimes 31 : 2003(10) Scale 61 : 2003(8) Supreme 424 : AIR 2003 SCW 6542.

Conviction under Section was set aside where there was no direct evidence available about harassment or ill-treatment meted out by accused to her wife. *Satya Narayan* v. *State*, 2003 Cr LJ (NOC) 185 (MP) : 2002 Cri LR (SC&MP) MPJ 820.

In a Bombay case, it was alleged that accused persons-in-law committed murder of deceased due to non-fulfilment of dowry demand. There was eye-witness to any kind of torture. The prosecution itself proved that at least on two occasions in five months of marriage, victim came home for day or two and stayed there for a week or so. No complaint was made against alleged torture. Acquittal of accused was held proper. *State of Maharashtra* v. *Vivek Gangadhar Thakare*, 2005 Cr LJ 3625 (Bom) : 2005 AllMR(CRI) 2612 : 2005(4) BomLR 180 : 2006(1) HinduLR 274.

7. Conviction.—Where there was allegation against the husband who was demanding scooter—Wife had died—It could not be proved whether death was suicidal or homicidal—Demand of dowry was corroborated—Conviction was held sustainable. *Alamuri Lalitha Devi* v. *State of A.P.*, (1994) 3 Crimes 761 (AP).

Where the accused mother-in-law set the deceased on fire, and the oral and written dying declaration were consistent and reliable, conviction was held proper. *Shakhunthala* v. *State*, 2004 Cr LJ 2906 (AP) : 2004(1) ALD (Crl) 531 : 2004(2) Andh LT (Cri) A.P. 1.

Where the wife was subjected to cruelty and harassment for not bringing the dowry demanded by husband (accused) and the evidence of parents of wife was found reliable, conviction under Section 498A was held proper. *Thilari Narayana Rao* v. *State*, 2003 Cr LJ (NOC) 171 : 2003(1) ALD (CRL) 392.

The conviction could not be sustained where cruelty and harassment were not in connection with demand of dowry. The accused was acquitted under Section 304B but his conviction under Section 498A was upheld. *Raju Ram* v *State*, 2004 Cr LJ 2237 (Raj) : 2004(3) All Cri LR 993 : 2004(1) Bom LR 33 : 2004 (3) Rec Cri R 644.

In an Allahabad case, where the accused-husband, who was having bad habits such as gambling, liquor addiction and beating of wife, had set the deceased to ablaze and had run away instead of extinguishing the fire, it was held that his conviction under Sections 498A and 302 was proper. *Ramesh Chand* v. *State*, 2003 Cr LJ 1315 (All) : 2003 All LJ 464 : 2003 (46) All Cri C 90.

Where there was allegation of cruelty and harassment and demand of dowry was made. After two years of marriage there was unnatural death— Offence was established. Conviction was fully justified. *Gurdeep Singh* v. *State of Haryana*, (1994) 2 CC Cases 232 : (1994) 1 Recent Cr R 190 (P&H) (DB).

Where there was abetment of suicide and subjection of wife to cruelty— There was also harassment, ill-treatment and torture of deceased wife by husband and mother-in-law for non-fulfilment of demands of dowry which resulted in wife committing suicide—Prosecution evidence established offence beyond reasonable doubt—Conviction was held to be justified. *P. Krishna Murthy* v. *State of A.P.*. 1994 Cri LJ 506 : (1994) 1 Crimes 357 (AP).

The opinion expressed by Doctor is clear that death was due to throttling. The evidence of PW 9 and PW 11, and explanation shows that death is homicidal in nature and not a suicidal one. If husband and wife are alone in the house and wife died unnaturally the presumption is always against the accused husband alone. Hence conviction and sentence upheld. *Chekka Venkataswamy* v. *State of A.P.*, (1994) 2 ALT (Cri) 252 (AP).

When offence was under Section 498-A, IPC—Conviction was by trial Court—Appeal against the same was filed. Version of the father, brother and sister of the deceased gave clean chit against husband and mother-in-law—Conviction was not held to be justified. *J. Yadamma (Smt)* v. *State of Andhra Pradesh*, (1994) 3 Crimes 615 (AP).

The deceased was continuously being harassed as she had not produced children after marriage. The involvement of husband and mother-in-law was proved but there was no evidence to prove the involvement of father-in-law. The accused husband and mother-in-law were convicted under Section 302/498A read with Section 34 but co-accused father-in-law was given benefits of doubt. *Boma Mallaih* v. *State*, 2003 Cr LJ (NOC) 14 (AP) : 2002(2) ALD (CRL) 548: 2002(2) Andh LT (Cri) AP 400.

Where there was evidence as regards alleged cruelty towards the deceased which was found to be quite vague, incomplete, contradictory, replete with material contradictions, unworthy of credence and same set of evidence being relied upon for conviction of the accused and for acquittal of others. It was finally held that there is jurisdiction to practice discrimination in respect of appellant to convict him for offence under Section 498-A. Grave error by trial judge in awarding conviction under Section 498-A, IPC. *Jairam* v. *State of Rajasthan*, (1995) 1 Crimes 611 : (1995) 2 CCR 534 (Raj).

When lady committed suicide within 7 years of marriage—Suicide committed due to numerous cruelties imposed upon the lady by the husband and the in-laws and there was no evidence with regard to abetment to suicide by the husband and the in-laws—Conviction under Section 306, was held to be not proper. Conviction should be under Secs. 498-A and 304-B. *Pasumarthy Prabhakar Rao* v. *State*, (1995) 1 Crimes 434 (AP).

When deceased being harassed by accused husband for not complying with unlawful demands—Testimony of witnesses corroborated by statement in diary maintained by deceased. However there was no evidence connecting co-accused and her in-laws with alleged offence. It was held that conviction of accused upheld while that of co-accused not proper. *Alamuri Lalitha Devi* v. *State of A.P.*, 1995 Cr LJ 2127 (AP).

In an Andhra Pradesh case, a complaint was made by wife that she was kicked out of the matrimonial house. Thereafter, the accused-husband gave an undertaking voluntarily to the police that she would take the complainant back in house and treat her properly but this undertaking was not in the form of a compromise and the complainant was not signatory to it. It was held that the undertaking on the contrary strengthened the version of complainant and that conviction of accused was proper. *Mohd. Abdul Aziz* v. *The State*, 2003 Cr LJ 4410 (AP) : 2003(1) ALD (CRL) 970 : 2003(2) Andh LT (Cri) AP 84.

When wife committed suicide due to ill-treatment of the appellant— Conviction was made under Section 498-A, IPC.—Appellants contended no independent witness. Conviction was fully justified. In such cases independent witnesses not possible. Appeal was hence dismissed. *Krishnamurthy* v. *State of A.P.*, (1994) 1 Crimes 357 (AP).

When all circumstances clinchingly establish culpability of accused persons themselves and no one else, their conviction under Section 498-A, IPC proper. *Balram Prasad Agarwal* v. *State of Bihar*, 1997 (1) Crimes 10 (SC).

Where the accused had treated the wife with cruelty and had pawned her jewellery and there was no evidence to show that outsider had entered the house to cause the murder of deceased, it was held that there could not be any basis to accept innocence of accused. *Sardar Khan* v. *State of Karnataka*, 2004 Cr LJ 910 (SC) : AIR 2004 SC 1695 : 2004 AIR SCW 461 : 2004(1) Scale 606 : 2004(1) Supreme 427.

8. Sentence.—*Held*—The evidence of Doctor's Post-mortem Certificate and inquest report proves death of deceased as homicidal in nature and not suicidal. The prosecution failed to prove harassment to deceased and it was not able to establish that accused caused the death of the deceased. Accused was, therefore, liable for offence under Section 201, IPC. The sentence of 7 years' Rigorous Imprisonment, reduced to 3 years' Rigorous Imprisonment. *K. Ravindra* v. *State*, (1994) 2 ALT 10 (NRC).

Where there was conviction and sentence under Section 498-A, IPC and appeal was made before Sessions Court—Benefit of Probation was given which was challenged in revision petition. Order passed by Sessions Judge was maintained as far as giving the benefit of probation under Section 4 of Act but his order is modified to the extent that fine amount of Rs. 1,500/- to be paid to wife. *Arti Panchpuri (Smt)* v. *Deena Nath*, 1995 JIC 315 (All).

Where the father-in-law of decased was aged 75 years, was bed ridden and was in feeble health and had been in custody during trial for about 40 days, the Court felt the ends of justice would be met if sentence is reduced to period already undergone. *State of Karnataka* v. *Balappa* 1999 Cri LJ 3064 (Kant).

9. Quashing of Proceeding.—The FIR, was registered at police station District Gurgoan but offence was committed at District Rewari under Cr PC, offence has to be tried at place where it was committed. Hence, FIR is liable to be quashed. *Karambir* v. *State of Haryana*, (1995) 3 CCR 582 (P&H).

Where there was quashing of FIR, actually—Incident occurred in other district and complaint in other district and there was dispute matrimonial. It was held that it was abuse of process of law—Proceedings was quashed. *Karambir* v. *State of Haryana*, (1994) 3 CC Cases 570 (P&H).

When husband and wife reached a compromise. Their application for compromise was rejected. Although rejection order was correct as offence is not compoundable, yet to secure ends of justice proceedings under Section 498-A, is quashed under Section 482, Cr PC. *Ramdas* v. *State of Rajasthan*, 1994 RCC 209-B (Raj).

When cruelty was committed at her husband's home it was held that investigation can not be made by the police of her father's residing area. Complaint was quashed. *Balwinder Kumar Sharma* v. *State of Haryana*, (1994) 1 Recent Cr R 483 : (1994) 2 SLJ 1597 (P&H).

Where there was cruelty by husband and complaint against the same was filed. Hence petition under Section 482, Cr PC.—Compromise before High Court—Divorce was by mutual consent. FIR against the same was quashed. *Vikas Gupta* v. *State of Haryana*, (1994) 2 Recent CR 365 (P&H).

Where there was summoning orders under Section 498-A and 406/34, IPC, against brothers and sisters of the husband and petition under Section 482, Cr PC, challenging complaint and summoning order. It was held that there was no specific allegations that any particular item of so-called dowry was entrusted to them. They were living at far off places. The conclusion is that petitioners have been implicated maliciously. Hence impugned order *qua* petitioners is quashed. *Amrit Lal Sharma* v. *State of Punjab*, (1994) 3 CC Cases 125 (P&H).

Where the complaint alleging harassment and cruelty was filed after 38 years of marriage with a view to retabate petition for divorce filed by husband, the complaint ws held liable to be quashed. *Arun Kumar Singh v. State of Jharkhand*, 2006 Cr. LJ (NOC) 40.

Where there was allegation which was not specific but was of general nature—Wife not making any allegation of cruelty in earlier proceedings under Hindu Marriage Act—Both parties were taking divorce by mutual consent. FIR was held liable to be quashed. *Kamalesh (Miss)* v. *State of Haryana*, (1994) 3 Recent Cr R 508 (P&H).

10. Valid marriage.—Offence of cruelty and dowry demand pre-supposes existence of valid marriage. Wife in a case was already married to some other person at time of her marriage with accused husband with whom her second marriage was void *ab initio*. The proceedings against accused were liable to be quashed as their marriage by competent Court was declared void. *Raghothaman* v. *State*, 2004 Cr LJ 1974 (Kant) : AIR 2004 Kant HCR 1204 : 2004(3) All Cri LR 161 : 2004(2) DMC 622.

11. Cases.—The complaint contained specific allegation of cruelty and harassment on dowry demand. There were sufficient material for Magistrate to frame charges against father-in-law and mother-in-law. Hence order of High Court set aside. *Khandu Pandu Jadhav* v. *State of Maharashtra*, (1995) 3 Crimes 818 (SC).

Consequences of cruelty which are likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical of the woman are required to be established in order to bring home the application of Sec.

498-A, IPC. Cruelty has been defined in the Explanation for the purpose of Sec. 498-A. It is to be noted that Secs. 304-B and 498-A, IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the Secs. and that has to be proved. The Explanation to Sec. 498-A gives the meaning of "cruelty". In Sec. 304-B there is no such explanation about the meaning of "cruelty". But having regard to common background to these offences it has to be taken that the meaning of "cruelty" or "harassment" is the same as prescribed in the Explanation to Sec. 498-A under which "cruelty" by itself amounts to an offence. *Satish Kumar Batra and Ors. v. State of Haryana.*, AIR 2009 SC 2180 : 2009 (5) SCR 451 (SC) : 2009 (12) SCC 491 : 2009 (5) JT 403 (SC) : 2009 (5) Scale 280 (SC) : 2009 (3) SLT 379 (SC) : 2009 CrLJ 2447 (SC) : 2009 (2) JCC 1341 (SC).

Where there was cognizance of offence under Section 498-A, IPC, can be taken ignoring bar under Section 468, Cr PC, in appropriate cases. Revision against proceedings was held to be dismissed. *Ashutosh Chodhury* v. *State.* 1995 4 CCR 132 (Cal).

Order summoning co-villagers for offence under Section 498-A, amounts to abuse of process of Court. *Dukhi Ram* v. *State of U.P.* 1993 Cri LJ 2539 (Alld).

Where there was charge of maltreatment for not fulfilling demand of. dowry and Magistrate found *prima facie* case under Sections 498-A and 323, IPC, summon was issued for facing trial for these offences—Other accused not summoned—Revision petition before Sessions Judge for summoning other accused was dismissed—Petition under Section 482, Cr PC, for setting aside the order, filed and was held that besides demand of Scooter there were no other allegations that petitioner was maltreated for not fulfilling the demand for any other article. The averments regarding cruel treatment were specific so far as husband was concerned. It did not appear reasonable that all members of the family including ladies picked up daggers and assaulted with the *Panch* which had came for reconciliation. The petition is devoid of merit and dismissed. *Jaswinder Pal Kaur* v. *Iqbal Singh.* (1994) 2 SLJ 1111 (P&H).

The deceased wife who had undergone operation was unable to do household work. The oral evidence showed that the accused used to beat her constantly. The post-mortem report showed that there were six bruises on the body of the deceased there on the right thigh and three on the right hip part. Thus the oral evidence was corroborated by the medical evidence. Under the circumstances an offence under Section 498A, IPC was made out. *State v. Gopal,* 2001 Cri LJ 2873 (Raj).

In a Supreme Court case, the accused-in-laws allegedly participated with accused husband in driving out deceased from their house. Except the said allegation by father of deceased, there was no evidence against the in-laws. It was held that the acquittal of in-laws under Section 498A/304B was proper, and the conviction of husband under Section 498A was justified. It was further held that the acquittal of husband under Section 304B as there was evidence about the demand of dowry. It was also held that the accused could also be convicted under Section 306, IPC, if no charge was framed thereunder. *K. Prema S. Rao* v. *Yadla Srinivas and Ranga Rao,* 2003 Cr LJ 69 (SC) : AIR 2003 SC 11 : 2002 AIR SCW 4391 : 2003 (2) All Cri R 1374 : 2003 (1) Crimes 62 : 2002 (8) Scale 153.

Where there was complaint by wife against husband and his relatives—

petitioners—None of petitioners was found to be residing in same premises—Story against them appear highly improbable and unacceptable— No *prima facie* case against any of them and no grave suspicion to commission of offence under Section 498-A. Petitioners are liable to be discharged in view of Section 227, Cr PC. It was held that mere apprehension of complainant that her husband will not come to fetch her is no offence punishable. *Dr. V.N. Sharma* v. *State*, (1995) 3 CC Cases 260 (P&H).

Where there was simply living as husband and wife and be getting child is no proof of marriage and in absence of evidence that they were accepted by community as husband and wife relationship of husband and wife is not established. *(Smt) Sabitri Patra* v. *State of Orissa*, (1994) 1 OLR 543 (Ori).

When there is sufficient evidence to constitute offence under Section 498-A, IPC, averments in complaint FIR being vague is immaterial and order of discharge of accused at stage of framing of charge not proper. *Ajit Singh* v. *State of Haryana*, 1997 Cri LJ 659 (P&H).

The marriage had taken place about 25 years back and allegation was that husband was treating the complainant with cruelty and harassing her right from day one for bringing insufficient dowry. The last occasion when wife was turned out of the house pertained to decade ago. It was held that harassment or cruelty that might have occurred two decades ago could not be made a ground for punishment and order of framing charge under Section 498A was liable to be set aside. *Smt. Basant Kaur* v. *State (NCT of Delhi)*, 2003 Cr LJ 803 (Delhi) : 2002(101) DLT 470 : 2003(66) DRJ 119.

The remark that the daughter-in-law was not beautiful was not of such a nature which would drive her to commit suicide. It was not sufficient gravity. It is a question of fact in each case whether the woman was subjected to cruelty within the meaning of Clause (a) of the Explanation to Section 498-A, IPC. The letter showed that the deceased was very much emotional, of low tolerance and unstable mind. There was no grave and serious provocation by the appellant. Even after the introduction of Sections 498-A I P C and 113-A Evidence Act proof must be beyond any shadow of reasonable doubt. *Gurbachan Singh* v. *Statpal Singh*, AIR 1990 SC 209 : 1990Cri LJ 562. On a dispassionate consideration of the material on record, it is found that the charges against the accused are also not established *Smt. Annapurna Bai* v. *State of Madhya Pradesh* 1999 Cri LJ 2696 (M.P.)

In a case where the wife committed suicide within one year of marriage the prosecution based his case on a letter written by the deceased wife to his father. The letter nowhere indicated any demand of dowry having been made by the accused. The deceased in his letter requested his father to return the ornaments which were given to him by the deceased for being repaired. The second thing which the letter suggested was of her having beaten and pushed out of house for her forgetful nature. The Court on going through the evidence held as under : "From an independent evaluation of evidence and having gone through oral evidence adduced and the several documents available on record, mostly the writing of the deceased we are satisfied that the present one is not a case of dowry death or the deceased having been instigated into committing suicide for her failure to satisfy the dowry demands of the accused appellant. However, treating by the accused appellant of the deceased, ill treating her for her mistakes which could have been pardonable and turning her out of the house, also once beating her inside the house at the odd hours of night did amount to cruelty within the meaning of section 498A of IPC and therefore we agree with the Trial Court as also with the High Court though to some extent at variance with the cause for cruel treatment that the accused appellant subjected deceased Seema to cruelty and, therefore, conviction of the accused appellant under Section 498-A deserves to be maintained". *Ramesh Kumar v. State of Chattisgarh* 4729(SC).

Where the husband suspected the character of wife and abused her saying "Bloody where why did you die, the framing of charge under Section 498A was held proper. *Mohan Chand Kholi v. State*, 2003 Cr LJ 710 (Delhi) : 2003(2) All CriLR 559 : 2003(1) Rec Cri R 694.

12. Intention—In cruelty by husband or his relatives intent to injury is most important element of cruelty under Section 498-A. *Rajammal* v. *State*, 1993 Cri LJ 3029 (Mad).

13. Compromise.—In matrimonial offence compromise between husband and wife is permissible even though offence is non-compoundable in exceptional circumstances. *Smt. Dagghopati Jayalashmi* v. *State*, 1993 Cri LJ 3162 (AP).

Where the husband and wife agreed for mutual divorce and application was filed for quashing the proceedings initiated by her but the High Court refused to exercise the inherent jurisdiction vested in it. It was held that refusal was not proper as it would prevent the woman from settling earlier and that is not the object of Section 498A. *B.S. Joshi* v. *State of Haryana*, 2003 Cr LJ 2028 (SC) : AIR 2003 SC 1386 : 2003 AIR SCW 1824 : 2003(3) Scale 214 : 2003(3) Supreme 227.

The offence under Section 498A could be compounded if parties have jointly expressed their views and willingness for the purpose. The parties during pendency of complaint separated from each other by getting a decree of divorce in which provisions were also included for making future maintenance to the wife. The Court said that even if offence is not compoundable under Section 320 Cr PC but Court by invoking inherent powers under Section 482 Cr PC can quash the complaint in order to save institution of marriage. *Chandra Papa Rao* v. *State*, 2003 Cr LJ (NOC) 62 (AP) : 2002(1) Andh LT (Cri) AP 300 : 2003(2) DMC 239.

14. Suicide by wife.—It can be presumed that cruel treatment meted out to deceased by accused husband earlier had continued unabated till wife was forced to commit suicide and hence conviction of accused justified. *Balram Prasad Agarwal* v. *State of Bihar*, 1997 Cri LJ 1640 (SC).

The accused married Kantaben (deceased). Soon after two years of his marriage, the accused started in flicting mental and physical torture on her and she was taunted by the accused for not bringing sufficient dowry in the marriage. He also demanded from the victim an amount of Rs. 40,000/- for the purpose of purchasing a house. He even wrote letters to the in-laws and demanded Rs. 40,000/- for purchasing the house. The demand was persistent. Even threats were administered to the deceased and her family members. Thus, the accused inflicted mental and physical torture on the victim which prompted her to commit suicide by burning herself after pouring kerosene on her body. Thus, as per the prosecution case, the appellant has committed the offence punishable under Sections 498-A and 306 IPC read with Sections 3 and 7 of Dowry Prohibition Act.

The complaint was given and on the strength of the complaint given by the complainant investigation was carried out. It is pointed about that the accused himself had taken the deceased to the hospital and from his conduct it clearly shows that the accused was not guilty. In essence, it is submitted that the commission of alleged offences has not been established by the prosecution.

The conviction so far as it relates to Sec. 306 IPC, therefore, cannot be sustained in view of the background facts and is set aside. But the materials on record particularly the letters on which specific emphasis has been led by the trial Court and the High Court amply demonstrate the commission of offences punishable under Sec. 498-A IPC and Sec. 3 of DP Act. The convictions are sustained. But the sentence in respect of Sec. 3 of DP Act is reduced to three years. *Kishangiri Mangalgiri Goswami v. State of Gujarat*. AIR 2009 SC 1808 : 2009 CrLJ 1720 : 2009 (4) SCC 52 : 2009 (2) JT 84 : 2009 (2) Scale 31 : 2009 (1) Supreme 491 : 2009 (1) SLT 698.

Suicide by woman within 7 years and cruelty by husband does not automatically give rise to presumption. Having regard to the principles aforesaid, we may now advert to the fact of the present case. Here is a case where the evidence on record discloses that the deceased wanted to be married in a literate family. She was not happy with the fact that her husband was illiterate and also with the status and condition of the family of her husband. She was also required to do some domestic work as the family was poor, for which she was not happy. The deceased was of the view point that her life has been spoiled by marrying appellant. The letter reflects the attitude of the in-laws of the deceased towards the deceased. In the said letter there was no reference of any act or incident whereby the appellants were alleged to have committed any wilful act or omission or intentionally aided or instigated the deceased to commit suicide.

On such slender evidence, therefore, we are not persuaded to invoke the presumption under Sec. 113-A of the Evidence Act to find the appellant guilty of the offence under Sec. 306 IPC.

The next question which remains forour consideration is whether an offence is made out under Sec. 498A of IPC. Though the letter allegedly written by the deceased mentions the fact that the attitude of the family was not good towards the deceased and she was not treated well but there is no mention about any of such incident. Witnesses in their statements have emphasized that the mother-in-law of the deceased used to ask the deceased to run hand driven flourmill to which she was not habitual. In the year 1988 when the abovementioned incident occurred, the hand driven flourmills were generally used by women in the poor families in the villages and even till today one may find use of the same in some villages in the country. Thus asking one to run the same at that point of time may not amount to an act of cruelty.

In the said statements there is also a mention of an incident where the deceased had been beaten by her husband. The mother-in-law cannot be held liable for the said act; rather there is evidence on record of PW3 who had stated that mother-in-law had once restrained her son. Though in the statement of PW 1 there is mention of one or two incident when the present appellant had beaten the deceased but there appears to be possibility of embellishment. The father of the deceased (PW2), in his statement has not made any statement regarding cruelty being committed on his daughter in her in-laws house. After analyzing the said evidence and the statements made by PW1 and

PW3 we are of the opinion that the benefit of doubt should be granted to mother-in-law. *Rajbabu and Anr. v. State of M.P.*, AIR 2008 SC 3212 : 2008 (8) JT 250 (SC) : 2008 (10) Scale 437 (SC) : 2008 (5) Supreme 666 (SC) : 2008 (8) SLT 472 (SC) : 2008 (8) SRJ 119 (SC) : 2008 CrLJ 4301 (SC) : 2008 (3) Crimes 313 (SC) : 2008 (3) JCC 2013 (SC) : 2008 (3) Recent CR 890 (SC).

No direct evidence to show that the appellant had by his acts instigated or provoked the deceased to commit suicide. Set aside the conviction under Sec. 306 but uphold the conviction under Sec. 498-A as allegation of cruelty proved by evidence.

The prosecution has specifically alleged that the day prior to the date of commission of suicide by the deceased, the deceased was tortured by the appellant, Anita and the other accused persons present in the house of the appellant, as a result of which the deceased committed suicide on the next day. On a perusal of the record of the present case, we find that both the trial Court as well as the High Court have disbelieved the said incident as, according to them, the statement of the witnesses to establish the said fact are not reliable and trustworthy. Those findings recorded by the trial Court and the High Court have not been challenged before us. It is not the case of the prosecution that the case in hand would fall within the ambit of clause firstly of Explanation 1 to Sec. 107, IPC.

It is pertinent to note that the appellant had brought Anita to stay with him at his house three months prior to the date of the death of the deceased. If the deceased had been so perturbed by the act of the appellant in marrying the said Anita and in bringing her to his house that she felt impelled to commit suicide then she could have done so on the very day when Anita had come to stay with the appellant in his house as naturally at that point of time her annoyance or dismay with life would have been at its pinnacle. From the period of three months which elapsed in between the incidents of the appellant bringing Anita to his house and the deceased committing suicide, it can be clearly inferred that it was not the act of the appellant which instigated or provoked the deceased to commit suicide.

The perpetration of physical torture on the deceased on the day prior to the date of the incident which led the deceased to commit suicide is the prosecution case all throughout. It is nowhere the case of the prosecution that the appellant had played any active role either in instigating or aiding the commission of suicide by the deceased for denying to accept Anita as the wife of the appellant. Anita, the second wife of the appellant was brought by the appellant to his house about three months prior to the date of the incident of suicide by the deceased and, therefore, bringing of the second wife to the house by the appellant cannot be said to have either incited or facilitated the commission of suicide by the deceased. It is also not the case of the prosecution as disclosed from the evidence led which we have scrutinised very minutely. The aforesaid contention, in our considered opinion, is far-fetched and is not established by the facts of the present case. After carefully assessing the evidence on record we find that there is no direct evidence to show that the appellant had by his acts instigated or provoked the deceased to commit suicide and has not done any act which could be said to have facilitated the commission of suicide by the deceased.

From the evidence on record available before us, we find that the prosecution witnesses have in their testimonies stated that the deceased was tortured both physically and mentally by the appellant for the first time after his marriage with the deceased when he was refused permission for marriage with said Anita by the deceased. On having been refused the permission for his second marriage with Anita, the appellant again, after a few days requested the deceased to accede to his request for marriage with Anita, which request was again refused by the deceased. Consequent to the said position and due to the adamant position taken by the deceased, cruelty was meted out to her by the accused which fact is sufficiently proved from the evidence on record. Therefore, we find no reason to take a different view than what has been taken by the trial Court and the High Court as far as Sec. 498-A, IPC is concerned. *Amalendu Pal alias Jhantu vs State of West Bengal*, 2009 AIR SCW 7070 : AIR 2010 SC 512

When cruel treatment to wife not stopped even after she gave birth to two sons, presumption arises that cruelty continued unabated till her suicide and thus accused liable to be convicted under Section 498-A, IPC. *Balram Prasad Agarwal* v. *State of Bihar*, 1997 AIR SCW 1271.

The essence of the offence in Section 498-A is cruelty as defined in the explanation appended to that section. It is a continuing offence and on each occasion on which the respondent was subjected to cruelty, she would have a new starting point of limitation. The last act of cruelty was committed against the respondent, within the meaning of the explanation, on October 13, 1988 when, on the allegation made by the respondent in the complaint to Additional Chief Judicial Magistrate, she was forced to leave the matrimonial home. Having regard to the provisions of Section 469 and 472 the period of limitation commenced for offences under Section 406 and 498-A from October 13, 1988 and ended on October 12, 1991. But the chargesheet was filed on December 22, 1995, therefore, it was clearly barred by limitation under Section 468 (2), Cr. P.C. Section 473 Cr P. C which extends the period of limitation is in two parts. The first part contains *non-obstante* clause and gives overriding effect to that section over Sections 468 to 472. The second part has two limbs. The first limb confers power on every competent Court to take cognizance of an offence after the period of limitation if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and the second limb empowers such a Court to take cognizance of an offence if it is satisfied on the facts and in the circumstances of the case that it is necessary so to do in the interests of justice. It is true that the expression in the interest of justice in Section 473 cannot be interpreted to mean in the interest of prosecution. What the Court has to see is interest of justice. The interest of justice demands that the Court should protect the oppressed and punish the oppressor/offender. In complaints under Section 498-A the wife will invariably be oppressed, having been subjected to cruelty by the husband and the in-laws. It is, therefore, appropriate for the Courts, in case of delayed complaints, to construe liberally Section 473, Cr. P.C in favour of a wife who is subjected to cruelty if on the facts and in the circumstances of the case it is necessary so to do in the interests of justice, When the conduct of the accused is such that applying rule of limitation will give an unfair advantage to him or result in miscarriage of justice, the court may take cognizance of an offence after the expiry of period of limitation in the interest of justice. This is only illustrative not exhaustive. *Arun Vyas* v. *Anita Vyas* 1999 Cri LJ 4379 (SC).

In *Vanka Radhamanohari (Smt.)* v. *Vanka Venkata Reddy*, (1993) 3 SCC 4: 1993 AIR SCW 3595, the wife who was subjected to cruelty left the matrimonial home in 1985. In 1990, she filed the complaint alleging cruelty and mal-treatment against the husband and mother-in-law and further stating that the husband had remarried. The Magistrate took cognizance of offence under Sections 498-A and 494, IPC. On the petition of the husband under Section 482 Cr. P.C the High Court quashed the complaint. The Apex Court on appeal from the judgement of the High Court, held that the High court erred in quashing the complaint as Section 468, Cr. P.C. could not be applied to offence under Section 494 IPC (for it is punishable with imprisonment for a term which may extend to 7 years) and even in respect of offence under section 498-A, the attention of the High Court was not drawn to Section 437, Cr. P.C while setting aside the impugned order of the High Court, the apex Court observed:—

> "As such Courts while considering the question of limitation for an offence under Section 498-A *i.e.* subjecting a woman to cruelty by her husband or the husband or the relative of her husband, should judge the question in the light of Section 473 of the Code, which requires the Court, not only to examine as to whether the delay has been properly explained, but as to whether it is necessary to do so in the interests of justice."

15. Cruelty to Wife.—Reading the evidence of PWs 1 to 3 together what is evident is that the allegation that there was demand for bore dowry is not supported by any reliable evidence. As already mentioned, as far as the version of assault and hospitalisation are concerned, they are unsupported by medical evidence. What is clear from the version of PWs 1 and 3 is that the main cause of difference of opinion between the parties is the animosity of the mother-in-law and that even now she is prepared to live with the husband provided the husband goes over to her house. The Court was not satisfied therefore that the prosecution has succeeded in improving the ingredients of Section 498(A). Cruelty, as defined in Section 498 (A), remains unestablished though the fact that there is difference of opinion between the spouses resulting in their separate life stand established. *Lawrence v. State of Kerela*, 2002 Cri. L.J. 3458 (Ker.).

'girl friend'. Husband having connection with. Appellant herein had not been charged for abetment of a crime. Any conspiracy amongst the accused persons has also not been alleged. A woman in terms of the aforementioned provision must be subjected to cruelty by her husband and/or his relative. The word 'cruelty' has also been defined in the explanation appended thereto. It is in two parts. Clause (a) of the said explanation refers to a conduct which is likely to drive the woman to commit suicide or to cause grave injury or danger to her life, limb or health (whether mental or physical); Clause (b) provides for harassment of the woman, where such harassment, is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security. It is not the case of the first informant that the appellant had any role to play with regard to demand of dowry. *U. Suvetha vs. State*, 2009 (6) SCC 757 : 2009 CrLJ 2974 (SC) : 2009 (2) Crimes 357 (SC) : 2009 (7) JT 222 : 2009 (7) SCR 902 : 2009 (7) Scale 149 (SC) : 2009 (3) Supreme 797 : 2009 (4) SLT 462 : 2009 (3) JCC 1677.

In the present case there are certain material aspects which were lost sight of by the trial Court but have been noted by the High Court. The dead body was detected in the morning. Parents of the deceased informed the police and not the inmates. The parents were informed by neighbours and not by the inmates. DW2 has been disbelieved as he was nearly 70 years of age. It was highly improbable that he was in employment as a watchman. Parents of deceased deposed that deceased was very depressed and unhappy due to improper treatment at hands of husband. The trial Court had held that the evidence of PWs. 6 to 8 regarding pressing mark on the neck and injuries on the fore arms of the deceased are not corroborated by the medical opinion. This is factually incorrect. The doctor had categorically stated that he was of the opinion that death was due to result of compression of the neck, and the post mortem report was accordingly issued. PW 6 has stated that second opinion was sought for and then the report was given. The falsity of alibi is an additional link. *Narendra v. State of Karnataka*, AIR 2009 SC 1881 : 2009 (7) SCR 585 (SC) : 2009 (6) SCC 61 : 2009 (7) JT 566 (SC) : 2009 (7) Scale 6 (SC) : 2009 (4) Supreme 101 (SC) : 2009 (2) Crimes 415 (SC).

The commission of the offence punishable under Section 498-A, IPC, against such of the accused who have been convicted, having perused the testimony of witnesses i.e. the parents and the brother of the deceased as also having perused her complaint made to the crime against Women Cell we are satisfied that the prosecution has satisfactorily brought home that deceased was physically beaten and was treated with mental and physical cruelty on account of dowry demands by her parents-in-law, her husband, her devar as also her devrani and one nanad. The conviction of said four persons for the offence punishable under Section 498-A, IPC cannot be faulted. *Gurcharan & etc. vs. State*, 2010 (3) CriLJ 3339 (Delhi).

Sporadie incidence of ill-treatment by husband, even if believed true would not attract the definition of cruelty. *Sunil Kashinath Raimale* v. *State of Maharashtra*, 2006 Cr LJ 569 (Bombay).

Accused persons can be convicted under Section 498-A even if a charge under Section 304-B fails. On reappraisal of the evidence on record in the considered opinion of this Court there being no clear, cogent and credible evidence on record with regard to death of the deceased by any burn or bodily injury otherwise than the normal circumstances and also the deceased was subjected to torture by the appellants for non-fulfillment of their demands of dowry and much less being the evidence that any torture had any live link to the death of the deceased. In such premises, the judgment of conviction recorded by the trial Court in this case appears to be indefensible and as such liable to be set aside.—*Khetramohan Panda and Ors. vs. State of Orissa*, 2010 (1) Cri LJ 498 (Orissa).

16. Section 498A and 366 IPC.—Sections 498A and 396, IPC are independent and constitute different offences. Though, depending on the facts and circumstances of an individual case, subjecting a woman to cruelty may amount to an offence under Section 498A and may also if a course of conduct amounting to cruelty is established leaving no other option for the woman except to commit suicide amount to abetment to commit suicide. However merely because an accused has been held liable to be punished under Section 498A, IPC it does not follow that on the same evidence he must also and necessarily be held guilty of having abetted the commission of suicide by the woman concerned. *Ramesh Kumar v. State of Chattisgarh*, 2001 Cr LJ 4724 (SC) : 2001(8) JT 599 : 2001(7) Scale 298 : 2001(10) SRJ : 2001(7) Supreme 737.

17. Domestic violence.—In cases of domestic violence or in cases of violence within close quarters, that obviously there will be no outsiders who could have or would have witnessed the incident and this habit of acquitting the accused on the ground that independent evidence was necessary is totally incorrect and will have to be deprecated. If the evidence of the victim is trustworthy, if it has withstood cross examination and if it is corroborated by the medical evidence, then there is no ground on which the trial Court can reject such evidence. In the present case, after a very careful consideration of the records which, defence case accepted that the material may not be strong enough to sustain the charge punishable under Section 307, IPC and consequently, acquittal order confirmed. As far as the charge under Section 498-A, IPC is concerned, the evidence clearly establishes the guilt of the accused. Regarding charges under Section 498-A the order of acquittal set-aside. *State of Karnataka v. Syed Fareed*, 2002 Cri LJ 2857 (Kant.).

18. Muslim woman (Protection of Rights on Divorce) Act, 1986—Applicability.—There was demand of dowry and for non-fulfilment of demand wife was tortured and assaulted. The accused took the plea that the complainant should have taken recourse to Muslim Woman (Protection of Rights on Divorce) Act, 1986 as no provision has been made in this Act that a Muslim woman can maintain criminal case for offence under Section 498A. Rejecting the plea it was held that persistent cruelty to wife was proved and conviction of accused was proper. *Mohd. Arif* v. *State*, 2003 Cr LJ (NOC) 261 (Jharkhand).

19. Prima facie case.—The trial Court found in the discharge application filed by the accused that *prima facie* a case has been made out against the accused to prosecute them for the offence under Section 498-A IPC. If the averments made in the charge-sheet and the statements made in support of it are proved, there is no doubt that the said averments clearly constitute an offence under Section 498-A IPC. The charge is triable, and there is no sufficient ground to discharge under Section 227 and the learned Magistrated also rightly refused to discharge the accused. Had the victim died in her attempt to commit suicide on account of the demand of dowry made by the accused, it would have been a dowry death under Section 304-B IPC with Section 113-B of Indian Evidence Act. If the averments made in the charge sheet are prima facie establishes the offence under Section 498-A, it is expected in the interest of justice to permit the prosecution to continue. *D. Surender Reddy and others v. State of A.P.*, 2002 Cri LJ 2611 (A.P.).

Birth to a female child. One of the reasons for ill-treatment to the deceased was that the deceased gave *birth to a female child*, which was considered to be inauspicious and after the birth of the said female child, the Rajendran's brother's wife died and the appellants thought that the birth of the said female child as the reason for various debacles in the family and consequently, she was tortured by the appellants.

Section 498-A IPC has two limbs. The first limb of Section 498-A provides that whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished. 'Cruelty' has been defined in Clause (a) of the Explanation to the said Section as any willful conduct which is of such a nature as is likely to drive to a woman to commit suicide. When there is demand of dowry, the case comes under Clause (b) of the Explanation to Section 498-A. Clause (a) of the Explanation has definite application to the facts of the present case. Additionally, effect of Section 113-A of the Indian Evidence Act cannot be lost sight of.

Further as per Section 113-A of the Evidence Act when the question as to whether commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume that such suicide had been abetted by her husband or by such relative of her husband. This has not been rebutted by the appellants. Above being the position we find no merit in these appeals, which are accordingly dismissed. *Rajendran vs. State*, AIR 2009 SC 855 : 2008 (15) Scale 371 : 2009 (1) SLT 283 : 2008 (16) SCR 1005 : 2009 (1) JCC 200.

20. Death of wife by burning.—Allegations that she was harassed for demand of dowry and was beaten black and blue, however dates years and months of beating not disclosed nor any particular incident mentioned. Even dying declaration was not reliable and found to be afterthought, therefore, no offence under Section 304-B will be made out. The prosecution witnesses including PW. 5 Munni have admitted that the husband and wife (Ganpat Singh and sajjan Kanwar) had a quarrel soon before the incident and the cause of quarrel was that Ganpat Singh refused to take his evening meal and went to sleep without taking the dinner. The investigation officer PW. 18PW. 18 Kalyan Singh has admitted this fact during his cross-examination. In these circumstances, there remains no basis for convicting the appellants under Section 304-B of the Indian penal code. *Ganpat Singh and others v. State of Rajasthan*, 2002 Cri LJ 2246 (Raj.).

Ill-treatment was meted out to deceased by husband, mother-in-law and sister-in-law. The wife had also filed petition for maintenance u/s. 125 CrPC. In the circumstances accused's conviction u/s. 306/498A read with Section 34 was upheld but sentence was reduced. *Kamalakar Padhu Mahapatra v. State*, 2004 Cr LJ 615 (SC) : AIR 2004 (SC) 503 : 2004(1) Crimes 31 : 2003(10) Scale 61 : 2003(8) Supreme 424 : AIR 2003 SCW 6542.

In a case where accused are charged of the offence under Sec. 498-A and Sec. 302 there should be no difficulty for the Court to convict the accused under Sec. 306 if the basic ingredients of the offence under Sec. 306 of IPC are established by the prosecution even without framing a charge under that section. What is material and relevant, is that the prosecution should establish that the accused had enough notice of the allegations which could form the basis for conviction under Sec. 306 of IPC. In a bride burning case there could be or could not be any eye-witness and if there is no direct evidence the Courts have to base the order of conviction either under Sec. 302 or under Sec. 306 of IPC on the basis of circumstantial evidence. Motive for committing murder and basic ingredients of the offence under Sec. 306 of IPC in such cases could be one and the same. In both the cases the accused would make every effort to disprove the case of the prosecution under Sec. 498-A, namely, that neither any demand of dowry was made nor any gifts or presents or money was received by the accused at a subsequent stage or that he subjected the deceased to cruelty for the same or for any other reason. In other words, the accused would try to disprove the motive if a charge is under Sec. 302 and/or to establish that the ingredients of the offence under Sec. 306 do not exist. The motive for conviction either under Sec. 302 or the basic ingredients to establish charge under Sec. 306 of the IPC in a case of bride burning would be common and, therefore, the conviction under Sec. 306 of IPC can safely be recorded and same would not result in failure of justice in any manner even if the charge under Sec. 306

was not framed and the accused was tried only under Sec. 302 r/w Sec. 498-A of IPC. There is absolutely no reason and ground as to why the trial Court cannot frame alternative charge under Sec. 306 of IPC in a case of bride burning particularly where the accused are charged under Sec. 498-A also. As a matter of fact, if the facts and circumstances demand, the trial Court should frame alternative charge under Sec. 306 also so as to keep the accused on guard and make him aware that there could be a conviction under Sec. 306 even if a charge under Sec. 302 of IPC is not established. *Kisan and Ors. v. State of Maharashtra*, 2007 CriLJ 130 (Bom).

Death caused by burn injuries within seven years of marriage of deceased. Evidence of witnesses stating incidence of quarrel which took place about two months prior to incident between accused persons and complainant about adjusting loan amount paid to accused by complainant as dowry money. All the accused said that an amount of Rs. 50,000/- shall be adjusted against the demand of dowry money. Thus, relying upon the evidence of witnesses, the trial Court and the High Court came to the conclusion that the prosecution has proved beyond reasonable doubt that deceased was being constantly harassed and tortured by accused for the demand of dowry and a sum of Rs.50,000/- paid to them as loan amount was also adjusted by them as dowry money. Witnesses have been subjected to searching cross-examination by the defence, but nothing tangible material has been extracted from their evidence to create any shadow of doubt that they are not reliable and truthful witnesses.

Having regard to the entire evidence discussed above and having carefully and closely considered the judgments of the trial Court and the High Court, it appears that the view taken by both the courts was reasonable and plausible. We find no infirmity or perversity in the findings recorded by the learned Judges of the High Court to interfere with the well-reasoned judgment. *Kanti Lal v. State of Rajasthan*, AIR 2009 SC 2703 : 2009 (6) SCR 525 (SC) : 2009 (3) SLT 569 (SC) : 2009 (5) JT 635 (SC) : 2009 (6) Scale 116 (SC) : 2009 (12) SCC 498 (SC) : 2009 (3) Supreme 360 (SC) : 2009 (3) JCC 1604.

21. Cruelty and demand of dowry.—A necessary ingredient for proving offence under Section 498-A of the Code must be held to be absent hence, the conviction for such an offence must also be held to be not maintainable. For this learned counsel has placed reliance on a decision of the Apex Court in the case of *Sakhi Mandalain v. State of Bihar*, (1999) 8 JT (SC) 351. That was a case in which the appellant, sister-in-law of the deceased was convicted under Sections 304-B/34 and 498-A of the Code as also under Sections 3 and 4 of the D.P. Act. On appeal the High Court had acquitted the appellant of the charges under Section 304-A read with Section 34 of the Code, giving her benefit of doubt but conviction under Sections 3 and 4 of the D.P. Act was maintained. In that case, it was the demand of dowry, coupled with harassment, which constituted the basis of the prosecution case. It was held by their Lordships of Supreme Court that once the main part of the charge under Section 304-B of the Code was not found to be established, it was not possible to record conviction under Sections 3 and 4 of the D.P. Act. *Smt. Basanti Devi and Others v. State of Bihar and Another*, 2002 Cri LJ 161.

Cruelty and Dowry Death. Accused person in-laws of deceased ill-treated her on account of non-fulfillment of dowry demand due to which deceased committed suicide. Evidence of prosecution witnesses viz., brother, parents and aunt was consistent.

The victim committed suicide. Such fact was proved by medical evidence. Inquest report proved that she committed suicide in her in-laws' place. In our considered view, the appellants being her in-laws were duty-bound to unfold the narrative, which was within their special knowledge. The appellants did not do so while being examined under Section 313. They did not even adduce any evidence. The Appellant on the other hand tried to make aspertion on the victim that she had extra marital affair, although the defence did not lead any evidence on that score. The other accused could not check her grievance and categorically stated that they did not get any gold out of dowry.

The learned Judge held the appellants' guilty under Section 304-B/498-A of Indian Penal Code. Taking a sum total of the facts, followed by consistent evidence of witnesses being corroborated by each other, we do not find any scope to hold it otherwise, specially in case of appellants. We, however, find that the evidence on record which is held reliable to convict the appellants for the offence under Section 498-A of Indian Penal Code clearly makes out a case for offence of abetting suicide under Section 306 of Indian Penal Code with the aid of Section 113-A of the Evidence Act, 1872. The facts of this case do not support the conviction of the appellants under Section 304-B of Indian Penal Code. *Jhantu Sardar and Ors. vs. State of West Bengal*, 2010 (3) Cri LJ 3012 (Cal).

Appellants tortured and assaulted victim for non-fulfillment of demand for dowry. Informant and witnesses had come to sasural of victim lady and asked appellants not to torture her. On same day they suffocated lady to death. Sufficient evidence to hold that all appellants have committed offence under Sec. 498-A. Held, conviction of appellants is proper. *Liyakat Miyan & Ors vs State of Jharkhand*, 2010 (4) CriLJ 4008 (Jhar).

Consequences of cruelty which are likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical of the woman are required to be established in order to bring home the application of Sec. 498-A IPC. Cruelty has been defined in the Explanation for the purpose of Sec. 498-A. Substantive Sec. 498-A IPC and presumptive Sec. 113-B of the Evidence Act have been inserted in the respective statutes by Criminal Law (Second Amendment) Act, 1983. It is to be noted that Secs. 304-B and 498-A, IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the Sections and that has to be proved. The Explanation to Sec. 498-A gives the meaning of 'cruelty'. In Sec. 304-B there is no such explanation about the meaning of 'cruelty'. But having regard to common background to these offences it has to be taken that the meaning of 'cruelty' or 'harassment' is the same as prescribed in the Explanation to Sec. 498-A under which 'cruelty' by itself amounts to an offence. *Gopal vs. State of Rajasthan*, AIR 2009 SC 1928 : 2009 (11) SCC 314 : 2009 (2) JT 419 : 2009 (2) SCR 423 : 2009 (2) Scale 704 : 2009 (2) SLT 193 : 2009 (2) JCC 920.

Demand of dowry in respect of invalid marriage would not be legally recognizable. However purpose for which Sections 498A, 304B of Penal Code and Section 113B of Evidence Act were introduced cannot be ignored. Absence of definition of husband to specifically include such persons who contract marriages ostensibly and cohabitate with such woman in purported exercise of his role and status as husband is no ground to exclude them from purview of Section 304B or 498A. *Reema Aggarwal v. Anupam*, 2004 Cr LJ 892 (SC) : AIR 2004 SC 1418 : 2004 AIR SCW 344 : 2004 AIR Jhar HCR 1026 : 2004(1) Crimes 276.

So far as the offence under Sections 498A and 304B, IPC is concerned, throughout it has come on record that accused 2 (brother in law) was staying elsewhere whereas accused 1 and deceased were staying first at Bettadapura and later at K.R. Nagar. It is also the evidence of the neighbouring witnesses staying near the house of the accused and deceased that the couple were cordial and some of the women who were talking with the deceased also have specifically stated that there was no dowry demand much less payment of additional dowry. Even the deceased had not complained of the harassment to bring additional dowry.

Of course, the defense of the accused is that the deceased was suffering from stomach-ache and also pain in the left lower limb as such, she being frustrated, committed suicide. It is seen, on some occasions the deceased had been treated at the hospital for which some documents are produced. Further, it is the specific case of the father of the deceased and other witnesses i.e. mother and sister that accused was never allowing the deceased to attend any of the ceremonies in their family. Even as per the prosecution, the deceased requested the 1st accused to take her to the house warming ceremony of one of her relatives and he refused to take her on which much thrust has been given in the evidence of witnesses. Of course, due to such an indifferent attitude on the part of 1st accused, the deceased must have felt humiliated or got annoyed. In the usual course, family bickering between spouses by itself, cannot be said to be a reason for her to commit suicide and it may not be a ground to hold against the accused that there was abetment to commit suicide and also that the accused is guilty of the offence under Section 498A, IPC.

From the evidence on record that of father, mother and sister and PW 15, it is seen, they have spoken about the deceased complaining of harassment to her whenever she used to meet them. In this regard, however, no complaint has been filed by the family of the deceased against the accused. Apart from that, what is noticed is, the deceased was residing along with her husband and after marriage, for three years she lead marital life and also gave birth to a child. It is also noticed, the 1st accused was demanding Rs. 20,000/- as per the evidence of some of the witnesses and also they made arrangement to pay Rs. 15,000/-. In this regard father has not stated or whispered anything before the Taluka Executive Magistrate. So, it appears to be an afterthought to make out a dowry harassment case to implicate the accused. Even with regard to the evidence as to collecting dowry is concerned, the statement of father is that the 2nd accused has collected dowry amount whereas in the further statement it is stated that 1st accused has collected the dowry amount and that itself shows that there is much contradictions and Ex. D5 also depicts the contradiction version. Moreover, in the absence of any such complaint being filed by father and mother on coming to know of the deat of the deceased except the suspicion they have expressed at the time of recording the inquest statement by the Tahsildar, no other steps have been taken by father to file the complaint. Even the FIR is registered for the alleged offences only after ten days. Certain of the contradictions marked at Ex. D. 4 to 6 show that there is no such demand by the accused for dowry. May be some misunderstanding between the husband and wife regarding not allowing the deceased to attend the function of her relative but, that itself cannot be treated as a cruelty harassment. In order to prove the offence under Section 304B, IPC, death must have occurred within seven years of marriage in unnatural circumstances in connection with dowry harassment. The evidence of the neighbouring witnesses is consistent and contradicts the version of the relatives of the deceased and also, apart from that, the boy witness who was residing along with the deceased and the accused has not whispered anything about any untoward incident that has occurred to hold the accused guilty of the offences under Sections 498A and 304B, IPC. Even if some amount is given or taken, it appears to be in the form of customary practice having regard to the status of the family and, even for having made payment, there is no record made available. Believing the version of the relatives of the deceased as gospel truth the trial Court has convicted and sentenced the accused without looking into the various contradictions and admissions and also the delay in filing the complaint. The complaint is lodged, that too by the police, after ten days. Ex.D. 1 to D 3 are the prescriptions of the deceased who was treated for ailments. The statement of PW 5 is recorded by the police only after 9 to 10 days after the death of the deceased and nothing has been stated by him in the Inquest Report regarding alleged demand for additional dowry by the accused. It appears to be an afterthought and improvement made by the prosecution witnesses, especially by father, mother and sister.

In view of the above discussion, having noticed that deceased committed suicide within seven years of her marriage, it appears her death would have probably been due to misunderstanding between the deceased and the 1st accused in not sending her to attend the ceremony of her relative in the family of her parents. Although several wild allegations are made, there is no cogent evidence to hold the accused guilty of the alleged offences. The order of conviction and sentence rendered by the trial Court is without looking into the contradictions and also without considering the material evidence of the independent witnesses who got to speak about the attitude of the accused with the deceased. *Dr. Seetharamaiah and Anr vs. State of Karnataka*, 2010 (3) CriLJ 3389 (Karn).

22. Charge.—Where the basic ingredients of offence under Section 306, IPC was established to substantiate the charge under Section 498A but conviction under Section 306 was not provide, it was held that conviction of accused under Section 306, IPC without framing a charge there under was permissible. *Hans Raj* v. *State of Haryana*, 2004 Cr. LJ 759 (SC) : AIR 2004 (SC) 2790 : 2004(3) Crimes 11 : 2004(2) Scale 727 : 2004(3) Supreme 676 : 2004(2) All Cri LR 698 : 2004(3) JT 45.

Even if there is no specific charge under Section 498, the conviction can be ordered if sufficient evidence to support the charge is available. *Dinesh Seth* v. *State*, 2003 Cr LJ 4532 (Delhi) : 2003(70) DRJ 556 : *Hira Lal* v. *State (NCT of Delhi)*, 2003 Cr LJ 3711 (SC) : 2003 (2) DMC 206 : 2003 (69) DRJ 714 : 2003 (4) PatLJR 100 : 2003 (4) Raj LW 541 : 2003 (8) SCC 80.

23. Jurisdiction of court.—Where there accused was charged. Under Section 498A and pleaded no jurisdiction in his defence. It was held that the offence under Section 498A being of continuing nature, the court of place where the victim wife was faced to take shelter had jurisdiction to by the offence under Section 498A. *Bina Dey v. Pratibha Dey*, 2003 Cr LJ 3618 (Gau.) : 2003 (3) GauLT 659.

Court at place where her matrimonial home was situated would have jurisdiction and not Court at place where her parental home was situated. More so, when there was no allegation in complaint that petitioner contacted her over phone after her return to parental home and then she was abused or treated with cruelty giving part of cause o action at that place. *Dr. Satheesh N.V. vs. State of Kerala*, 2010 (2) CrLJ 1734 (Kerala).

The husband came to the house of the complainant's father and seeing the child he repeated his earlier remark that the child did not match his face and she carried the sin of somebody else. The question is whether this remark allegedly made by the accused /husband in the house of the complainant's father can give jurisdiction to the learned Magistrate at Asansol for the trial of the case under Sections 498/A/323/505/406/34 of the IPC. In my considered opinion, this single averment which does not introduce a new fact can hardly gives jurisdiction to the learned Magistrate of Asansol. This bare remark is a repetition of what the accused No.1 earlier stated in her matrimonial home. In fact a thorough reading of the petition of complaint revealed that cruelty was perpetrated upon the complainant in her matrimonial house in the district of Hooghly. The solitary expression which is a repetition of what was earlier stated at the time when the child was not born cannot give the Asansol Court of the jurisidiction to try the case. The provision of Section 178 Cr. P.C. does not apply here because it is not a case where offence is committed partly in one area and partly in another, nor the said offence can be said to be a continuing one; nor it is the offence consisting of several acts done in different local areas. Further the expression alleged in Paragraph 14 does not come within the ambit of Section 179, Cr.P.C. because the alleged expression is not an act by reason of anything which has been done and of a consequence which has ensued. *Sankar Prasad Roy Chowdhury & Anr. vs Mitali Roy Chowdhury*, 2010 Cri LJ 981 (Calcutta).

24. Bail.—Old age and health condition of accused. With regard to the case of appellant, it has been contended that she is an 80 years old lady and is suffering from various age related ailments. This factual assertion is not disputed by the respondents. Looking at the age of the appellant it does not seem fair to hold her back in jail during the pendency of appeal even if she had been convicted for the alleged serious offence, against which she has come before this Court. Furthermore, in the peculiar circumstances of this case and in view of the fact, that the Appellant is an old lady of 80 years of age and she had already been in jail for more than one year, in our view, she is entitled for the relief prayed in the application. Accordingly, we grant interim bail to the second appellant, subject to the appellant furnishing the bail bond as well as surety to the satisfaction of the Additional Sessions Judge. *Bakshish Ram vs. State of Punjab*, 2009 (6) SCC 561 : 2009 (2) Crimes 351 (SC) : 2009 (6) JT 431 : 2009 (7) Scale 231 : 2009 (3) Supreme 757 : 2009 (4) SLT 366.

Seriousness and gravity of offence must be looked into. It is clear from the various decisions of this Court as stated above that, cases where a serious offence had been committed and the accused had been held guilty for the said offence, then his application for grant of bail should not be decided leniently during the pendency of the appeal. The seriousness and gravity of the offence must be looked into before granting the bail. In the instant case, accused are convicted by the trial Court for harassing, torturing and compelling the deceased to end her life by committing suicide, and the said conviction is confirmed by the High Court. *Bakshish Ram vs. State of Punjab*, 2009 (6) SCC 561 : 2009 (2) Crimes 351 (SC) : 2009 (6) JT 431 : 2009 (7) Scale 231 : 2009 (3) Supreme 757 : 2009 (4) SLT 366.

25. Deceased died in her matrimonial home.—The deceased breathed her last within about one year and three months from the date of marriage while living in the house of her in laws. She was not suffering from any ailment prior to marriage and even after the marriage she continued to be hale and hearty. The evidence of PW-3, the father of the deceased is very significant. According to him on 17.03.1995 the deceased came to his house. She informed him that the accused was torturing her as they had to purchase a new house they were demanding Rupees one lac from her. To the similar effect is the evidence of PW-4 the brother of the deceased. Prosecution had pressed into service the agreement deed Exh. PB for the purchase of house by Gurmukh Singh from one Sapan Dass (PW-2). Said agreement reveals that it was executed on 08.02.1995 and the sale deed was to be executed on 08.05.1995. The High Court noted that this document amply established that the family required money for purchase of plot from Sapan Dass. The High Court further noted that there was no material brought on record to show that the agreement was performed by the accused persons. The High Court found that the presumptuous conclusion of the trial Court that there was no link of the demand for dowry with the said agreement. The High Court also noted that the trial Court had erroneously concluded that the accused persons were rich persons and, therefore, there was no need for asking any dowry. *Jagjit Singh vs. State of Punjab*, AIR 2009 SC 2133 : 2009 CrLJ 2440 : 2009 (2) Crimes 134 (SC) : 2009 (4) SCR 75 : 2009 (4) SCC 759 : 2009 (3) JT 382 : 2009 (3) Scale 680 : 2009 (2) Supreme 422.

26. Cruelty and dowry death—Distinction between.—Secs. 304-B and 498-A, IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the Secs. and that has to be proved. The Explanation to Sec. 498-A gives the meaning of 'cruelty'. In Sec. 304-B there is no such explanation about the meaning of 'cruelty'. But having regard to common background to these offences it has to be taken that the meaning of 'cruelty' or 'harassment' is the same as prescribed in the Explanation to Sec. 498-A under which 'cruelty' by itself amounts to an offence. Under Sec. 304-B it is 'dowry death' that is punishable and such death should have occurred within seven years of marriage. No such period is mentioned in Sec. 498-A. *Rajendra vs. State*, AIR 2009 SC 855 : 2008 (15) Scale 371 : 2009 (16) SCR 1005 : 2008 (1) SLT 283.

Secs. 304-B and 498-A, IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the Secs. and that has to be proved. The Explanation to Sec. 498-A gives the meaning of 'cruelty'. In Sec. 304-B there is no such explanation about the meaning of 'cruelty'. But having regard to common background to these offences it has to be taken that the meaning of 'cruelty' or 'harassment' is the same as prescribed in the Explanation to Sec. 498-A under which 'cruelty' by itself amounts to an offence. Under Sec. 304-B it is 'dowry death' that is punishable and such death should have occurred within seven years of marriage. No such period is mentioned in Sec. 498-A. *Rajendra vs. State*, AIR 2009 SC 855 : 2008 (15) Scale 371 : 2009 (16) SCR 1005 : 2008 (1) SLT 283.

Consequences of cruelty which are likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical of the woman are required to be established in order to bring home the application of Sec. 498A IPC. Cruelty has been defined in the Explanation for the purpose of Sec. 498A. Substantive Sec. 498A IPC and presumptive Sec. 113B of the Evidence Act have been inserted in the respective statutes by Criminal Law (Second Amendment) Act, 1983. It is to be noted that Secs. 304B and 498A, IPC cannot be held to be mutually inclusive These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the Secs. and that has to be proved. The Explanation to Sec. 498A gives the meaning of 'cruelty'. In Sec. 304B there is no such explanation about the meaning of 'cruelty'. But having regard to common background to these offences it has to be taken that the meaning of 'cruelty' or 'harassment' is the same as prescribed in the Explanation to Sec. 498A under which 'cruelty' by itself amounts to an offence. Under Sec. 304B it is 'dowry death' that is punishable and such death should have occurred within seven years of marriage. No such period is mentioned in Sec. 498A.

A person charged and acquitted under Sec. 304B can be convicted under Sec. 498A without that charge being there, if such a case is made out. If the case is established, there can be a conviction under both the Sections. See *Akula Ravinder and others v. The State of Andhra Pradesh.* AIR 1991 SC 1142, Sec. 498A IPC and Sec. 113B of the Evidence Act include in their amplitude past events of cruelty. Period of operation of Sec. 113B of the Evidence Act is seven years, presumption arises when a woman committed suicide within a period of seven years from the date of marriage. *Gopal v. State of Rajasthan*, AIR 2009 SC 1928. : 2009 (2) SCR 423 (SC) : 2009 (11) SCC 314 : 2009 (2) JT 419 (SC) : 2009 (2) Scale 704 (SC) : 2009 (2) SLT 193 (SC) : 2009 (2) JCC 920 (SC).

Cruelty to wife is distinct offence from offence of dowry death. Consequences of cruelty which are likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical of the woman are required to be established in order to bring home the application of Sec. 498-A, IPC. Cruelty has been defined in the Explanation for the purpose of Sec. 498-A. It is to be noted that Secs. 304-B and 498-A, IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the Secs. and that has to be proved. The Explanation to Sec. 498-A gives the meaning of "cruelty". In Sec. 304-B there is no such explanation about the meaning of "cruelty". But having regard to common background to these offences it has to be taken that the meaning of "cruelty" or "harassment" is the same as prescribed in the Explanation to Sec. 498-A under which "cruelty" by itself amounts to an offence. *Satish Kumar Batra and Ors. v. State of Haryana.*, AIR 2009 SC 2180 : 2009 (5) SCR 451 (SC) : 2009 (12) SCC 491 : 2009 (5) JT 403 (SC) : 2009 (5) Scale 280 (SC) : 2009 (3) SLT 379 (SC) : 2009 CrLJ 2447 (SC) : 2009 (2) JCC 1341 (SC).

Accused persons can be convicted under Section 498-A even if a charge under Section 304-B fails. On reappraisal of the evidence on record in the considered opinion of this Court there being no clear, cogent and credible evidence on record with regard to death of the deceased by any burn or bodily injury otherwise than the normal circumstances and also the deceased was subjected to torture by the appellants for non-fulfillment of their demands of dowry and much less being the evidence that any torture had any live link to the death of the deceased. In such premises, the judgment of conviction recorded by the trial Court in this case appears to be indefensible and as such liable to be set aside.—*Khetramohan Panda and Ors. vs. State of Orissa*, 2010 (1) Cri LJ 498 (Orissa).

27. Cruelty, soon before death of deceased.—There was an unrelenting demand for dowry and Asha Devi-deceased was persistently subjected to cruelty and harassment for and in connection with the demand. Both her parents and her brother deposed before the Court that Appellant had once again raised his demand when he had gone to their house to bring deceased to his place. Their inability to meet his demand had caused him annoyance and anger. Asha Devi was naturally apprehensive and was very reluctant to go with him. But they somehow prevailed upon her and made her depart with him. There is thus direct and positive evidence of her being subjected to harassment. There is nothing to show that after she was brought to the appellants' place and till her death merely about two months later the situation had radically changed, the demand of dowry had ceased and relations had become cordial between the deceased and three appellants. In the facts and circumstances of the case, we are satisfied that in connection with the appellants' demand for dowry deceased was subjected to cruelty and that was the proximate cause of her homicidal death. *Deen Dayal vs. State of Uttar Pradesh*, AIR 2009 SC 1238 : 2009 CrLJ 1119 : 2009 (1) Crimes 243 (SC) : 2009 (11) SCC 157 : 2009 (1) JT 170 : 2009 (1) SCR 56 : 2009 (1) Scale 408 : 2009 (1) SLT 341 : 2009 (1) JCC 540.

Soon before death must be proved. To allow the benefit of doubt to the Appellants having particular regard to the fact that except for certain bald statements made by mother and brother of deceased alleging that the victim had been subjected to cruelty and harassment prior to her death, there is no other evidence to prove that the victim committed suicide on account of cruelty and harassment to which she was subjected just .prior to her death, which, in fact, are the ingredients of the evidence to be led in respect of Section 113-B of the Indian Evidence Act, 1872, in order to bring home the guilt against an accused under Section 304-B, IPC.

In order to hold an accused guilty of an offence under Section 304-B, IPC, it has to be shown that apart from the fact that the woman died on account of burn or bodily injury, otherwise than under normal circumstances, within 7 years of her marriage, it has also to be shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Only then would such death be called "dowry death" and such husband or relative shall be deemed to have caused the death of the woman concerned.

In this case, one other aspect has to be kept in mind, namely, that no charges were framed against the Appellants under the provisions of the Dowry Prohibition Act, 1961 and the evidence led in order to prove the same for the purposes of Section 304-B, IPC was related to a demand for a fan only.

In *Biswajit Halder's @ Babu Halder vs. State of W.B.*, 2008 (1) SCC 202 = 2007 AIR SCW 2189, was rendered in almost similar circumstances. In order to bring home a conviction under Section 304-B, IPC, it will not be sufficient to only. lead evidence showing that cruelty or harassment had been meted out to the victim, but that such treatment was in connection with the demand for dowry. In our view, the prosecution in this case has failed to fully satisfy the requirements of both Section 113-B of the Evidence Act, 1872 and Section 304-B of the Indian Penal Code. *Durga Prasad & Anr. vs. State of M.P.*, 2010 (3) CrLJ 3419 (SC).

28. "Husband"—Need not be legally wedded person.—Word "husband" in Sec. 498-A is not limited to cover only those persons who have entered into legally valid marriage. The thrust of the offence under Sec. 498-A is subjecting of the woman to cruelty. Likewise, the thrust of the offence under Sec. 304-B is also the "Dowry Death". Consequently, the evil sought to be curbed are distinct and separate from the persons Committing the offending acts and there could be no impediment in law to liberally construe the words or expressions relating to the persons committing the offence so as to rope in not only those validly married but also any one who has undergone some or other form of marriage and thereby assumed for himself the position of husband to live, cohabitate and exercise authority as such husband over another woman.

The purpose for which Secs. 498-A and 304-B, I. P. C. and Sec. 113-B of the Evidence Act, 1872 were introduced cannot be lost sight of. Legislations enacted with some policy to curb and alleviate some public evil rampant in society and effectuate a definite public purpose or benefit positively requires to be interpreted with certain element of realism too and not merely pedantically or hyper-technically. The obvious objective was to prevent harassment to a woman who enters into a marital relationship with a person and later on, becomes a victim of the greed for money. Can a person who enters into a marital arrangement be allowed to take a shelter behind a smokescreen to contend that since there was no valid marriage the question of dowry does not arise. Such legalistic niceties would destroy the purpose of the provisions. Such hairsplitting legalistic approach would encourage harassment to a woman over demand or money. The nomenclature 'dowry' does not have any magic charm written over it. It is just a label given to demand of money in relation to marital relationship. The legislative intent is clear from the fact that it is not only the husband but also his relations who are covered by Sec. 498A. Legislature has taken care of children born from invalid marriages. Sec. 16 of the Marriage Act deals with legitimacy of children of void and voidable marriages. Can it be said that legislature which was conscious of the social stigma attached to children of void and voidable marriages closed eyes to plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship. If such restricted meaning is given, it would not further the legislative intent. On the contrary, it would be against the concern shown by the legislature for avoiding harassment to a woman over demand of money in relation to marriages. It would be appropriate to construe the expression 'husband' to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerce her in any manner or for any of the purposes enumerated in the relevant provisions (Secs. 304-B/498-A), whatever be the legitimacy of the marriage itself for the limited purpose of Secs. 498-A and 304-B, I. P. C. Such an interpretation, known and recognized as purposive construction has to come into play in a case of this nature. *Koppisetti Subbharao alias Subramaniam v. State of A. P.*, AIR 2009 SC 2684 : 2009 (7) SCR 157 (SC) : 2009 (12) SCC 331 : 2009 (4) SLT 687 (SC) : 2009 (6) JT 212 (SC) : 2009 (6) Scale 528 (SC) : 2009 (3) Supreme 688 (SC) : 2009 CrLJ 3480 (SC) : 2009 (4) JCC 3061 (SC).

29. Dowry Prohibition Act.—The accused married Kantaben (deceased). Soon after two years of his marriage, the accused started in flicting mental and physical torture on her and she was taunted by the accused for not bringing sufficient dowry in the marriage. He also demanded from the victim an amount of Rs. 40,000/- for the purpose of purchasing a house. He even wrote letters to the in-laws and demanded Rs. 40,000/- for purchasing the house. The demand was persistent. Even threats were administered to the deceased and her family members. Thus, the accused inflicted mental and physical torture on the victim which prompted her to commit suicide by burning herself after pouring kerosene on her body. Thus, as per the prosecution case, the appellant has committed the offence punishable under Secs. 498-A and 306 IPC read with Secs. 3 and 7 of Dowry Prohibition Act.

The complaint was given and on the strength of the complaint given by the complainant investigation was carried out. It is pointed about that the accused himself had taken the deceased to the hospital and from his conduct it clearly shows that the accused was not guilty. In essence, it is submitted that the commission of alleged offences has not been established by the prosecution.

The conviction so far as it relates to Sec. 306 IPC, therefore, cannot be sustained in view of the background facts and is set aside. But the materials on record particularly the letters on which specific emphasis has been led by the trial Court and the High Court amply demonstrate the commission of offences punishable under Sec. 498-A IPC and Sec. 3 of DP Act. The convictions are sustained. But the sentence in respect of Sec. 3 of DP Act is reduced to three years. *Kishangiri Mangalgiri Goswami v. State of Gujarat*, AIR 2009 SC 1808 : 2009 CrLJ 1720 : 2009 (4) SCC 52 : 2009 (2) JT 84 : 2009 (2) Scale 31 : 2009 (1) Supreme 491 : 2009 (1) SLT 698.

It is clear from the evidences of the two witnesses, especially the father that the demand of motorcycle and Rs. 25,000/- was made only by the accused and as per the statement of witness the only torture that they give medicine for abortion which has not been found true by the Court below by the doctor.

The conviction of in-laws have not been proved beyond reasonable doubts by the prosecution and accordingly, they are acquitted from the charges made against them under Section 498A of the IPC and their conviction and sentence is set aside.

However, the conviction of the appellant has been proved beyond reasonable doubt by the evidence that he was demanding Rs. 25,000/- for purchasing motorcycle and when the same was not given, he left his wife in the hospital and while she was in hospital, he conducted second marriage. In that view of the matter, his conviction and sentence is maintained. *Raju Mahto vs. State of Jharkhand*, 2010 (3) CriLJ 3362 (Jhar).

Demand of dowry—What is not.—Accused Geeta had no issues and she was insisting the deceased Ratnavva to give her son in adoption to her, to which she refused and so accused No. 4 started ill-treating her. This version is unbelievable, simply because, accused No. 4 has no issues, it does not mean that she same will insist her brother or her brother's wife to give their only son in adoption to her. Even assuming that she has demanded so, it does not mean that is demand of dowry so as to attract the provisions of Section 498-A IPC. *Bhaskar Ramappa Madar vs. State of Karnataka*, 2009 (11) SCC 690 : 2009 CrLJ 2422 : 2009 (2) Crimes 80 (SC) : 2009 (4) JT 640 : 2009 (5) SCR 256 : 2009 (5) Scale 100 : 2009 (3) Supreme 5.

30. Difference between Sec. 306 and 498-A.—One other provision which is relevant to be noted is Sec. 306, IPC. The basic difference between the two Sections i.e. Sec. 306 and Sec. 498-A is that of intention. Under the latter, cruelty committed by the husband or his relations drag the woman concerned to commit suicide, while under the former provision suicide is abetted and intended. *Satish Kumar Batra and Ors. v. State of Haryana.*, AIR 2009 SC 2180 : 2009 (5) SCR 451 (SC) : 2009 (12) SCC 491 : 2009 (5)

JT 403 (SC) : 2009 (5) Scale 280 (SC) : 2009 (3) SLT 379 (SC) : 2009 CrLJ 2447 (SC)
2009 (2) JCC 1341 (SC).

The charges under Sections 306 and 498-A of the IPC are independent of each other. Under Section 498-A of the IPC, the cruelty is committed by the husband and his relations dragging the woman to commit suicide. While under Section 306 of the IPC suicide is abetted and intended [*Giridhar Shankar Tawade vs. State of Maharashtra* 2002 (5) SCC 177 = 2002 Cri LJ 2814, referred to]. However, in the statutory provision under Section 498-A of the IPC, two specific instances have been taken note of in order to ascribe a meaning to the word "cruelty", where explanation (a) involves three specific situations viz. (1) to drive a woman to commit suicide, or (2) to cause grave injury, or (3) to cause danger to life, limb or health, both mental and physical. In explanation (b) there is an absence of physical injury that includes coercive harassment which obviously is equally heinous to match the physical injury, where one is patent, the other one is latent, but equally serious in terms of the provisions of the statute since same would also embrace the attributes of cruelty in terms of Section 498-A of the IPC. *Jamnalal Pande vs. State of MP*, 2010 (1) CrLJ 538 (MP).

31. Harassment of wife and bigamy by husband—Scope.—Section 494, IPC, *inter alia*, requires the following ingredients to be satisfied, namely, (i) the accused must have contracted first marriage; (ii) he must have married again; (iii) the first marriage must be subsisting and (iv) the spouse must be living. Insofar as present case is concerned the appellant's marriage was not subsisting on 02.01.2002 when he is said to have married second time. Pertinently before the High Court, along with reply, the complainant annexed copy of an affidavit filed by Kamaljeet Kaur which states that she was not aware of the divorce proceedings filed by her husband. However, from this affidavit, it is apparent that her husband has obtained a divorce judgment. There is nothing in the affidavit that divorce judgment has been stayed or set aside. On the face of the allegations made in the first information report, therefore, ingredients of the offence under Section 494, IPC are not satisfied. Moreover, in the affidavit there is not a word about demand of dowry or harassment on account of dowry by the appellant. *Pashaura Singh vs. State of Punjab and Anr.*, AIR 2010 SC 922.

Accused treated wife with cruelty for bringing insufficient dowry and also performed another marriage. Statement of witnesses showed that bigamy was in vogue in that place and was recognized as custom.

The proceeding under Section 125 Cr.P.C was compromised between the accused and Sangya Devi wife and at their instance consent order was passed by learned Chief Judicial Magistrate. The learned Sessions Judge has also observed that in view of second marriage of appellant with Sumitra Devi the accused has abetted the suicide of Sangya Devi. Sangya Devi was aware of the marriage of Sumitra Devi with accused and the fact that the accused had married second time with Sumitra Devi has been pleaded in the maintenance application. The maintenance application was prepared on 25.5.1999 and Sangya Devi had committed suicide in the intervening night of 26/27.08.1999. Therefore, it cannot be said that second marriage of accused with Sumitra Devi is the immediate cause of committing suicide by Sangya Devi and in other words by second marriage the accused had abetted suicide of Sangya Devi.

It has come on record that in the area to which the accused and Sangya Devi belong, it is not uncommon for a male to solemnize more than one marriage. Psyche of individual is influenced by the culture of the society in which he or she lives. PW-2 Shyama Nand aged 82 years who remained member of Gram Panchayat has stated that bigamy is prevalent in Kinnaur District and is recognized by custom as well. It is thus clear that for a male to have more than one wife was a part of custom and culture of the society of accused and deceased. In these circumstances, it cannot be said that the second marriage of the accused was the cause for Sangya Devi to commit suicide and for this reason appellant cannot be blamed to have abetted the suicide of Sangya Devi. The prosecution has not brought on record evidence so as to bring the case within the ambit of abetment as provided in Section 107 IPC. *Surendra Kumar vs. State of HP*, 2010 (2) CriLJ 1356 (HP).

Accused husband subjected victim, second wife, to physical and mental torture and attempted to kill her. Evidence of witnesses that accused used to beat victim under influence of liquor.

Initially the defence case was that the victim had herself poured kerosene oil. However, the suggestion was changed during the cross-examination of the victim. I have already mentioned earlier that the victim was given a suggestion that kerosene oil fell on her body accidentally in the midst of scuffle. Strangely, while giving statement under Section 313, Cr.P.C., accused neither pleaded that the victim had herself poured kerosene oil to make out a false case or that the said petroleum product had accidentally fell on her body.

Be that as it may a good number of independent witnesses from the locality have deposed in chorus that the victim came running to the house of P.W. 3 and was found terrified and reported that her husband had attempted to kill her by setting her afire. No prosecution witness was given any suggestion that he or she was giving a tainted testimony due to any enmity or grudge against the accused. At any rate, the suggestion given to the victim that kerosene oil fell on her body in the midst of scuffle is somewhat an admission of the accused and the same can be considered as corroborative evidence under Section 21 of the Evidence Act, 1872.

In the cross-examination, has deposed that she herself was tortured by her step-mother and that she did not have good relation with her. In my considered opinion, this might be the reason for giving a twisted testimony to defend her father. I am also of the view that the defence story of pouring kerosene oil just to teach a lesson to the husband, who was already in an angry mood and physically powerful, is inconceivable. In ordinary course, in such a situation, a battered and mentally week woman would run for cover instead of challenging a physically sound and intoxicated person.

Section 307, I.P.C. relates to the offence of attempted murder. Under this provision of law, if any act is done with such intention or knowledge that the act was likely to cause death, if not prevented or intercepted, it would constitute the offence of attempt to murder. In the case before me, large quantity of kerosene oil, was poured on the body of the victim woman. Had the appellant been successful to ignite the wearing apparels of the victim there would have been every possibility of her death. Hence, conviction of the appellant under Section 307, I.P.C., having based on evidence does not call for interference. *Sri Maran Nama vs. State of Tripura*, 2010 (2) CriLJ 1594 (Gau).

32. Circumstantial evidence.—The accused did not make an effort to save th deceased but was shown to have been abusing the deceased and his relatives, tried t prove his innocence by manipulating records of a nursing home. The obvious attemp was to show that he could not have looked after the treatment of the wife as he himse was undergoing treatment. Several other factors throw considerable light relating to th absence of any material to show that a stove had burst which resulted in causin injuries on the body of the deceased. Unfortunately, the High Court did not eve analyse the circumstances but came to an abrupt conclusion that the circumstances d not constitute a complete chain.

As noted above, the circumstances point to only one conclusion, *i.e.* guilt of th accused. The judgment of the High Court impugned in this appeal is set aside and tha of the trial Court is restored. The Respondent shall surrender to custody forthwith t serve remainder of sentence if any. *State of West Bengal vs. Dipak Halder*, AIR 2009 S 1883 : 2009 (2) Crimes 484 (SC) : 2009 (7) SCC 288 : 2009 (7) JT 444 : 2009 (7) Scal 596 : 2009 (8) SCR 530 : 2009 (5) SLT 282.

33. Dying declaration—When reliable.—Prosecution case that husband an appellant, wife of brother of husband demanded dowry and subjected deceased t torture in that connection after the marriage. Allegations that there was illic relationship between appellant and husband of deceased. While in hospital, decease disclosed before her parents and other relatives that appellant not only poured th kerosene oil on deceased and lit fire but also closed the door after going out of the sai room where the deceased was left to burn by the fire.

The judgments of the Courts below clearly indicate that endorsements at the tim of the admission of the deceased in Dhenkanal Hospital made in Ext. A as well as i Cuttack Hospital made in Ext. 9 indicate that the cause of injury received by the patien was mentioned to be an accident due to bursting of stove, but that the sai endorsements do not indicate nor the evidence of witnesses adduced during the cours of the trial show that the aforesaid endorsements were recorded on the basis of th statements made by the deceased. On the other hand it is indicated therefrom that Be Head Ticket (Ext. 9) proves and establishes that on 09.02.2000, as per the history give by the deceased herself the treating physician had endorsed that it was a case c homicidal burn due to ignition caused by spilling of kerosene. Further, though n specific endorsement has been made on the dying declaration but there i contemporaneous evidence in the form of Ext. 9/1 which makes it clear that the Docto recording the dying declaration had recorded that the patient was oriented to time an place and mentally clear at the time of recording of the dying declaration.

We have scrutinized the contents of the recorded dying declaration which wa recorded by the doctor of the hospital where the deceased was treated for her bur injuries. On going through the same we find no infirmity in the said dying declaratio as the said dying declaration vividly mentions the manner in which the decease suffered the burn injuries on pouring kerosene oil on her by the appellant who als lighted the matchstick which caused the fire and burnt the deceased. The appellant nc only poured the kerosene oil on the deceased and lit the fire but also closed the doc after going out of the said room where the deceased was left to burn by the fire. Th said description given by the deceased in the dying declaration recorded by the doctor i clear, unambiguous and there is no reason why we should not accept the said dyin declaration as correct and true version of the incident.

The objections raised by the Counsel appearing for the appellant which are of technical nature with regard to recording and admissibility of the aforesaid dying declaration. We are however, of the considered opinion that the said dying declaration recorded by the doctor is also corroborated by the oral dying declaration made before PW-1 and PW-3 and the said fact also finds corroboration from the statement of PW-1 and PW-3 and also from the FIR which were proved through the evidence of PW-1.

The aforesaid principles which are laid down are fully applicable to the facts of the present case as in this case the dying declaration was recorded by a doctor who was most disinterested witness. It was also categorically stated by the doctor that at the time when she made her dying declaration, she was in a fit state of mind.

Both the Courts were totally justified and also right in relying upon the two dying declarations one recorded by the doctor (PW-10) and the other *i.e.* oral dying declaration made to PW-1 and PW-3. The two technical objections which were raised by the Counsel for the appellant, one regarding the doctor's certification and endorsement as to mental fitness of the deceased, the same was held by this Court to be a rule of prudence and not the ultimate test as to whether or not the said dying declaration was truthful or voluntary.

The doctor who recorded the dying declaration was examined as a witness and he had in his deposition categorically stated that the deceased while making the aforesaid statement was conscious and in a fit mental condition to make such a statement. The aforesaid position makes it, therefore, clear that the aforesaid dying declaration could be relied upon as the same was truthfully recorded and the said statement gave a vivid account of the manner in which the incident had taken place.

Therefore, taking an overall view of all the facts and circumstances of the case and the evidence on record, we find no ground to interfere with the order of conviction and sentence recorded by the trial Court and confirmed by the High Court holding the appellant guilty of the offence under Sec. 302 IPC. *Sukanti Moharana vs. State of Orissa*, 2009 (3) Crimes 271(SC) : 2009 (9) SCC 163 : 2009 (9) JT 697 : 2009 (10) Scale 246 : 2009 (11) SCR 996 : 2009 (5) Supreme 636 : 2009 (4) JCC 2585.

34. Investigation—Slip-shod investigation.—Under Sec. 157 Criminal Procedure Code, the copy of the FIR has to be sent to the Magistrate. This never happened. However, seen from the records, this FIR reached the Magistrate only on 22.06.1994. This is extremely suspicious. In his deposition, the Investigating Officer proved that the FIR was chalked out in writing by Maheshwari Mandal, the SHO. Very significantly, this SHO or any other officer never examined the house thoroughly nor have they examined the inner rooms for ascertaining as to whether the doors and the latches were intact or not. This was a typical dumb investigation. Investigating Officer has not even bothered to draw a spot Panchnama. Though he stated that the accused were not present, he did not suggest any efforts having been made for their arrest. In his cross-examination, he admitted that in the case diary, he had not recorded as to which officer received information in the police station or was it mentioned in the case diary as to which lady was referred to in the telephonic information. Even the name of the informer was admittedly not there in the case diary. Specific questions were put as to whether he inspected the rooms at the place of occurrence or not. He admitted that it was not so recorded in the case diary. Even the time of sending the dead body for post-mortem was not mentioned. He admitted that when he reached the spot, neither the accused nor his parents were present. Then he asserted that their luggage was there. It is ver significant to note that he admitted that Anil Kumar had not stated about the time o occurrence nor did he state the fact of beating Sushma with fists and slaps. Ver significantly, he admitted that Anil Kumar had not stated about this meeting with Om Prakash Vidyalankar on the way. He had also not stated that his sister was murdere on account of not giving the colour television and motor cycle. He further admitted tha Anil Kumar (PW-1) had not stated that his father had told him while he went for tuitio that some articles were to be delivered to his sister. The witness admits "on enquiry b us, he remained silent".

The investigating agency would have done well in examining at least th neighbours but that does not seem to have been done. DW-2 was also a neighbour i the sense that she stayed very near to the house of the deceased. It is not known as t why the Investigating Officer did not examine neighbours, one of whom was the relativ of the deceased. The apathy on the part of the Investigating Officer to examine th house closely creates suspicion. This is an unfortunate case where due to the slip-sho investigation the death of a young woman has to go unpunished.

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35. Cruelty and harassment—Elements of.—Cruelty has been defined by th explanation added to the Section itself. The basic ingredients of Section 498-A IPC ar cruelty and harassment. The elements of cruelty so far as Clause (a) is concerned, hav been classified as follows :

(i) any 'wilful' conduct which is of such a nature as is likely to drive the woma to commit suicide; or

(ii) any 'wilful' conduct which is likely to cause grave injury to the woman; or

(iii) any 'wilful' act which is likely to cause danger to life, limb or health, whether physical or mental of the woman.

For the purpose of Clause (b) the essential ingredients are as under :

(I) The harassment of a married woman.

(II) With a view to coercing her or any person related to her to meet the unlawful demand of dowry or for any property or valuable security or on account of her failure or failure of any person related to her to meet such a demand.

Therefore, it is evident that the charge under Section 498-A can be brought home i the essential ingredients either in Clauses (a) or (b) or both are found duly established. *Undavali Narayana Rao vs. State of Andhra Pradesh*, 2009 (3) Crimes 265 (SC) : 2009 (9) JT 573 : 2009 (10) Scale 125 : 2009 (5) Supreme 608 : 2009 (11) SCR 660 : 2009 (6) SLT 795.

36. Inherent Powers.—Complainant and accused had entered into registered agreement of divorce as per custom. The customary divorce may be legal or illegal. The fact that such an agreement had been entered into or the appellant had received a sum by way of permanent alimony, however, stands admitted. The document is a registered one. Appellant being in the legal profession must be held to be aware of the legal implication thereof. If the contents of the said agreement are taken to be correct. indisputably the parties had been living separately for more than ten years. How then a case under Sec. 498A of the Indian Penal Code can be said to have made out and that too at such a distant point of time is the question, particularly in view of the bar of limitation as contained in Sec. 468 of the Code of Criminal Procedure. Even otherwise it is unbelievable that the appellant was really harassed by her husband or her in-laws.

We are not oblivious of the fact that there does not exist any period of limitation in respect of an offence under Sec. 494, as the maximum period of punishment which can be imposed therefor is seven years.

But no allegation has been made out in regard to commission of the said offence so far as the respondents are concerned. If even for exercising its jurisdiction under Sec. 482 of the Code of Criminal Procedure, the High Court has taken into consideration an admitted document, we do not see any legal infirmity therein. If it is a case of customary divorce, the question in regard to the existence of good custom may have to be gone into in a civil proceeding. But a criminal prosecution shall not lie. It was initiated *mala fide*. Thus, it is allowed to continue, the same shall be an abuse of the process of court. *M. Saravana Porselvi v. A. R. Chandrasekar and Ors.*, AIR 2008 SC 2462 : 2008 (9) SCR 937 (SC) : 2008 (11) SCC 520 : 2008 (7) JT 245 (SC) : 2008 (9) Scale 411 (SC) : 2008 (4) Supreme 7 (SC) : 2008 CrLJ 3034 (SC) : 2008 (2) Crimes 301 (SC) : 2008 (3) JCC 1597 (SC) : 2008 (3) Recent CR 454 (SC).

37. Complaint for Cruelty—Taking cognizance.—Limitation for taking cognizance is three years. Complaint filed beyond period of three years was barred by limitation. *Satish alias Rajendra Harbans Tiwari & Ors vs State of Maharashtra & Anr.*, 2010 (4) CriLJ 4089 (Bom).

38. Matrimonial cruelty.—In the context of offence of "matrimonial cruelty" one has to consider family status of the parties. The deceased was well educated, sensitive and newly married young woman. The incident of frequent beatings, denial of conjugal rights, returning of the husband to home under spell of liquor and that he had kept a mistress, considered together, would indicate that the sensitive woman was unable to bear with the regular trouble. The accused husband could have gathered her mental state when she had once attempted to self inflict injuries to her palms. Even so, he continued to tell her to die. This is the conduct which is no short of matrimonial cruelty of high degree as contemplated under sub-clause (a) of S. 498-A of the Penal Code. *Sanjay Baburao Pathrale v. State of Maharashtra*, 2009 CriLJ 2165 (Bom).

39. Past ill-treatment.—In the matter at hand cause of death of wife is fact in issue. Relatives claim deceased to have made a statement that husband demanded Rs. 50,000/-. But, it is not the case of prosecution, which mainly relies upon the two dying declarations and the oral dying declaration that soon before the incident of burning there were expressions on the part of the husband which could relate his annoyance the spur of moment to demand Rs. 50,000/- for the purposes of purchasing motorcyc and the demand of Rs.50,000/- or ill-treatment, if any, on that count to which deceas was subjected during two years preceding the death, therefore, cannot be termed "cause of her death" or "circumstances of the transaction which resulted in her death All the claims of the relatives of this past ill-treatment, therefore, cannot be admissib pieces of evidence and the prosecution, therefore, cannot rely upon that evidence f bringing home the guilt under Section 498A of I.P.C. *Shivkumar Maruti Umardand State of Maharashtra*, 2009 CriLJ 2549 (Bom).

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CHAPTER - XXI

OF DEFAMATION

Sec. 499. Defamation.—Whoever by words; either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1.—It may amount to defamation to impute anything to a deceased person. If the imputation would harm the reputation of that person, if living, and is intended to be hurtful to the feeling of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alter-native or expressed ironically, may amount to defamation.

Explanation 4.—No imputation, is said to harm a 'per-son's reputation. unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in loathsome state, or in a state generally considered as disgraceful.

Illustrations

(a) *A* says.—"*Z* is an honest man ; he never stole *B*'s watch" ; Intending to cause it to be believed that *Z* did steal *B*'s watch. This is defamation, unless it falls within one of the exceptions.

(b) *A* is asked who stole *B*'s watch. *A* points to *Z*, intending to cause it to be believed that *Z* stole *B*'s watch. This is defamation, unless it falls within one of the exceptions.

Imputation of truth which public good requires to be made or published.—*First exception.*—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation shall be made or published. Whether or not is for the public good is a question of fact.

Public conduct of public servants.—*Second Exception.*—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his functions, or respecting his character, so far as his character appears in that conduct, and no further.

Conduct of any person touching any public question.—*Third Exception.*—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, In voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Publication of reports of proceedings of Courts.—*Fourth Exception.*—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation.—A Justice of the Peace or other officer holding an inquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Merits of case decided in Court or conduct of witnesses and others concerned.—*Fifth Exception.*—It is not defamation to express in good faith any opinion whatever, respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Illustrations

(a) *A* says.—"I think *Z's* evidence on that trial is so contradictory that he must be stupid or dishonest". It is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects *Z's* character as It appears In *Z*s conduct as a witness, and no further.

(b) But if *A* says.—"I do not believe what *Z* asserted at the trial because I know him to be a man without veracity". *A* is not within this exception, inasmuch as the opinion which he expresses of *Z's* character. Is an opinion not founded on *Z's* conduct as a witness.

Merits of public performance.—*Sixth Exception.*—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations

(*a*) A person who publishes a book, submits that book to the judgment of the public.

(*b*) A person who makes a speech in public, submits that speech to the judgment of the public.

(*c*) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(*d*) A says of a book published by *Z*—'*Z's* book is foolish ; *Z* must be a weak man. Z's book is indecent ; *Z* must be a man of impure mind". *A* is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses of *Z* respects *Z's* character only so far as it appears in *Z's* book, and no further.

(*e*) But if *A* says—I am not surprised that book is foolish and indecent, for he is a weak man, a libertine". *A* is not within this exception, inasmuch as the opinion which he expresses of *Z*s character is an opinion not founded on *Z*s book.

Censure passed in good faith by person having lawful authority over another.—*Seventh Exception.*—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration

A judge censuring in good faith the conduct of a witness, or of an offence of the Court, a head of a department censuring in good faith those who are under his orders : a parent censuring in good faith, a child in the presence of other children : a school-master, whose authority is derived from a parent, censuring in good faith, a pupil in the presence of other pupils ; a master censuring a servant in good faith for remissness in service ; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

Accusation preferred in good faith to authorised person.—*Eighth Exception.*—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration

If A in good faith accuses Z before a Magistrate ; if A in good faith complains of the conduct of Z, a servant, to Z's master ; if A in good faith complains of the conduct of Z, a child to Z's father—A is within this exception.

Imputation made in good faith by person for protection of his or other's interests.—*Ninth Exception.*—It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Illustrations

(a) *A*, a Shopkeeper, says to *B*, who manages his business.—"Sell nothing to *Z* unless he pays you ready money, for I have no opinion of his honesty". *A* is within the exception, if he has made this imputation on *Z* in good faith for the protection of his own interests.

(b) *A*, a Magistrate, in making a report to his own superior officer, casts an Imputation on the character to *Z*. Here, if the imputation is made in good faith, and for the public good. *A* is within the exception.

Caution intended for good of person to whom conveyed or for public good.—*Tenth Exception.*—It is not defamation to convey a caution, in good faith to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Synopsis

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1. Principle.—"The offence of defamation, as it is defined in this Code, consists in the injury offered to reputation, not in any breach of the peace or other consequence that may result from it. The essence of the offence consists in its tendency to cause that description of pain, which is felt by person who knows himself to be the object of the unfavourable sentiments of his fellow creatures and those inconveniences to which a person who is the object to such unfavourable sentiments is exposed. No distinction is made between written and spoken defamation. The offence is committed whether the words are spoken, written, printed or engraved, or in whatever manner the words, signs, or visible representations conveying the imputations are expressed".— *Morgan and Macpherson.*

2. Scope.—In criminal prosecution question whether statement is made on privileged occasion is to be decided with reference to Section 499. AIR 1931 Rang 83 : 32 Cr LJ 934 : 1931 Cr C 371 : 132 Ind Cas 553. Defamation in civil and criminal law is quite distinct. 128 Ind Cas 371 : 32 Cr LJ 132 : 8 Rang 359 : AIR 1931 Rang 81. Mere assenting to a third party's report of what one had said may be defamation. 85 Ind Cas 361 : 26 Cr LJ 521 : AIR 1925 Mad 320 : 47 MLJ 746. Defamatory statements by a party to a civil proceeding is punishable. 16 SLR 150 : 84 Ind Cas 58 : 26 Cr LJ 234. But Courts should be careful when a complaint of defamation is filed with respect to proceedings in a Civil Court to see whether the provisions of Section 209. Cr. Pro. Code, generally have not been evaded. 86 Ind Cas 1005 : 26 Cr LJ 941. Statements in course of judicial proceedings as such have no absolute privilege. 84 Ind Cas 977 : AIR 1925 Rang 15. Publishing an imputation intending to harm and knowing and having reason to believe, that such imputation would harm the complainant's reputation is enough. 27 Cr LJ 868 : 22 Bom LR 1224. The rules of the English common law apply to question of civil liability for defamation in India, but criminal liability is determined exclusively by the Penal Code. A defamatory statement whether on oath or otherwise, or contained in a plaint falls within Section 499, and is not absolutely privileged. 7 Pat LT 587 : 40 Cal 438 : 48 Cal 388 : 24 ALJ 329 : 92 Ind Cas 429 : 97 Cr LJ 253. A person may be defamed by scurrilous attack on his wife's character. AIR 1949 Cal 567 : 50 Cr LJ 972.

When defamatory questions are put to a witness by the advocate of the accused a complaint against him is premature when the case is still pending. 48 Cr LJ 997 : AIR 1948 Pat 56. The prosecution under Section 171-G, is not obligatory when the offence committed is also one under Section 600. AIR 1940 Nag 249 : 44 Cr LJ 734 : IL 1942 Nag 208. Where a notice published in the newspaper contained an imputation that the complainant has been dishonest in the management of the affairs of a company and was trying to conceal that dishonesty by methods that were themselves dishonest, the imputation is defamatory. 97 Ind Cas 431 : 27 Cr LJ 1119. A newspaper is not a person and therefore it is not a criminal offence under Section 499, to defame a newspaper. 99 Ind Cas 347 : 28 Cr LJ 139 : AIR 1927 Rang 43 ; but *see* AIR 1933 All 434 : 34 Cr LJ 926 : 1933 Cr C 740. An imputation of insolvency against a person in the way of his trade is *per se* defamatory. 21 SLR 130 : 98 Ind Cas 124 : 27 Cr LJ 1276 : AIR 1927 Sind 54. Calling a person a discharged, bankrupt and gambler in an affidavit amounts to defamation. 96 Ind Cas 409 : 27 Cr LJ 247 : 1927 Sind 58.

Publication is sufficiently proved when it is shown that the accused did the act which has the quality of communicating to third persons. 27 Cr LJ 1276 : 21 SLR 130 : 98 Ind Cas 124. A plea that though there was publication of the statement, there was no publication to person mentioned in the charge, is a highly technical plea and the defect in the charge is curable under Section 537, Cr. Pro. Code. 96 Ind Cas 496 : 27 Cr LJ 947. Prosecution must make out a case for conviction but the accused must prove that this case comes within the exceptions under Section 105, of the Evidence Act. AIR 1928 Nag 58. Imputation to a Hindu that he is an outcaate is defamatory and is not covered by Section 95. AIR 1928 All 213. There is a distinction between "fair comment" based on well known or admitted facts and the assertion of unsubstantiated facts for comment. Where comment is made on allegations of fact which do not exist, the very foundation of the plea disappears. A wilful misrepresentation of fact or any mis-statement which an editor could have discovered to be a mis-statement if he had made proper enquiries cannot support the plea of "fair comment" as an editor must make due enquiries as to its truth before disseminating the statement of those facts. 116 Ind Cas 99 : 23 SLR 216. Comment based on mis-statement of facts is not protected. AIR 1927 All 116 : 27 Cr LJ 1361 : 98 Ind Cas 481. Editor should make enquiry before publishing defamatory matter. 145 Ind Cas 126 : AIR 1933 All 434 : 34 Cr LJ 926. Truth is not an absolute defence to a prosecution for defamation. 17 NLJ 66 : AIR 1934 Nag 129.

Every defamatory statement not coming within any of the exceptions is punishable under Section 500. None of the exceptions exempts a defamatory statement from punishment on the ground of privilege. AIR 1930 All 623 : 1960 All Cr R 118 : 1960 Cr LJ 1296.

Section 499 makes no distinction between an ordinary citizen and the editor of a newspaper does not enjoy greater freedom in the matter of giving expression to his opinion than an ordinary citizen. ILR (1957) 2 Cal 181 : AIR 1958 Madh Pra 216 : 1958 Cr LJ 1036 (degree of care and caution of the editor of the newspaper) : (19 57) 2 All ER 385. A witness cannot be prosecuted for demotion in respect of statements made by him when giving evidence in a judicial proceeding. This protection is not available to a complainant when he deliberately makes a defamatory statement without the slightest justification. AIR 1955 Punj 142 : 1955 Cr LJ 991 : AIR 1962 MP 241 : 1962 (2) Cr LJ 193.

Publishers, Editors, Journalists and Reporters forming part and parcel of freedom of speech and expression, which no doubt includes freedom of press as well, are entitled to ventilate the views only within the permissible limits, permissible by law and not beyond thereto. They are expected to be careful and cautious while proceeding with publication of the matter and they cannot claim any special privilege as far as the law relating to defamation is concerned. It may be part of their lawful duties, but at the same time they also owe a duty to be careful and diligent in verifying such statements with care and caution before publishing them. Negligent and reckless allegations constituting defamatory statements can never be protected under the guise of any of the Exceptions. At the same time, proof of Exceptions and discharge of burden in relation thereto and the standard of proof required cannot be weighed in golden scales and the discharge of burden in such a case just cannot be equated with that of discharge of burden on the part of the prosecution. It is no doubt true that even in the case of reproduction of article by yet another newspaper, care should be taken to scrutinize the same. *Sultan Salahuddin Owaisi* v. *Syed Vigaruddin*, 2005 Cr LJ 2726 (AP) : 2006(1) ALD (CRL) 190 : 2006(1) AndhLT(Cri) AP 45 : 2005(3) Rec Cri R 874.

A superior officers noting that a subordinate had used objectionable language in the file would not, in any manner, bring the remarks within the ambit of defamation punishable under Section 500, IPC. *M.S. Ahuja* v. *Ami Chand*, 2006 Cr LJ 1503 (P&H).

The members of the Legislative Assembly and of the Parliament are absolutely privileged and they can make with impunity libellous statements while participating in the deliberation of the House and the Court has no jurisdiction to entertain an action in respect of defamatory utterances by them, despite the fact that the statements are grossly defamatory and deliberately false. This privilege, however, does not extend to a statement published by a member outside the House even though it may be a reproduction of what was said during the debate. AIR 1961 Punj 215 : 1961 (1) Cr LJ 710.

Neither ill-will nor malice is an ingredient of the offence of defamation, and absence of either cannot serve as a defence. An unproved plea of injudicious cross-examination of the person aggrieved, and obstinately persisting in the libellous charge withoutany sufficient reason, may be taken into consideration, as evidence of malice. AIR 1961 Punj 215 : 1961 (1) Cr LJ 710.

Intention on the part of the accused to harm the reputation or the knowledge or reasonable belief that the imputation will harm the reputation of the person concerned is an essential ingredient of the offence under the section. 1983 Cr LJ 772 : 1983 Rajdhani LR 58.

Even a Corporation be punished for libel published by its authority. AIR 1926 Ker 264 : 1966 Cr LJ 1299. A wife can complain against her husband in India. AIR 1961 Mad 230.

Mere feeling of involvement cannot constitute a case of defamation and cannot be an actionable wrong. The imputation made in newspaper against president and director of the society cannot be said to be defamatory to the society. Defamatory purpose wil not render the accused person liable if the statement has defamatory significance fo others. *Homen Borgohain* v. *Brahmaputra Valley Regional Handloom Weavers Co operative Society Ltd.*, 1995 GLR 401 (Gau).

In a case where the article published only highlighted ideological differences existing between the members of SF Group and the petitioner and the members of the Christian Fellowship Centre, it was held that the expression of the petitioners view who was having different religious belief did not amount to defamation. *JAC Poonen v. Hedlden Treasure Literature Incorporated in Canada*, 2002 Cri LJ 481 (Kant).

The defamatory imputations against a collections of person thus falls within the definition of defamation. The language of the explanation is wide, and therefore, besides a company or an association, any collection of persons would be covered by it, but such a collection of persons must be an identifiable body so that it is possible to say with definiteness that a group of particular the community, was defamed. Therefore in a case where explanation (2) is resorted to, the in entity of the company or the association or collection of persons must be established so as to be relatable to the defamatory words or imputations. *Zac Poonen, v. Hidden Treasure Literature Incorporated in Canada and another*, 2002 Cri LJ 481. (Kat) : AIR 2002 Kant HCR 33 (Kant) : 2002(2) All Cri LR 771 (Kant).

3. Harm the reputation..—"In order to establish the offence under this section, it is not necessary to prove that actual harm has been caused. It is sufficient to show that harm was intended to the complainant's reputation or that the accused person knew or had reason to believe that the imputations made by him would harm his reputation. 9 Ind Cas 775. If an imputation has no tendency to harm a person in his reputation, it will not amount to defamation although its effect may be to cause that person to suffer in his interest. An imputation which is defamatory when directed against the person, is not necessarily defamatory when directed against another person".—*Morgan and Macpherson.*

The respondent in a letter addressed to his wife was described as her ADC, by the accused who sought protection in a revision from Exception 9 to Section 500, IPC. *Held*, the alleged material contained not the ingredients of defamation and as such its protection is not available to him. (1986) 2 Crimes 564 (Cal).

The expression measure on imputation reaching a third person or rather shown to have reached such a person. 1986 Cr LJ 1121 (Mad) : 1985 LW (Cr) 148.

Imputations in the offending article must be directed against a definite person. Offending article aiming at a particular community in general. No personal injury caused to the complainant—Complaint, *held*, not maintainable. *Vishwa Nath* v. *Shambhu Nath Pandeya*, 1995 Cr LJ 277 (Alld).

The accused, a barrister and the complainant, a pleader, were engaged in a criminal case. The latter made a remark conveying an imputation on the former upon which the former called the latter a liar. *Held*, that even if the expression made use of by the appellant amount to defamation in point of law, the case came under the provisions of Section 95. AWN 1883. 46. The use of common abusive terms does not constitute an offence under the section. AWN 1883. 36. Although the language of Section 499, IPC, is open to the most elastic application, yet Magistrate will act wisely in refusing to adopt it to cases in which no real harm has been done or where civil remedy might more appropriately be sought. AWN 1883, 167. The accused referred to the complainant, who was a *Porsutia Kaisth, as a Kari Chamar* with the result that none of the priests attended the religious ceremony which had to be performed at the complainant's house. *Held,* that the accused were guilty of an offence under this section. 6 Ind Cas 876 : 11 Cr LJ 413. The headman of a caste issued a notice to a member of that caste, intimating that a complaint had been received by the caste that his daughter had committed adultery with a certain person and requiring him to appear before the caste with his daughter in order to clear her character. *Held,* that the notice would not furnish the basis of charge of a defamation, as it contained no imputation by the persons who signed it, against the daughter. Rat Un Cr C 387. Although a person who defames another may so compose himself that little injury results from his offence, yet, he is not accused from the penalties attached to the offence. 1 Weir 594. What the imputation was which a man intended to convey who did not directly express it, and whether he believed or had reason to believe that the imputation should produce a particular sentiment or opinion on the part of those to whom the communication was made are matters of fact, or inference from fact belonging where the judicial functions are divided, to the province of jury. Rat Un Cr C 140. An imputation charging a woman of being pregnant by adultery is defamatory. Rat Un Cr C 474. An expression of opinion by the members of a caste that their caste is superior to another caste is not such an imputation as would warrant a conviction under Section 500, Penal Code. 1 Weir 575. When the question arises whether the words used were intended to harm or had the effect of harming the reputation the Court must be in possession not only of the words used but also of the context in which they were used in order to find the intention and effect of the words. 51 All 313 : 26 ALJ 1334 : 30 Cr LJ 101 : 113 Ind Cas 213 : AIR 1929 All 1. A mere abuse is not ordinarily a defamation but the fact that the words used were those of abuse does not of itself take the article out of the definition of defamation, if, taken as a whole it was calculated to harm the reputation of the complainant. 112 Ind Cas 772 : 30 Cr LJ 4 : 30 Cr LJ 379 : AIR 1929 Lah 234. In the matter of a case under Section 500, when it is said to rest upon allegation made in petition to a Court in determining whether due care was taken by the accused, allowances should be made for the intelligence of the accused, his capacity to reason, the circumstances under which he was placed, and the occasion which necessitated his making the imputation. AIR 1929 Cal 779. The essence of the offence of defamation in the publication of a imputation with the knowledge that it will harm the reputation of the person defamed. AIR 1935 All 743 : 155 Ind Cas 638 : 36 Cr LJ 816 : 1935 ALJ 676 : 1935 Cr C 887 : AIR 1959 Ori 141 : 1959 Cr LJ 1006. A distinction should be made between a statement made by a person in an attempt to praise one's own self and statement calculated to cast reflection on another. A statement in praise, even exaggerated praise of one self, does not necessarily imply a-reflection on some other. What the complainant has to establish is not that the accused have indulged in exaggeration, or even falsehood, in respect of their own position and importance but that the defamatory statement contains an imputation concerning him calculated to harm his reputation. 160 Ind Cas 230 : 37 Cr LJ 258 : 1936 A Cr C 63 : 1936 ALJ 66 : 1936 Cr C 71 : AIR 1936 All 143.

The word "Black-marketeer" used at a public gathering is *per se* defamatory under the section and hence it is not necessary that actual harm should be caused but it was sufficient if it is proved that harm to the reputation of the person was intended. AI 1952 Mys 123 : 1952 Cr LJ 1633.

By the mere use of the words 'dishonest and fraudulent' the accused committed r offence of defamation. For making out an offence of defamation it is necessary that b using certain expressions the intention is to harm the reputation of a certain person c the person using those expressions knew or had reason to believe that such imputatio would harm the reputation of such person. 1953 Raj LW 203.

Reputation is not at all a necessary fact to be proved in a charge under Sectio 500, and hence it does not become a fact in issue. 32 Pat 276 : 1954 Cr LJ 121 : AI 1954 Pat 84.

Journalist of some standing can be presumed to know or have reason to believ that the imputation published by him would harm the complainant's reputation. 196 Ker LJ 1212 : 1961 Ker LJ 1006 : 1962 (2) Cr LJ 142. Article is newspaper alleging tha public servant concerned amassed tidy amount by way of bribe was held to harm th reputation of the public servant and was defamatory of him. 1961 All LJ 967 : 1961 A WR (HC) 770 : 1962 All Cr R 9 : ILR (1962) 1 All 179 : 1962 (2) Cr LJ 520.

The freedom of the journalist is an ordinary part of the freedom of the subject an to whatever length the subject in general may go, so also may the journalist, but apa from statute law, the privilege is not other and no higher. AIR 1962 Ori 197 : 1983 (Crimes 615 : 1973 Cr LJ 1722 (to meet the corrected a liberal standard of criticism tha uniformity guarantees a wide freedom of discussion for every one, as is now available i this country, is absolutely necessary) ; *see* also AIR 1969 Punj 201 (prosecution prove that the accused printed and published the said matters knowing or havir reason to believe that the same was defamatory). It is undisputed that it is the duty an editor of a newspaper to check the news of the information that is supplied to hi before publishing the same in his paper, especially when the news is defamatory. AI 1964 Mani 20.

It is not necessary to prove that actually harm was caused if the words are *prin facie* defamatory and would be sufficient it can be made out that the maker of tl statement knew or had reason to believe that the imputation made by him would har the reputation of the person against whom the imputation is made. 1965 (2) Cr LJ 693

4. Words either spoken or intended to be read, etc.—No distinction exis between written and spoken defamation. 2 WR Cr 36 ; 3 WR Cr 45 ; 8 M 175. T making and publicly exhibiting of the effigy of a person and beating it with sho amounts to defamation. 2 NWP 435.

5. Cases.—A complaint of defamation cannot be dismissed on the technical grou that the offence of defamation charged against the accused merged in an offen punishable under Section 182, for which previous sanction was required under Secti 195. Cr. Pro. Code. 1 Weir 585; 1 Weir 580. Where a defamatory poem was contribut to newspaper and the accused, the Editor, Printer and Publisher of the newspap refused to give up the name of his correspondent, but contended that the poem was satire on *ultra pursuits* and did not refer to any individual, *held*, that the jury must lo at the whole poem and must take it as a whole, and that they must read the poem reasonable men, and should *see* whether it was capable of the construction put by t prosecution. *Held*, also that it was necessary that the whole world should read it as lil but, it is sufficient that those who knew the accused would consider it refer to the complainant by putting reasonable construction on the poem. 1 CWN 465. The Indian Penal Code, makes no exception in favour of a second or third publication of a defamatory statement as compared with the first. Such an exception would obviously be made a means of defeating the principal provisions of the law of defamation. 12 Bom 167. In reply to a book written by the complainant attacking *Vaisnavism* and its Founders, the accused resorted by a similar publication and both books dealt with highly controversial religious matters. Very violent language was used in the latter about the complainant. *Held*, it did not amount to defamation, as the personal character or responsibility of the complainant was not in any way assailed. 47 MLJ 664 : 1924 Mad 898 : 1924 MWN 768. Where the articles in question described the girls in a particular college that they were habitually misbehaving. *Held*, that the inevitable effect on the reader must be make believe that it was habitual with the girls of the college to behave in this way ; that being so all the girls in the college individually must suffer in reputation and not a complaint by some of them was competent. AIR 1935 All 743.

The process was issued mechanically without *prima facie* finding out against each of the accused persons. Mere allegation of their presence during second marriage is not enough. Hence summoning order set aside. *Suresh* v. *State of Maharashtra*, 1995(3) Crimes 646 (Bom) : 1996 Cr LJ 1782 : 1995(3) CCR 180 : 1995 Cr R 750 (Bom)

When a person is having sufficient balance with the concerned bank account and yet if the cheque is dishonoured it cannot be disputed to be anything less than defamation unless at trial accused makes out a case of some genuine honest, *bona fide* mistake. *J.V. Ganatra* v. *Rameshchandra Nathalal Machchhar*, 1994(2) GCD 587 (Guj).

The news item about the insufficiency of sandalwood pieces at the cremation of the prescribed of the party has not affected the reputation of the first respondent either in his personal capacity or as a member of the National Party. As the alleged defamatory statement refers to unidentified party-leaders in Delhi and as it does not refer to any definite and determinate person or persons, it is indeed difficult to hold that the first respondent is in any way aggrieved by it. The first respondent has no locus *standi* to file the complaint against the news item regarding some event which happened at New Delhi. *Karunakaran* v. *C. Jayasooryan*, 1992 Cr LJ 3540 at 354 L, 3541 (Ker).

In order to bring defamatory imputation within the meaning of Section 499 of the Indian Penal Code, ill will or malice on the part of the writer or publisher is not necessary to be proved. The complainant also need to prove that he suffered on account of the publication. It is enough if it is shown that the accused intended or knew or at least had reason to believe that the defamatory imputation made by him would harm the reputation of the complainant. *M.P. Narayana* v. *M.P. Chako*, 1986 Cri LJ 2002 (Kerala). *Dhyandevrao L Waghmode* v. *Allaabuksh Gulab Nadab* 1999 Cri LJ 1754 (Bom).

6. Intention.—The essence of the offence is the intention or knowledge of the offender that the imputation may harm some person's reputation. Where no such intention or knowledge exists, the offence of defamation is not committed. The journeyman printer may be acquitted of defamation on the ground that in setting the types for printing defamatory matter and so aiding towards the circulation thereof, he had not the intention described in the definition, while the person who wrote the defamatory matter, for printing which the journeyman ignorantly set the types, may h convicted, because it may be clear that his purpose was to defame".—*Morgan an Macpherson*, 442. It is not necessary to constitute an offence under this section tha there should be evidence to show that the complainant has been injuriously affected b such alleged defamation. The law requires merely that there should be an intent an the person, who makes or publishes any imputation, should do so intending to harm o having reason to believe that such imputation will harm the reputation of such person 28 Cal 63 : 5 CWN 819 : 1 Weir 575 : 6 NWP 66 : 21 Ind Cas 478 : 14 Cr LJ 606 : 8 Ind Cas 503 : 22 Bom LR 1224 : 59 Ind Cas 202 : 22 Cr LJ 58 : 43 Ind Cas 403 : 19 C LJ 115.

No actual harm is necessary. AIR 1952 Pepsu 165 : 1952 Cr LJ 1553. AIR 195 Mys 128 : 1952 Cr LJ 1633. Malice is answer to the fair comment and if there was n *prima fercie* case of libel at all, any proof of libel is irrelevant. (Gour : Penal Code, 10th Ed. 4th Vol. page 4137).

Where defamatory statement is made on a privileged occasion the complainan must show malice in fact. 7 CWN 246 ; 11 CWN 390. Qualified privilege in a conditiona defence. The immunity is forfeited by abuse of the occasion 1983 Cr LJ 48.

The gist of offence of defamation lies in lowering down of reputation of perso concerned or his family in estimation of others. Accused sent closed letter of a perso concerned who read it herself. Thus the accused cannot be said to have intended t lower the reputation of accused in estimation of others. *(Smt.) Anju Kulshrestha* v *Harvijai Singh*, 1995 (32) ACC 227 (All).

7. Makes or publishes any imputation concerning any person.—In a case o defamation it must be proved that an alleged libel was made or published. 27 Mad 238 The defamatory matter must be published, *i.e.*, it must be communicated to som person other than the person to whom it is addressed. 1 Weir 579 ; 7 CWN 74 : 30 Ca 402. Publication involves the communication of it to some person other than the perso defamed. AIR 1943 Sind 196 : 45 Cr LJ 105 : 209 IC 834 ; AIR 1941 Pat 9 : 41 Cr L 814 ; AIR 1935 Cal 736 : 37 Cr LJ 133. Where a person sends a notice in closed cove containing defamatory matter about the recipient of the notice, but which is no communicated by the writer to any other person it is not such a making or publicatio as could harm the prosecution in the sense given to that word in Explanation 4. 7 A 205 (FB) : AWN 1884, 340 ; 18 Bom 205 , 159 Ind Cas 527 : 61 Cr LJ 205 : 1935 Cr 1188 : AIR 1935 Cal 736. But it cannot be laid down as a general rule that in no cas can a defamatory statement contained in a communication addressed to the perso defamed justify a conviction. The only rule is that there can be no offence of defamatio unless the defamatory statement is published or communicated to a third party, that is to a party other than the person defamed. The question whether there is suc publication or not is one of fact and the question may be decided either by direc evidence or on the circumstances of the case. 1937 ALJ 128 : 169 Ind Cas 622 : 38 C LJ 806 : 1937 AWN 77. Having over manuscript to the printer for being printed i publication. 1 Weir 579. The dictating of a defamatory letter to a third person woul amount to publication. 1 Weir 579. In order to sustain a charge under Section 499, it i not material whether the accused originality intended to publish the defamatory matte or not. It is sufficient that he ultimately publishes it. 1 Weir 580. The sending of newspaper, containing defamatory matter published in Calcutta by post, addressed to person in Allahabad is a publication of the defamatory matter in the latter place. 3 All 342. When a defamatory petition presented to superior public officer is sent to a subordinate officer for inquiry there is a publication of the defamation in the place where the latter may receive the petition. 14 PR 1899 Cr. Filing in Court a petition containing imputations against a person calculated to injure his reputation with intention that other persons should read it amounts to making or publishing the imputation within Section 499, Penal Code. 14 WR Cr 27. Where a person to whom a claim is presented by a legal practitioner on behalf of his client, in replying exceeds the privilege by sending to the legal practitioner a letter containing defamatory statements concerning the client, the publication is complete when the letter is received and read by the legal practitioner. 6 PWR 1910 Cr. : 5 Ind Cas 892. Defaming husband in wife's presence and *vice versa* is sufficient publication within the meaning of this section. But the uttering of a libel by a husband to his wife is no publication. It is settled law that the communication of defamatory matter concerning a particular person to that person only is not publication within the purview of Section 499, Penal Code. *Ibid.* Making allegations in a memorial to the Lieutenant Governor is publication. 13 ALJ 681 : 16 Cr LJ 482 : 29 Ind Cas 322. To be guilty of the offence of defamation it is not necessary that the accused should himself have actually altered the words complained of. Where another person uses defamatory words purporting to report what the accused himself had told him and the accused, who is present at the time, by his conduct and by a few words which he speaks, intends to give and does give the impression that he adopts the words of that other as his own. the accused is guilty of the offence of defamation. 20 LW 921 : 47 MLJ 746. To constitute the offence of defamation there must be publication to a stranger of the libel complained of. To maintain a prosecution in a particular Court there must be publication within the jurisdiction of the Court. The originals of the libel alleged should be adduced in evidence. 45 MLJ 754 : 33 MLT 168 (HC) : 1923 MWN 913. For publication it is sufficient if the accused intentionally does an act which has the quality of communicating the alleged libel to a third person or persons generally. 55 All 203 : 145 Ind Cas 392 : 34 Cr LJ 952 : 1933 ALJ 266 : AIR 1933 All 210 : *see* also AIR 1927 Sind 54 : 21 SLR 130. Sending letter containing defamatory matter about President of Committee and the letter was placed by President in course of official routine on record and read by other members is sufficient publication within the section. AIR 1933 All 210 : 34 Cr LJ 952 : 55 All 253 : 1933 Cr C 366 : 1933 ALJ 266. Where A and *B* conspire to defame *Y* by drawing a document containing the imputations and the document is left with *B*. there is no publication. AIR 1931 Mad 487 : 32 Cr LJ 767 : 1931 Cr C 551 : 1931 MWN 866 : 131 Ind Cas 654. Even when the Court before which the alleged defamer had given evidence finds that the deposition is false, it is open to the person defamed to institute proceedings under Section 499 of the Penal Code. without the Court filing a complaint in accordance with the provisions laid down in Section 95, Cr. Pro. Code. All the more such a complaint is unnecessary where the defamatory statement is made by a witness in the course of a Judicial proceeding and the Court has not adjudicated upon the truth or falsity of it, or where the Court was deprived of an opportunity of so adjudicating; in all such cases it is open to the party defamed to take proceedings under this section. The prior decision of the Court regarding the falsity of the statement would deprive the party defamed from proceeding with the complaint AIR 1951 Mad 54 (FB). Witnesses cannot be sued in Civil Courts for damages for defamation in respect of evidence given by them on oath in a judicial proceeding but the question of absolute privilege to a witness does not arise in criminal prosecution in view of this section. *Ibid*, (where all the previous cases we considered).

When the alleged imputation is communicated only to the person defamed *i.e.* th complainant and is not in any other way published to anybody else, an offence und Section 499, Penal Code is not committed. 1951 AWR (HC) 257. It must be also prove that it was made with the intention of harming or with the knowledge or reason t believe that it would harm the reputation of the complainant. *Ibid.* The standard to b applied in proof is that the defamatory matter refers to the complainant as, would reasonable man so understand it. A complainant can often be able to make goods thi part of his case even though his name is not mentioned in the libel. 1952 Cr LJ 1553 AIR 1952 Pepsu 165. Similar accusations made against complainant by others will no be available or would be defence. To bring the publication of a scandalous imputatio under the penal law, it is not necessary to prove that it was done out of any ill-will malice or that the complainant had actually suffered from it. *Ibid.* The gist of the offenc of defamation lies on the discrimination of the harmful imputation. The gist of th offence of defamation lies on the dissemination of the harmful imputation. When defamatory statement is published, it is not only the publisher, but also the maker, wh becomes responsible and it is that context the word 'makes' in the section is used. AI 1962 MP 382 : 1962 (2) Cr LJ 760. To maintain a prosecution for defamation in particular Court there must be publication of the libel within the limits of jurisdiction that Court. 1961 Ker LJ 1212 : 1962 (2) Cr LJ 142.

Publication of notice in newspaper, informing petitioner that suit filed against hi by his employer was posted to a particular date cannot be held to be defamator *Gutalpathi Prasada Rao v. Public Prosecutor*, 2005 Cr LJ (NOC) 41 (AP).

The use of the word 'publish' in Section 499 does not contemplate tho communications which one is bound to make to others in the normal course of his leg duties. AIR 1960 Raj 213 : ILR (1959) 9 Raj 1160 : 1960 Cr LJ 1136.

Every re-publication of libel is a new libel and each publisher is answerable for h act to the same extent as if the calumny originated with him. AIR 1961 Punj 215 : 19 (1) Cr LJ 710 ; AIR 1964 Ker 277 : 1964 (2) Cr LJ 549. Defamatory communication postcard must be presumed to have been published, and is enough proof of publicati unless the contrary is proved. 1955 Raj LW 110. When a letter enclosed in an envelo is posted at any particular place, it cannot amount to publication at the place where t letter is posted. The gist of the offence of defamation of being publication of t defamatory matter, if the letter does not reach the other side, it cannot be said th defamation has been completed merely because the letter was posted at a particul place. AIR 1957 Mad 572 : 1957 Mad LJ (Cr) 304 : 1957 Cr LJ 983.

The word 'makes' in Section 499 has been used etymologically as connoting make public' or "makes or publishes any imputation concerning any person" to ma known to people in general. 1965 (2) Cr LJ 693.

8. Explanation 1.—It is defamatory libel and crime, though not actionable wro [*Broom* v. *Richie*, (1905) 6 F 942 ; 5 Bom 580], to write and publish words injurious the reputation of any deceased person, provided it is done with a malevolent purpose vilify the memory of the deceased and with a view to injure the posterity and theref with a design to break the peace. Per *Lord Kenyon* in *Rex* v. *Topham*, 41 TR 126; *see* also *R.* v. *Labouchere*, (1884) 12 QBD at p. 322. In the last named case, *Lord Coleridge* observed :"*The locus classieus* on this subject in *Rex* v. *Topham*, (1791) 4 TR 126" ; *see* also *R.* v. *Ensar*, 3 TLR 366, where *Stephen, J.*, said : "There must be a vilifying of the deceased with a view to injure his posterity." So "publication tending to disturb the minds of living individuals and to bring them into contempt and disgrace by reflecting upon persons who are dead, is an offence against the law". Per *Abbot, C.J.*, in *Rex* v. *Hunt*, (1824) 2 St 2 Tr NS at p. 98. Here the essence of the offence consists in its tendency to cause that description of pain which is felt by a person who knows herself to be the object of his fellow-creatures and in those inconveniences to which a person who is the object of such unfavourable sentiments is exposed. 41 All 311 : 17 ALJ 214 : 49 Ind Cas 855 : 20 Cr LJ 231.

9. Explanation 2.—This explanation is intended to include a company or an association or collection of persons as such with the word "person" as used in the definition so that the latter should not be limited to individuals. In a case in which the explanation is properly called into use the identity of the company or association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such with intention of harming their reputation so that thereby they are defamed. 29 CWN 904 : 42 Cr LJ 178 : 26 Cr LJ 1539 ; *see* also 55 Cal 1280 ; 1 Pat 414. According to Explanation 2, if a collection or company of persons as such is defamed, one of their members may make a complain on behalf of the collection or company of persons as a whole but the defamation must be shown to be of all the persons in the association or collection as such ; the defamation is of the collection or association as such. Where the complaint is the complaint of an individual as such, Explanation (2) has no application. 175 Ind Cas 9 : 39 Cr LJ 518 : AIR 1938 Sind 88.

According to English Law, it is also a defamatory libel and a crime to write and publish words injurious to the reputation of anybody of individuals without referring to any individual in particular. *Rex* v. *Obbom*, W. Kel. 230 ; *Rex* v. *Williams*, 2 B. & Ald. 595 ; *Rex* v. *Gathercole*. 2 Lowein CC 237 ; *see* also *South Hilton Coal Co.* v. *N.E. News Association*, (1894) 1 QB 133. An imputation against a company or an association or collection of persons as such amounts to defamation. Therefore, the mere fact that the reputation of a Bank is sought to be affected by the publication does not take it away from the mischief of a defamatory publication. AIR 1950 Pat 545. Each and every member can file a complaint. AIR 1938 Sind 38 : 39 Cr LJ 518 ; AIR 1935 All 743 : 36 Cr LJ 816. Having regard to the provisions of Section 499 with Explanation 2 and the definition of person in Section 11 of the Penal Code, it cannot be said that a complaint for defamation is not maintainable at all by a Corporation. 1952 All LJ 64 : 1952 Cr LJ 282 : AIR 1952 All 114. In respect of an association of persons the law of defamation in India is not the same as the English law of defamation relating to a trading Company or Corporation. 66 CWN 24. If the words complained of contain no reflection a particular individual or individuals, but may equally apply to other belonging to the same class an action for defamation will not lie. 1962 Ker LT 538 : 1962 Ker LJ 796.

The language of Explanation 2 is general and any collection of persons would be covered by it. Of course, the collection of persons must be identifiable in the sense that one could, with certainty say that the group of the particular people has been defamed as distinguished from the rest of the community. (1965) 1 SCWR 571 : 1965 SCD 600 1965 (2) Cr LJ 434 : AIR 1965 SC 1451.

Prosecution against company. It cannot be said that corporate body cannot commi offence of defamation.

The argument that there cannot be vicarious liability relating to offence punishable under the Indian Penal Code beyond application of Sections 34, 109, 14 and 120-B, IPC is not correct because persons representing a company may commi offences punishable under provisions of the IPC in the name of company itself.

In *Municipal Corporation of Delhi vs. J.B. Bottling Company Pvt. Ltd.*, 1975 CrL 1148, Full Bench of the Delhi High Court held that where only a corporal punishment is prescribed, an artificial body like a company cannot be prosecuted, since it cannot b punished. Of course, this legal decision is subsequently stated to have been altered t the effect that even for the offence wherein corporal punishment is prescribed, artificia body like a company can be prosecuted but it can only be punished with fine Therefore, Court is of the opinion that simply because A. 1 is corporate body, it canno be said that it cannot commit offence of defamation defined under Section 499, IPC.

In the present case, A. 1 is being represented by its Managing Director. In fact, A. is Managing Director of A. 1 company. But the lower Court did not take cognizance o the case as against A. 3 in his individual capacity, but it took cognisance of the cas against A.1 company represented by its Managing Director, who is A. 3. Therefore Court finds that A. 1 cannot escape liability by simply pleading that it is a corporat personality. *Rallis India Ltd. & Ors. vs. K.T. Vijay Kumar and Ors.*, 2010 (2) CrLJ 248 (AP).

In the news item there are no defamatory words or imputations against th National Political Party. As the report does not mention the name of any leader of th party and as it does not disclose any defamatory statement against that party, it has t be held that the complaint is ill-conceived.

The person aggrieved must have a legal grievance. There cannot be any grievanc merely on account of a fanciful or sentimental attitude. As the complaint does no disclose any specific defamatory statement against any specific and identifiable body o persons, it cannot constitute any offence or defamation. *P. Karunakaran* v. C *Jayasooryan*. 1992 Cr LJ 3540 at 3541, 3542 (Ker).

10. Explanation 3.—This explanation has followed the English law on the subjec where it has been held that ironical phrase may amount to a libel. *Boydell* v. *Jones*, M. & W. 446.

11. Explanation 4.—"It will be the duty of the Judge in the trial of cases o defamation not to decide the question whether an imputation is or is not defamatory b reference to any particular standard, however correct, of honour, or morality, or o taste; but to extend as impartial protection to opinions which he regards as erroneous and to feelings with which he has no sympathy. India is inhabited by races which diffe widely from one another in manners, tastes and religious opinions. Practices which ar regarded as innocent by one large portion of society, excite the horror of another larg portion. A Hindu would be driven to despair if he knew that he was believed by person of his own race to have done something which a Christian or a *Mussalman* woul consider as indifferent or as laudable. Where such diversities of opinion exist, that part of the law which is intended to preventpain arising from opinion ought to be sufficiently flexible to those diversities."—*Morgan and Macpherson*, 440.

An imputation that a Mahommedan had killed a cow in his compound cannot be said to harm his reputation, or lower his moral or intellectual character, or lower his character in respect of his caste or calling or lower his credit within the meaning of this section. 5 CPLR 53. It must lower him in other people's estimation. Anything which lowers him in his own estimation is not defamation. 7 All 205 (FB). It is defamatory to say without cause that any one is ex-communicated. The fact that all Muhamadans are generally speaking, of one caste does not make it any the less defamatory, and the word "caste" is not entirely confined to Hindus. It refers to any class who keep themselves socially distinct or inherit exclusive privileges. 25 LW 357 : 99 Ind Cas 943 : 28 Cr LJ 217 : AIR 1927 Mad 397.

This explanation does not apply where the words used and forming the basis of a charge are *per se* defamatory. 9 All 420.

Section 499, Explanation (4) seems to imply that what constitutes defamation has to be determined not upon an interpretation that may be found for a word by a laborious research in a Court of law but upon the meaning that might be conveyed by the word to a reasonable and fair minded man. ILR (1957) 2 Cal 181.

The prosecution must specifically establish the field in which the reputation has fallen or could fail in the eye of the reasonable man. The fields have been enumeration in Explanation 4 to Section 499, I.P.C. and for the purpose of Section 500 an imputation which does not refer to any of such fields cannot be regarded as defamatory. 1971 ALJ 1005 ; *see* also 1961 ALJ 769. Character is an expression of wide import which takes in all the traits special and particular qualities impressed by nature or habit ; includes reputation but is not synonymous with it. 1970 Cr LJ 83 : 1969 MPLJ 805 : 1969 Jab LJ 968 : (1970) 1 Cut WR 74 : 1969 Cr LJ 571 (imputing unchastity to a woman).

This Explanation makes it clear that harm referred to in the Explanation has reference to the imputation on a man's character made to lower him in the estimation of others and not of himself. 1962 Cr LJ 699 ; AIR 1963 SC 1317 : (1963) 2 Cr LJ 345 (a woman of loose character).

12. Exceptions.—The exceptions to Section 499, IPC, would seem to have been drafted with reference to the question of qualified privileges as recognised by the law of England, omitting all reference to the question of privilege in connection with statements made in judicial proceedings or to other classes of absolute privilege recognised by the law of England. The provisions of the IPC and also those of the Evidence Act of 1872 are mainly based upon the English law. Whenever the Legislature in this country intended to depart from the English law, they made their intention clear by express enactment. In considering the intention of the Legislature, the Law of England at the time of passing of the Indian enactment can be taken into consideration. The cannons of construction laid down by *Lord Herschell* are applicable only where it is intended to codify existing law but not where new law is created. The English common law right of absolute privilege in respect of judicial proceeding is inapplicable to India. 14 Ind Cas 659 : 13 Cr LJ 275 : 23 MLJ 39 : 36 Mad 216. Even where the accused deny having made the statements alleged to be defamatory, they are entitled to call evidenc to prove that the allegations if made by him would bring them within one of th exceptions of the section. AIR 1928 Rang 167. Although it is for the prosecution t make out of a case for conviction, the accused person must prove the existence o circumstances bringing the case within the exceptions to Section 499. 105 Ind Cas 12 : 28 Cr LJ 996 : AIR 1928 Nag 58. No man can ever be justified in disseminatin defamatory matter unless he can bring himself within one of the exceptions to Sectio 499, IPC, or unless his action is privileged in other respects. AIR 1938 Rang 394 : *se* also ILR 1936 Nag 217. In a trial under Section 500, the burden of proving th exception lies upon the accused. AIR 1939 Rang 371 : 41 Cr LJ 46 ; AIR 1937 Nag 122 ILR 1936 Nag 217. In order that a comment be fair, the following conditions must b satisfied ; (a) It must be based on facts truly stated ; (b) It must not contain imputation of corrupt or dishonourable motives on the persons whose conduct or work is criticised save in so far as such imputations are warranted by the facts ; (c) It must be the hones expression of writer's real opinion. ILR 1943 Nag 347 : 43 Cr LJ 856 : AIR 1942 Nag 11 : 202 IC 543.

13. Good faith is of the essence of exceptions.—A mere perusal of exceptions 2 3 and 9 is sufficient to show that these exceptions which embody the defenc compendiously known as "fair comment" apply only to expression of opinion o imputations on character, and not to assertions of fact. AIR 1959 Ker 100 : 1959 ML (Cr) 930 : 1959 Cr LJ 464. Burden of proof is on the accused to make out this his cas comes within the Exceptions. *Ibid* ; AIR 1958 Madh Pra 216 : 1958 MPC 199 : 1958 C LJ 1036 : 1958 MPLJ 405 : 1958 MPLJ 248.

14. First Exception.—To entitle a person to the benefit of this exception, th statement made must not only be proved to be true, but it must be shown that thei publication was for the public good. 9 Ind Cas 775 ; *see* also AIR 1934 All 904 : 152 In Cas 1047 : 1934 Cr C 1129 : AIR 1933 Sind 403 : 34 Cr LJ 667 : 1933 Cr C 1538 : 14 Ind Cas 63. In the absence of good faith question of public good need not be considere 28 CWN 579 : 26 Cr LJ 71 : AIR 1924 Cal 611 : 83 Ind Cas 63. "It is good defence i criminal cases that the words complained of are in fact true, and that it was for th public benefit that the matters charged should be published, even though the actua motive of publication is malevolence. The defence of qualified privileges extends t communications made by a person who has a legal, moral or social duty to som particular person or persons, who have a corresponding interest or privilege to receiv it, and such communications might be not only allegations of fact that could be tru but also expressions of opinion and personal inferences. In order to be entitled to th benefit of the exceptions the accused must show that he in good faith made th imputation in self defence, or for public good. He must have acted with due care an caution, and the actual words used, the manner in which the words are published, th person to whom they are communicated, must all be limited to the reasonabl requirements of the occasion. 8 Ind Cas 209. In order to come under this exception th imputation must be made for public good."—*Morgan and Macpherson*, 443. In all suc cases the person who publishes such imputation renders a greater service to the publi But where the spreading of the true reports only hurts the feelings of an individua without producing any compensating advantage to the public, certainly it is no protected under this exception. *Ibid.*, 443. Where a matter is of public interest the Cou ought not to weigh any comment on it in a fine scale. 13 Bom LR 1187 ; *see* also 1 LBR 139 ; 4 Cal 124 ; 3 Bom LR 188. The first exception exempts any imputation made or published for the public good and concludes as follows :—Whether or not it is for the public good is a question of fact. Although the imputations are true and made for public good, yet, on considering the manner of the publication, *ie.*, in a newspaper, the accused may be held not to have published it for the public good. 19 Bom 763. In the absence of good faith, the publication of a circular that a person has been put out of caste does not come within this exception. 6 ALJ 472 : 9 Cr LJ 535 : 2 Ind Cas 229. A defamatory imputation even if it be true is not by itself good ground for making it. 5 CPLR Cr. 55. Any exception on the ground of good faith or public good fails if the publication was made in a newspaper. Rat Un Cr C 769 ; *see* also 15 Mad 214 : 2 MLJ 127 ; 3 Bom LR 188. In an action for defamation, the proper question for the purpose of ascertaining the good faith of the accused is not, whether the allegations made by him are true but whether he had after due care and attention, good reason for believing them to be true. 4 Cal 124. A statement in order to come under the first exception to Section 499 of the Penal Code, must be true in fact. 40 All 271 : 16 ALJ 201 : 43 Ind Cas 823. In AIR 1950 Cal 339, *Harries, C.J.*, said : "It is to be observed that Exception I requires that the allegation is true and if Mr. Dutta's argument is accepted. Exception I should be read." It is not defamation to impute anything which may or may not be true'. I do not think that the principle of the Allahabad Full Bench case can be made to apply in the present case. To say something of a person which holds him to contempt is defamatory. If what is said is true then that is a defence. On the other hand if there is a doubt as to whether it is true or not there is no defence at all and as the matter tends to bring the person defamed into contempt is defamatory under Section 500, Indian Penal Code." If one chooses to write, print and publish libels imputing the commission by the complainant of a criminal offence, he must be prepared to prove that all he has said is true in substance and in fact. 1952 Cr LJ 1553 : AIR 1952 Pepsu 165. A statement in an objection to the nomination of the complainant that the complainant is drunkard is defamatory having no relevancy to the election. AIR 1957 All 777 : 1958 All Cr R 201 : 1957 Cr LJ 1360.

The stringent provision of the definition set out would be unworkable, were it not for salutary rules which the section recognizes as special exception to criminal liability. AIR 1959 Ker 100 : .1959 Cr LJ 464 : ILR 1959 Ker 195. (The concluding sentence of the articles which was adopted as title by the accused was obviously an ironical statement implying that Minister Krishna Iyer's administration was a bad administration riddled with corruption and nepotism). No amount of truth will justify a libel unless its publication was for the public good. 1963 Ker LT 845 ; 1977 (Cr) 86 : 1983 (1) Crimes 438 : 1971 ALJ 1005 ; AIR 1965 All 439. (The articles must be considered rather in their entirety than by separate instances of isolated passages) ; AIR 1964 Ker 277 (repetition of the libel) and AIR 1959 Cal 677 : 1959 Cr LJ 1350 (publication must be for public good). There can be no doubt that the defamation contained in the plaint is published by the plaintiff being filed in the Court. (1966) 1 MLJ 547 ; AIR 1958 MP 216 : 1958 Jab LJ 252 : 1958 MPC 199 (no public good is rushing to the press). When the news item is factually incorrect, this Exception cannot be relied upon by the accused. 1966 Cr LJ 292.

Exception I recognises the publication of truth as a sufficient justification if it is made for the public good. When truth is set up as a defence it must extend to the entire libel. 1964 Ker LJ 422 : ILR (1964) 2 Ker 31 : 1964 (2) Cr LJ 549 : AIR 1964 Ker 277. By virtue of Section 105 of the Evidence Act the Court is bound to presume the absence of the circumstances which would bring the offence with in any of the special exceptions contained in Sec. 499 and the burden would primarily rest on the accused to show that the exception. But the burden cast on an accused by virtue of Sec. 105 of the Evidence Act is not so onerous as the primary burden cast on the prosecution is to prove the offence beyond reasonable doubt. 1963 Ker LJ 1209 : 1963 Ker LT 845. The imputation must not only be proved to be true but it must also be proved that it was published for public good. *Ibid.* For application of this exception it must be for public good that such imputation must be made or published. AIR 1970 SC 1372 : 1970 Cr LJ 1266.

15. Second Exception.—The public conduct of public functionaries is allowed to be discussed, provided that such discussion is conducted in good faith. It will be observed that in this and generally in the following exceptions, it is not required that an imputation should be true. It is requisite only that it should be made in good faith. 'To require in these cases that the imputation should be true, would be to render these exceptions mere nullities. Where a public functionary is or is fit for his situation—Whether a person who has bestirred himself to get up a petition in favour of public measure, ought to be considered as an enlightened and public spirited citizen or a foolish meddler— Whether a person who has been tried for an offence was or was not guilty—Which of two witnesses who contradicted each other on a trial ought to be believed—Whether a portrait is alive—Whether a song has been well sung— Whether a took is well written—These are questions about which honest and descrying men may hold opinion diametrically opposite ; and to require a man to prove to the satisfaction of Court of law that the opinion which he has expressed on such a question is a right opinion, is to prohibit all discussion on such questions".—*Morgan and Macpherson*, 444. "Good faith" does not require logical infallibility but due care and attention. 51 Cr LJ 472 : 34 CWN 1070. Publishing defamatory statements and also denying it is not using due care. AIR 1933 All 434 : 1933 Cr C 740 : 145 Ind Cas 126.

Bona fide criticism concerning question of public interest involving conduct of public servant and expression of opinion for public good provide a corrective and held to maintain a standard of conduct which is expected of them. (1969) 71 Punj DJ 222.

One of the essential conditions for the application of Exceptions 2 and 9 to Section 499, IPC is that the accused should have acted in good faith. 1952 Cr LJ 1553 : AIR 1952 Pepsu 165 ; *see* also AIR 1962 Ori 197 : 1962 (2) Cr LJ 617 (imputation against the Governor untrue and made without verification). For defence of fair comment and to bring the case under Exception 2, 3 and 9, *see* AIR 1961 MP 205 : 1961 (2) Cr LJ 114 : AIR 1959 Ker 100 : 1959 All Cr R 150 : ILR 1959 Ker 195 : 1959 MLJ (Cr) 930 : 1959 Cr LJ 464.

Whoever fills a public position must accept an attack as a necessary, though unpleasant, appendage to his office. Public men in such position may as well think it worthwhile then to ignore any vulgar criticisms and abuses hurled against them rather than give an importance to the same by prosecuting the persons responsible for them. AIR 1956 SC 541 : 1956 SCA 775 : 1956 SCJ 539 : 1956 SCR 476 : 1956 Cr LJ 945.

16. Third Exception.—"Third exception applies to public men who are not public functionaries. Persons who hold no office yet take a very active part in urging or opposing the adoption of measures in which the community is deeply interested. Every person is allowed to comment in good faith on the proceedings of these volunteer servants of the public with the same freedom with which he is allowed to comment on the proceedings of the official servants of the public."—*Morgan and Macpherson*, 444. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he does not make the commentary a cloak for malice and slander. 1 BHC App 85. The word "malice" in the legal sense of the term, is not limited to hostility of feeling, but by virtue of its etymological origin, extends to any state of the mind, which is wrong or faulty (whether exercised in action by excess of defect), such as would be unjustifiable in the circumstances, and incompatible with thoroughly innocent intentions. It is not necessary that such impropriety of feeling should in all cases be established by evidence extrinsic to the comment, which is the subject of the complaint. 31 Bom 293. It is impossible to justify allegation of defamation on the ground of fair comment, the moment it is shown that the allegation is based upon a misstatement of facts. 98 Ind Cas 481 : 27 Cr LJ 1361 : AIR 1927 All 116. Publication of a verbatim account of an incident that took place in a municipal meeting by a Municipal councillor is privileged under this section. 8 SLR 143 : 16 Cr LJ 141 : 27 Ind Cas 205. Law does not permit a lower standard of good faith in defamatory statements in the discussion of public statements. Any criticism must be justly and reasonably deducible from the public conduct in question. 76 Ind Cas 230 : 25 Cr LJ 134 : 17 SLR 245. A printer liable for defamatory matter printed by him. AIR 1933 All 434 : 34 Cr LJ 926 : 145 Ind Cas 126. Member of Board of Secondary Education was described a described as. There was reasonable inference warranted by facts. Held the accused rendered valuable public service and acting in good faith and was hence acquitted under Section 500. ILR (1957) 2 Cal 181.

Whether or not good faith is established by the accused who plead in his defence Exceptions 3 or 9 of the section is applicable is a question of fact. (1971) 1 Mys LJ 28 : 1968 Cr LJ 836. In order that this exception may apply it must be proved that the opinion was expressed in good faith. AIR 1965 SC 1451 : 1965 (2) Cr LJ 438 : 1980 Bom CR 567.

17. Fourth Exception..—"The privilege is given to report of proceedings in the Court as it is for the public benefit that they should be informed of what took place substantially as if they were present." *Per Sir Corell Barnes, P., in Furniss* v. *Cambridge Daily News Ltd.*, (1907) 23 TLR at p. 706. So "a full and faithful report may be considered are enlarging the Court and allowing the great body of the public to be present at the trial." Per Lord *Campbell, C.J.*, in *Andrews* v. *Chapman*, 3 C & K 289. But the report must be confined strictly to what actually took place in Court. *Furniss* v. *Cambridge Daily News Ltd.*, 23 TLR 705 (CA). A report need not be a *verbatim* production of what took place in Court but it must be substantially a fair account of what took place in Court. *Andrews* v. *Chapman*, 3 C & K 289. A fair abstract can be published. *Millissilah* v. *Lloyds*, 46 LJCP 404. If any comments are made, they should not be made a part of the report. The report should be confined to what took place in Court and the two things, report and comment, should be kept separate. *Andrews* v. *Chapman*, 3 C & K 288.

Under the Fourth Exception to Section 499, it is not necessary that th proceedings of a Court of Justice should be published contemporaneously. All that required is that the publication should be substantially true report. 56 CWN 705.

18. Explanation.—This privilege is not confined to the proceedings of superi Court. *Usill* v. *Hules*, 3 CPD 310 ; *Kimeer* v. *Press Association*, 1 QB 65.

19. Cases.—26 Mad 464 ; 1971 All LJ 1005 ; 1973 Cr LJ 1637 (pleadings als covered) ; *see* in this connection AIR 1961 SC 613 : (1961) 1 Cr LJ 793, for the scope this exception.

Unless a person makes or publishes any imputation concerning any perso intending to harm or knowing or having reason to believe that such imputation wi harm, there is no offence of defamation. In the instant case if two other persons rea the letter as stated by complainant it was surely an accident and it cannot be said tha the accused intended to harm or knew or had reason to believe that imputation woul harm the reputation of the complainant. No offence was committed. Acquittal cannot b interfered. *N. Mounagurusamy* v. *K.C. Palanichamy*, 1994 MLJ (Cri) 216.

20. Fifth Exception.—"All persons are allowed freely to discuss in good faith th proceedings of Court of law, and the characters of parties, agents and witnesses, a connected with those proceedings. It is almost universally acknowledged that th Courts of law ought to be thrown open to the public. But the advantage of throwin them open to the public will be small indeed, if the few who are able to press their wa into a Court are forbidden to report what has passed there to the vast numbers wh were absent, or if those who are allowed to know what has passed are not allowed comment on what has passed."—*Morgan and Macpherson*, 445.

A libellous reflection upon the conduct of Judge in respect of his judicial duti may certainly come under Section 499 of the Indian Penal Code and it may be open the Judge to take steps against the likeller in the ordinary way in vindication of h character and personal dignity as a Judge. AIR 1952 SC 149 ; AIR 1968 Punj 217.

21. Sixth Exception.—The object of this exception is that the public should aided by comment, in its judgment of the public performance submitted to i judgment. Comment otherwise defamatory is justified on this ground alone. Th comment must, therefore, make it clear to the public that decision is invited, only such evidence as is supplied by the public performance. It follows that an imputati on an author made by a critic, without reference express or implied, to the work und criticism, if in terms so general as to be capable of conveying an unfavourab impression of him, apart from what appears in his work, cannot be justified by t critic, on the ground that his intention was to base his imputation solely on the wo reviewed, and that he had in his mind passages therein supporting the imputation. T responsibility of the critic is to be gauged by the effect, which is comment is calculat to produce, and not by what he says was his intention. It is not enough that he shou intended to form his opinion on the work before him ; he is also found, in the words the exception to express his opinion with due care and caution, and to give the pub no ground for supposing that he is speaking of anything but the performance submitt to its judgment. 31 Bom 298. The word "malice" in the legal use of the term is n limited to hostility of feeling, but by virtue of its etymological origin, extends to any sta of the mind, which is wrong or faulty (whether evinced in action by excess or defe such as would be unjustifiable in the circumstances, and incompatible with thoroughly innocent intentions. It is not necessary that such impropriety of feeling should in all cases be established by evidence extrinsic to the comment, which is the subject of the complaint. For, whether fair comment is to be regarded as following under a branch of the law of privilege or not, it cannot excuse an injury, arising not from the mere act of criticism, but from a state of mind in the critic, which is in itself unjustifiable. And the excuse may be so forfeited, either by reason of an evil intent in him or by reason of mere recklessness in making an unwarrantable assertion. For, then, the comment would not be fair comment at all. The right of fair comment involves two essentials ; first, that the imputation should be comment on the work criticised ; and second, that it should be fair ; and is to say, if it professes to be an inference drawn from the contents of that work, it must be an inference which it is possible to draw therefrom. Good faith requires not logical infallibility, but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must, in such case, be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind may differ very largely from the honest conclusion of a person excited by sectarian zeal and untrained to habits of precise reasoning. At the same time, it must be Bome in mind that good faith in the formation or expression of an opinion, can offer no protection to an imputation, which does not purport to be based on that which is the legitimate subject of public comment. (*Ibid.*)

In the case of defamation complainant opposite-party alleged that charge-sheet accusing him of stealing papers has lowered down his prestige in the estimation of other employees. It was observed that imputation had an admitted factual basis. Papers in question were actually found .with the papers of complainant opposite party. Petitioners had every right to react for protection of its own interest. It was covered by ninth exception to Section 499 which laid down that imputation made in good faith for protection of one's own interest was not defamation. According to seventh exception censure passed in good faith by person having lawful authority over another was not defamation, which also applied. *Held*, that there was no want of good faith in the case. 1987 Cri LJ 2074 (Cal).

Petitioner contributed his 'Foreword' to a novel. Novel and "Foreword" came in for bitter criticism at the hands of petitioner. It was observed that the words (*datru*) and (*Kshudurudu*) used by the petitioner were *per se* defamatory and the same were calculated to harm the reputation of the complainant. It was further observed that the words employed by petitioner were not in good faith. They wholly unrelate to the contents of the "Foreword". *Held*, that petitioner was not protected either under sixth exception or under the ninth exception. The concurrent finding of guilt recorded against petitioner by both Courts below was, therefore, unassailable. 1987 Cri-LJ 2000 (AP).

In the case of defamation complainant opposite-party alleged that charge-sheet accusing him of stealing papers had lowered down his prestige in the estimation of other employees. It was urged by opposite party that application of exceptions to Section 499 could not be ascertained unless evidence had been gone into. It was observed that argument did not hold good when very facts forming the basis of complaint attract application of an exception. *Held*. that exceptions actually were applicable to the facts of the case even without going into any evidence. 1987 Cri LJ 2074 (Cal).

22. Seventh Exception..—"By this exception we allowed a person under whose authority others have been placed, either by their own consent or by the law, to censure, in good faith, those who are so placed under his authority, as far as regards matter to which that authority relates." Note *R. Report of the Law Commissioners*. Caste associations are autonomous ; the powers vested in their constituted heads being, subject to any special custom, those necessary for the protection of the interest committed to their charge. The Court's only duty is to *see* that these powers are exercised in accordance with the principles of natural justice that is, in the majority of cases, after the person to be affected by their exercise has been heard and his defence has received fair consideration. 45 MLJ 116 : 72 Ind Cas 165 : 24 Cr LJ 325 : 1923 Mad 587. Where an individual has done something wrong or prejudicial to the interest of the community, the members of his community which by virtue or custom or usage, is competent to deal with such matter, can not take a decision by common suit. ILR (1964) 2 Mad 416 : (1964) 2 MLT (Cr) 597 : 1965 (1) Cr LJ 390 ; *see* 1982 UP Cr R 185 (when two impugned letters were held to be exception 1 and 7).

23. Eighth Exception.—Two ingredients are essential to be establishing of the protection under Section 8 (1) that the accusation must be made to a person having authority over the party accused ; and (2) that the accusation must be preferred in good faith, that is to say, with such reasonable care and attention on the part of the person making it, in first satisfying himself of the truth and justice of the charge, as an ordinary man should be expected to exercise. 6 All 220 : AWN 1884, 53 ; *see* also SBHC Cr 168. A complaint made *bona fide* to proper public officer is protected. AIR 1924 All 445 : 22 ALJ 35 : 79 Ind Cas 640 : 178 Ind Cas 478 : 48 LW 320 : 1938 MWN 871 : AIR 1938 Mad 904 : (1938) 2 MLJ 397. A defamatory statement contained in a complaint filed before a Magistrate is not absolutely privileged. 46 Mad 728 : 27 Cr LJ 1026.

Report to police that a lost article was in the accused house falls under this exception. 95 Ind Cas 480 ; *see* also 27 PLR 171. Doctrine of absolute privilege does no apply in mofussil in India. AIR 1928 Nag 58. Petition to President of Union Board tha person is disqualified for election on account of leprosy does not amount to defamation AIR 1931 Mad 487 : 1931 Cr C 551 : 32 Cr LJ 767. A defamatory statement made by a person opposing the registration of his Will in his petition to the Registrar, objecting t the registration, is not absolutely privileged. 13 Cr LJ 508 : 15 Ind Cas 652. A statement made by a villager casting imputation on the character of a co-villager in a complaint to the higher authorities is privileged only if the imputation is substantiall true and made in good faith. 15 Cr LJ 281 : 23 Ind Cas 489. A petitioner should not b convicted for making defamatory statements in application for transfer. 17 CWN 449 11 Ind Cas 349 : 40 Cal 441. Note.

In order to deprive a person of the privilege given under this section, expres malice on the part of the accused must be proved. 11 CWN 390 : 5 Cr LJ 160 ; 7 All 90 : AWN 1885. 272. Where a defamatory statement is made on a privileged occasion, th complainant must show malice in fact. 7 CWN 246. Otherwise accusation preferred i good faith to authorised persons are privileged. 1 Weir 608. But in such a case th burden of proving good faith in respect of such accusation lies on the accused. 1 We

608. Defamatory statement to Municipal Council is not privileged. 1 Weir 612. The accused, the defendant in a civil suit, in his written petition to the Deputy Commissioner, charged the Munsiff, trying the case, with conspiracy with the plaintiff to get up a false case, but was not able to prove the charge ; *held*, that he was rightly convicted of defamation. 21 PR 1887 Cr. Bringing to the notice of the Deputy Commissioner the fact that the complainant, a Medical Officer in charge of hospital, was leading an immoral life and to ask for his removal, is no defamation and come within this exception. 7 CPLR Cr 20.

To make a statement to a superior officer that a Government servant had borrowed for his immediate superior from persons connected with the department would amount to defamation. 1 Weir 585. A defamatory statement contained in a complaint filed before a Magistrate is not absolutely privileged for the exception applicable expressly lays down that the privilege conferred by it on persons who prefer accusations against others extends only to those who make them in good faith. The burden of proving the same is on the party pleading the exception, 6 Mys LJ 496 ; 4 DLR (Cal) 51. It is quite clear from the wording of Exception VIII to Section 499, IPC, that an accused person is not bound to prove that the allegation made by him as true. It is sufficient if he proves that on reasonable grounds he believed the allegations to be true and in that belief he made the accusation to the lawful authority mentioned in the Exception. 1952 Cr LJ 611 : AIR 1952 Cal 228. In order to appreciate the privilege it is, therefore, necessary for the Court to come to a definite finding as to this questions put to him and answers by him. 1952 MLJ 234 : 1952 Cr LJ 438 : AIR 1952 Nag 68.

Accused making application to District Panchayat Officer that complainant was keeping bawdy house, held that the Exceptions 8 and 9 were not applicable. 1963 SC 351 : 1963 SCJ 351 : 1963 All Cr R 206 : 1963 (2) Cr LJ 345 : AIR 1963 SC 1317. An accused person is entitled to the protection under Exception 9 if the imputations, though subsequently found to be baseless and incorrect are made by him in good faith and for public good. 1962 MPLJ 995 : 1963 (1) Cr LJ 186 : 1963 Jab LJ 887 : AIR 1963 MP 60.

No doubt in political theory in any democratic form of Government a Minister is in the long run responsible to the public. But that is not the sort of lawful authority contemplated by the Exception ; nor is accusation before the public by publication in a newspaper the sort of accusation that the Exception speaks of. AIR 1959 Ker 100 : ILR 1959 Ker 195 : 1959 All Cr R 158 : 1959 MLJ 930 : 1959 Cr LJ 464 (overruled in AIR 1961 SC 387 : 1961 (1) Cr LJ 566).

Imputation made in good faith to protect his own interest by holder of liquor shop licence, before Excise Department. Initiation of departmental enquiry against excise officer on basis of affidavit, affidavit making allegations against excise officer, filed in defence by accused. Accused never intended that their affidavit would be used as material against excise officer for initiating departmental inquiry. They were intending was only to defend their interest in proceeding, initiated by excise officer. Order issuing process liable to be quashed. *Nayana Jaikisan Tekwani & Anr vs State of Maharashtra & Anr.*, 2010 (4) CriLJ 4094 (Bom).

No plea of good faith can be advanced in respect of a matter which was false within the knowledge of the person making it. AIR 1960 All 623 : 1960 All Cr R 118 : 1960 Cr LJ 1296. A statement is the first information report stands on a different footing from an answer to questions put by an investigating officer during investigation and ca enjoy the absolute immunity, but can claim privilege only if the accused can bring the within the province of the Exception. AIR 1955 Sau 19 : 1955 Cr LJ 259.

The distinction between the eighth exception and proviso to Section 132, Evidenc Act is that the former excludes a statement from the definition of defamation altogeth whereas the latter excludes the prosecution for defamation and bars proof of th accusation in a trial for defamation. AIR 1960 All 606 : 1960 All Cr R 345 : ILR (1960) All 649 : 1960 Cr LJ 1285. The Commissioner and the Assistant Commissioner Hindu Religious Endowments are subject to the administrative control of the La Department of the State Government. AIR 1959 Ori 141 : 1959 Cr LJ 1006 (Ori) : 2 Cut LT 16 (Ori).

In order to establish a defence under Exception 8, the accused would have to prov that the person to whom the complaint was made had lawful authority over the perso complained against in respect of the subject matter of the accusation. Accusation befor the public by publication in a newspaper is not the sort of lawful authorit contemplated by the Exception. 1964 Ker LJ 423 : ILR (1964) 2 Ker 31 : 1964 (2) Cr L 549 : AIR 1964 Ker 272 ; *see* also (1964) 1 Sr CJ 320 : (1963) 1 SCWR 122 : 1963 SC 350 : 1963 All Cr R 206 : 1963 (2) Cr LJ 345 : 1963 Supp 1 SCR 479 : A1R 1963 S 1317 ; *see* also AIR 1970 SC 1372 : 1970 Cr LJ 1266 (accusation was made in goo faith) ; AIR 1970 Guj 171 (without justification is not protected). For absolute qualified privilege. *See* AIR 1961 Pat 164 : ILR 40 Pat 84.

The point of difference between this exception and Exception 9 is that whereas i the former the person to the complaint is made must have lawful authority to deal wit the subject-matter of the complaint and take proceeding against that person whe under the ninth exceptions the protection is for the interest of the person making i 1963 SCD 351 : 1963 All Cr R 206. Interest of the person has to be real and legitima when communication is made in protection of the interest making it. AIR 1970 SC 137 : 1970 Cr LJ 266. An accusation made in good faith to those who have lawful authori over the person so accused is protected by the exception even though the accusation found to be untrue. 1979 Raj Cr C 126 ; 1970 All Cr R 356 ; 1965 (2) Cr LJ 693 ; 198 Mad LW (Cr) 115. A complaint and report against a judicial official of his dishonestl partiality and conduct, made to the authority to which is subordinate, is though not contempt of Court, may amount to defamation, under Section 499. 1968 MPLJ 725 1968 Jab LJ 678.

24. Ninth Exception.—Exceptions (1) and (9) codify those portions of the law libel and slander treated in English textbook or books under the heads of justificatio and qualified privilege. In order to be entitled to the benefit of the exceptions t accused must show that he in good faith made the imputation in self defence or f public good. He must have acted with due care and caution, and the actual words use the manner in which the words are published, the persons to whom they a communicated, must all be limited to the reasonable requirements of the occasion. Ind Cas 209 ; 15 Bom 351 ; AIR 1949 Cal 292 : 50 Cr LJ 544 ; AIR 1948 Mad 469 : 4 Cr LJ 724. That the English rule of absolute privilege does not apply *prcpriovegore* India is apparent from the proviso to Section 132 of the Evidence Act, and the ca must be decided with reference to this section. 13 Ind Cas 217 ; *see* also 8 Ind Cas 22 : 11 Cr LJ 594 ; 317 PR 1913 ; AIR 1928 Nag 58 : 28 Cr LJ 996 : 105 Ind Cas 820 ; A

1927 Cal 823 : 55 Cal 85 : 28 Cr LJ 877 : 46 Cr LJ 227 : 104 Ind Cas 717 : AIR 1935 Sind 81 ; but *see* 14 Ind Cas 659 : 36 Mad 216 ; 4 Bur LJ 147 ; 97 Ind Cas 354. Exception 9 to Section 499 only protects certain imputations made in good faith. 128 Ind Cas 371 : 32 Cr LJ 132 : 8 Rang 359 : AIR 1931 Rang 81. To bring a case within Section 499, Exception 9, the imputation on the character of the complainant must have been made ; (1) in good faith, (2) for the protection of the interest of the person making it or for the protection of the interest of any other person or for the public good. AIR 1960 Madh Pra 386 : 1960 Cr LJ 1613. As regards this exception, the Law Commissioners said : "We do not require that an imputation should be true we require only that it should be made in good faith. For to require in these cases that the imputation should be true, would be to render these exceptions mere nullities. It is plainly desirable that a merchant should disclose to his partners his unfavourable opinion of the honesty of a person with whom the firm has dealings. It is desirable that a father should caution his son against marrying a woman of bad character. But if the merchant is permitted to say to his partners, if the father is permitted to say to his son, only what can be legally proved before a Court, it is evident that the permission is worth nothing. Whether an imputation be or be not made in good faith is a question for the Courts of law. The burden of the proof will lie sometimes on the person who has made the imputation, and sometimes on the person on whom the imputation has been thrown."—*Note R. Report of the Law Commissioners, see* also AIR 1960 MP 386 . 1960 Cr LJ 1613 : 1960 Jab LJ 922 (burden of proving that the ninth exceptions applied to the case is on the accused) : AIR 1959 Ker 100 : ILR 1959 Ker 195 : 1959 All Cr R 158 : 1959 Cr LJ 464. Reversioner making imputations against widow if directly interested is protected if the imputations are not disproportionate to the facts. 26 Cr LJ 428 : 85 Ind Cas 44 : AIR 1925 Mad 246. It is doubtful whether a complaint for defamation against a lawyer for matters treated in Court in the course of his professional duties cannot be entertained. 50 Mad 667 : 25 LW 295. Person claiming protection under this exception must prove good faith for protecting interest. 1929 All 1. Words altered to protect his own interest and as protest against conduct of *tahsildar* is protected under exception 9. 35 Cr LJ 703 : 11 OWN 382 : 1934 Cr C 511 : AIR 1934 Oudh 169.

A pleader is entitled to the presumption that the question he asks in cross-examination are asked in good faith for the protection of the interest of his client. The presumption therefore, is that a question asked in cross-examination making an imputation, affords no ground for criminal prosecution. To rebut this presumption, there must be convincing evidence that the pleader was actuated by an improper motive personal to himself and not by a desire to protect or further the interest of his client in the cause. 41 Cal 514 : 18 CWN 424 ; 1 Weir 587 ; 1 Ind Cas 799 : 19 MLT 217 : AIR 1926 Pat 409 : 6 Pat 224 : 7 PLT 608 : 27 Cr LJ 1090 ; AIR 1927 Mad 379 : 50 Mad 667 : 52 MLJ 269 : 100 ind Cas 537 ; AIR 1932 Bom 490 : 33 Cr LJ 740 : 34 Bom LR 910 : AIR 1933 Cal 185 : 34 Cr LJ 865 ; AIR 1931 Rang 83 ; AIR 1927 Cal 303 : 54 Cal 137 : 28 Cr LJ 42 ; AIR 1928 Nag 58 : 28 Cr LJ 996 : 105 Ind Cas 820 ; AIR 1937 Rang 537 ; 1937 MWN 1195 ; AIR 1948 All 409 : 49 Cr LJ 701 ; AIR 1948 Pat 56 : 48 Cr LJ 997 ; 50 CWN 545 : AIR 1947 Cal 278 : 48 Cr LJ 15. A pleader must use common sense and caution in asking a defamatory questions asked in absolute bad faith are not protected. AIR 1927 Cal 343 : 54 Cal 137 : 28 Cr LJ 472 ; 101 Ind Cas 660. But when not acting as a pleader he is not entitled to any privilege. 9 Bom LR 1287 ; 29 Cr LJ 889 : 50 Mad 667 ; 19 Bom 340 ; 36 Cal 375 ; 15 Mad 414 : 13 CWN 1087 : 55 Cal 58. But no privilege attaches to the profession of the press as distinguished from the members the public. 18 CWN 785 ; 25 MLJ 621 : 12 ALJ 1042 : 16 Bom LR 544 ; 7 Bur LT 167 41 Cal 1023 (PC). Witnesses are free from any other consequences except that indictment for perjury. 11 Mad 477 ; LBR (1893-1900), 206. Under the Indian la witness has not absolute privilege as regards the statements made by him. 52 Mad 43 AIR 1934 Sind 114 : 1934 Cr C 955 : 28 SLR 251 ; ILR 1937 Nag 425 : 169 Ind Cas 42 : AIR 1937 Nag 138 ; 156 Ind Cas 219 : 36 Cr LJ 881 : AIR 1935 Sind 81. Relevan statements made by a witness on oath or solemn affirmation in a judicial proceedin are not absolutely protected from being made the subject of a prosecution fo defamation by the proviso to Section 132 of the Evidence Act in cases where th witnesses have not objected to answering the questions put to them. 28 Bom LR 1 : 5 Bom 162 (FB) : 27 Cr LJ 423 : 14 PR 1893 ; 7 PWR 1910 Cr ; 1 Weir 612 ; 31 PLR 191 : 7 PWR 1911 ; 1 Weir 589 ; 13 CWN 1087 ; 27 Cal 262 ; 21 Cal 392 ; 32 Cal 756 ; WR Cr 363 WR Cr 45 ; 40 All 271 ; 29 All 685 (FB) ; 24 ALJ 329 : 22 Cr LJ 159 ; se also 7 PWR 1911 Cr : 10 Ind Cas 682 ; 13 Ind Cas 494. but no complaint against witness should be permitted until the Court before whom the witness gave evidence i answer to questions put to him which are relevant to the enquiry has expressed i opinion on such questions, 28 SLR 241 : 152 Ind Cas 346 : 1934 Cr C 955 : AIR 193 Sind 114. The rule is the same as regards statements of the accused under Section 34 of Criminal Procedure Code. 28 Bom LR 1 ; 9 Cr LJ 276 : 1 Ind Cas 48. A printer escap liability on the ground of absence must prove that he was absent in good faith an show who was the printer in his absence. AIR 1928 All 400. The statement of a perso charged with an offence in answer to a question by the Court trying him is a absolutely privileged one, so as to make him not liable to be punished for an offenc under Section 499 in respect of the statement. 14 Ind Cas 650 : 36 Mad 216. A plaint to a suit is not privileged under exception 9 unless the allegations made in the plai were made in good faith. 8 Ind Cas 220 : 11 Cr LJ 594. A statement made persons in pleading is not privileged. 5 CWN 293 ; 3 LBR 265 ; 8 Ind Cas 220 ; 23 Cal 867 ; 2 W Cr 36 ; 14 WR Cr 27 ; 3 CLR 122 ; 49 Mad 728 (FB) ; 37 Mad 216 ; 37 Mad 110 ; 7 PL 587 ; 21 PR 1887 ; 13 Bur LR 96 ; AIR 1926 Pat 425 : 7 PLT 601 : 27 Cr LJ 1090 : 9 Ind Cas 354 ; 65 Ind Cas 304 : 18 CLJ 1018 : 11 Bur LT 104 : 42 Ind Cas 763. Hone but mistaken opinion expressed by members of social club will come under this claus ILR 1945 Mad 479 : 47 Cr LJ 1038 : AIR 1946 Mad 228. There is no presumption malice even if defamatory pleading is signed by a counsel. 219 IC 48 : 48 Cr LJ 530 AIR 1945 Lah 97. Where in an article in a newspaper imputations made against public officer, the writer can take protection under exceptions 2 and 9 if su statements were made in good faith or for public good. AIR 1948 Mad 266 : 49 Cr 447 ; *see* also AIR 1942 Nag 117 : 48 Cr LJ 856 : ILR 1949 Nag 347 ; 1935 MWN 36 AIR 1943 Oudh 1 ; AIR 1942 Nag 117 : 43 Cr LJ 85 : AIR 1944 Mad 484 : 46 Cr LJ 7 44 Cr LJ 33 : AIR 1943 Oudh 1. Even where imputation is true it must be proved by t accused that it was for public good. AIR 1941 Bom 410 : 43 Cr LJ 174.

A defamatory statement made in an affidavit is not privileged, if it was who irrelevant to the enquiry to which the affidavit related. 8 CWN 292. The English doctri of absolute privilege is inapplicable but the party can rely on exception to this sectio 128 Ind Cas 371 : 32 Cr LJ 132 : 1931 Rang 81. A defamatory statement made answer to the question by a police officer, in the course of an investigation, is privileged communication, because such a person is bound by Section 161. Cr. P

Code, to answer truly all question put to him, except such as tend to criminate himself. and is therefore entitled to the protection which the law gives to the witnesses. 16 Mad 235 : 1 Weir 587 ; *see* also 47 Bom 15 : 24 Bom LR 400 ; 20 Bom LR 601. Where the alleged defamatory statement was made in answer to the requisition by the investigating officer under Section 161. Cr. Pro. Code, the statement being made on a privileged occasion would certainly come within the Exception 9 to Section 499. 47 LW 136 : 1938 MWN 217 : (1938) 1 MLJ 810. It is opposed to public policy to prosecute a party to a civil suit, who is under an obligation to speak the truth under Sections 5 and 13 of the Indian Oaths Act, in answer to questions put to him by Court for defamation in respect of such answers even though such answers are not true and he not made in good faith. 30 Mad 222 : 6 Cr LJ 130 ; *see* also 11 Mad 477. But in latter cases it has been held that such statements enjoin qualified privilege. 52 Mad 432. Plaintiff to a suit is privileged unless the allegations made in the plaint were made in good faith. 8 Ind Cas 220 : 11 Cr LJ 594 : 34 PR 1889 Cr. ; 1 LBR 84 ; 65 Ind Cas 204 ; but *see* 40 A 341 (FB) ; 20 ALJ 597. There is no expression to this section saying that where the defamation is made in a statement to a public servant or in Court proceedings by virtue of which the offence is punishable under Section 182 or Section 211, Penal Code or some other section, then no prosecution under Section 500 would lie. 1938 Rang LR 404 : 175 Ind Cas 915 : 39 Cr LJ 663 : AIR 1938 Rang 232 (FB) ; *see* also 176 Ind Cas 572 : 39 Cr LJ 736 : 42 CWN 674 : AIR 1938 Cal 527 ; AIR 1936 Nag 241.

No defamatory statement by witness is protected unless it is made in good faith within the meaning of the Exception to Section 499, IPC. The true test of immunity in the case of witnesses, as of other persons, is whether an exception to that section is established in its entirety. 14 PR 1893 Cr. A statement made by a witness under examination, wholly irrelevant to the matter of enquiry, uncalled for by any question put to him, and introduced by the witness voluntarily and maliciously for his own purpose, and in order to injure the reputation of another, is not privileged. 32 Cal 759 : 9 CWN 911. A defamatory statement made by one person regarding another in a complaint presented by the former against the latter are absolutely privileged. 11 MLT 431 : 14 Ind Cas 757 : 13 Cr LJ 293 : 37 Mad 110. A pleader or *Mookhar* is not liable to a charge of defamation, if relying on the statements of his client, he introduced into a pleading in good faith, a defamatory statement. 2 NWP 473. Where a letter written by a creditor of a firm and circulated amongst other persons who dealt with the same firm, contained a statement that one of the members of the firm had filed a petition for insolvency, with the object of collecting the outstandings and defeating the creditors of the firm, *held*, that the statement came under Exception 9, Illustration (a) of Section 499, the evidence having shown that the letter was written with the intention of protecting the writer's own interest and in a manner which was honest and *bona fide*. 9 CWN 195 : 2 Cr LJ 47. Where a defamatory statement is made to his solicitor, it may be that the same amount of care and attention should not be expected as when the statement is made to a stranger, and in deciding the question of the client's honest belief the Court should consider whether he made the statement to protect his own interest. 5 Bom LR 122. To give out that a woman had miscarriage without any knowledge whether she was married or not would amount to defamation because the person who makes the statement would have reasonable belief that such imputation would harm the reputation of the woman in case she was not married and if such statement is made in a witness-box and especially so in examination-in-chief when the character of the woman is not a fact in issue, the witness is not protected by Sectior 132. Evidence Act, unless the Judge himself asked the question. AIR 1930 All 493.

Where an accused who was charged with having beaten the complainant statec before the *panchayat* that he had kept the complainant for 10 years the statement is one made in good faith in order to explain his relations with the woman to account for the beating and is privileged. 96 Ind Cas 304 : 27 Cr LJ 938.

Exception 9 can only afford protection. When the defamatory statement has been made in good faith for the protection of the person making it or of any other person or for public good. 24 Bom LR 400 : 69 Ind Cas 94 ; AIR 1942 Lah 76 : 43 Cr LJ 572. Exceptions 9 and 10 to this section require the existence of good faith which implies the exercise of due care and attention. AIR 1940 Nag 249 : ILR 1942 Nag 208 : 41 Cr LJ 734 ; AIR 1944 Mad 484 : 46 Cr LJ 71 ; AIR 1943 Oudh 1 : 44 Cr LJ 33 : 203 IC 143 : AIR 1941 Sind 92 : 42 Cr LJ 684 ; AIR 1938 Rang 232 : 39 Cr LJ 663. In a contest relating to an offence, the allegation that complaint is a *'pichlay'* and *'lawaris'* was made in order to disqualify him. *Held.* it is covered by Exception 9. 67 Ind Cas 589 : 23 Cr LJ 429. But where in an election campaign, the poster is headed "Hollowness of Mr.—'s capacity as Barrister is exposed", the accused cannot claim protection under this exception. 164 Ind Cas 809 : 37 Cr LJ 1033 : 1936 Cr C 244 : AIR 1936 Lah 204. Where a party to a judicial proceeding is prosecuted for defamation in respect of a statement made therein on oath or otherwise his liability must be determined be a reference to Section 499, IPC, and he is entitled only to benefit of the privilege mentioned in the section. 48 Cal 388 : 24 CWN 982 : 22 Cr LJ 31 ; *see* also 22 Cr LJ 159 ; 49 Ind Cas 109 : 20 Cr LJ 125 ; 17 Cr LJ 381 : 35 Ind Cas 813. A statement made by a party to suit in good faith and for the prosecution of his interest, and which is relevant to the matter in issue, falls under Exception 9 of Section 499 of the Penal Code and is privileged. In order to take such a statement out of the exception express malice must be proved. 45 Ind Cas 833 : 19 Cr LJ 641 ; *see* also 20 Bom LR 601 ; 9 Bur LT 136 : 17 Cr LJ 213 : 34 Ind Cas 325. Where an advocate was charged with defamation in respect of a statement made by him as party in departmental proceeding, the burden is on him of proving that his case falls under one of the Exceptions to Section 499. AIR 1931 Rang 83.

Statements made in an affidavit in support of an application for transfer will be allegations made for the protection of interest of the party making it and it made in good faith is clearly covered by Exception 9 of Section 499 of the Penal Code and as acquittal of the person making such statement of offence of defamation is right. 64 LW 902 : 1951 MWN 597 : (1951) 2 MLJ 229. On complaint by a Government employee that certain allegations made against him in the petitions sent by the accused to the Collector and other officers were defamatory, the Magistrate found that though the allegations were defamatory in character and they were duly published he was not liable to be punished as the terms of Exception 9 to Section 499, were duly satisfied. The aforesaid finding was reviewed on appeal but the High Court did not interfere with the conviction. AIR 1957 A 1957 Andh Pra 345 : 1957 Cr LJ 521. An accused person is entitled to the protection under Exception 9 if the imputations though subsequently found to be baseless and incorrect are made by him in good faith and for the public good. AIR 1963 Madh Pra 80 : 1962 MPLJ 995. The defences available to the accused under the exceptions 9 to Section 499, have to be proved as strictly as if the complainant was being tried for the offences imputed to him. AIR 1961 Raj 215 : 63 Punj LR 794 : 1961 (1) Cr LJ 710 ; *see* also AIR 1959 Cal 677 : 1959 Cr LJ 1310 ; 1962 MPLJ (Notes) 256 ; AIR 1958 Ori 259 : 1958 Cr LJ 1416 : 24 Cut LT 417 ; AIR 1957 MP ; 162 : 1957 MPLJ 407 : 1957 Cr LJ 1143 ; AIR 1956 All 267 : 1956 Cr LJ 470 ; AIR 1955 Mys 135 : ILR 1955 Mys 401 : 1955 Cr LJ 1512 ; 1965 MLJ (Cr) 298 ; AIR 1954 Mad 741 : 1954 Cr LJ 1239. (The privilege of an advocate in respect of the words spoken or written in the performance of his professional duty is not absolute but the burden is cast upon the prosecution to prove absence of good faith).

Under Exception 9, besides the *bona fides of* the person making the imputation. the person to whom the imputation is conveyed must have a common interest with the person making it which is served in the communication. (1964) 1 SCJ 320 : (1963) 1 SCWR 122 : 1963 SCD 350 : 1963 All Cr R 206 : 1963 (2) Cr LJ 345 : AIR 1963 SC 1317 : 1963 Supp 1 SCR 479 (for difference between Exceptions VIII and IX).

Where the editor published the news item on the basis of enquiry report submitted by the high official to the Government relating to certain irregularities committed in jail for the welfare of the society in good faith, the editor was entitled to protection under Section 499, Exception 9. AIR 1981 SC 1514 : 1981 Cr LJ 894 ; 1980 Cr LJ (NOC) 154 ; (1984) 1 Rev Cr R 108 : (1983) 2 Chand LR (Cr) 637 ; AIR 1971 SC 1567 : 1971 Cr LJ 1168 (protection of interest of the person making the imputation will have to be established by showing that the imputation was itself the protection of the interest making it) ; AIR 1966 SC 97 : 1966 Cr LJ 82 ; AIR 1970 SC 1372 : 1970 Cr LJ 1266 (interest of the person making the imputation must be real and legitimate). For arriving at a conclusion that the 9th exception is applicable to the case see AIR 1963 SC 1317 : 1963 (2) Cr LJ 345 : 1963 MP 60 : (1963) 1 Cr LJ 186 (even if the imputations are baseless and incorrect, still if they are made in good faith and for parade good, the exception will apply).

The Court appears to be labouring under an impression that journalists enjoyed some kind of special privilege and have greater freedom than others to makes any imputation or allegation sufficient to ruin the reputation of a citizen. AIR 1981 SC 8514 : 1981 Cr LJ 894 ; AIR 1962 Ori 197 ; 1983 (1). Crimes 615.

The notice was issued by petitioner as Advocate on behalf of accused. There was no allegation of illwill or malice against petitioner. Reacted in good faith is to be presumed. Hence proceedings against him are liable to be quashed as the action would come within Exception 9 to Section 499, I.P.C. *J.P. Chandra Bose* v. V. *Palani*, (1994) 2 Crimes 386 (Mad) : 1994 MLJ (Cr) 384 : (1994) 1 LW (Cr) 270.

25. Protection of trust fund.—Where the object of the accused in using the words complained of is not to defame the complainant at all, but to protect certain trust fund. the accused is protected by the 9th Exception. 1937 MWN 884.

26. Communication by members of caste..—"Caste" refers to any class keeping themselves socially distinct or inheriting exclusive privilege. AIR 1927 Mad 397 : 28 Cr LJ 207 : 99 Ind Cas 943. A privileged communication means a communication which is made by a member of a caste to the other members. inviting an enquiry into the conduct of persons against whom the allegations are directed. 14 Bom LR 585 : 13 Cr LJ 687 : 46 Ind Cas 335. Defamatory statement made by a member of a caste against another member of the same caste for protection of his own interest is privileged under

this Exception. 1 Weir 609 ; *see* also 7 M 36 : 1 Weir 610 ; 11 Bom LR 638 : 3 Ind C
744 ; 22 Cal 46 ; 6 M 381 : 1 Weir 595 ; 6 MHC App 40 ; 47 MLJ 8 ; AIR 1924 All 29
46 All 14 : 21 ALJ 765 : 25 Cr LJ 327 : 77 Ind Cas 183 ; 22 ALJ 79 : 77 Ind Cas 82
27 Cr LJ 296 : 24 ALJ 171 : 92 Ind Cas 584 ; 33 Cr LJ 472 ; AIR 1950 All 619. But
the absence of good faith the statement is not privileged. 3 All 664. Where the accus
made a statement at a caste meeting that a child was born to a woman of adultero
intercourse, it amounts to defamation unless he proves it was true or that he made it
good faith. 76 Ind Cas 393 : 25 Cr LJ 168. Imputation that a Hindu is an outcaste
defamatory and is not covered by Section 95. AIR 1928 All 213 : 26 ALJ 361 : 29 Cr
451 : 108 Ind Cas 690 ; *see* also 1932 Nag 97 : 28 NLR 106 : 38 Cr LJ 855 ; AIR 19
Nag 283 : 41 Cr LJ 585. Imputation of outcasting is defamatory even to Mahommedar
AIR 1927 Mad 397 : 28 Cr LJ 207 : 90 Ind Cas 943. Bringing to a notice of *Panchay*
behaviour of person charged with social offence is covered by Exception 9 and 10. A
1933 Oudh 377 : 1933 Cr C 1094 : 10 OWN 778. But such a privilege does not exte
to a composite assembly consisting members of many castes other than the interest
caste. AIR 1950 Mad 409. There is nothing objectionable if a caste *Panchayat* who
help is sought for by the complainant refuses to decide the dispute unless he hims
would be amenable to the caste discipline by paying a fine for his past transgression
the caste rules. AIR 1961 Ori 33 : 1961 Cr LJ 296.

27. Public good.—Where a matter is of public interest, the Court ought not wei
any comment on it in a fine scale. 13 Bom LR 1187 : 12 Cr LJ 595 : 12 Ind Cas 971.
the absence of good faith public good need not be considered. AIR 1924 Cal 611 :
CWN 579 : 26 Cr LJ 83 : Ind Cas 631 ; *see* AIR 1970 SC 1372 : 1970 Cr LJ 12
(question of fact).

28. Good faith.—Under Section 27 of Act. XVIII of 1882 proof of existence of t
facts relied on as a defence should be given before good faith could be presumed ir
case of defamation, and the onus lies on the person making the imputation. 4 WR Cr
; 1 Weir 580. If a person receives information that other persons are about to do h
harm, he is surely entitled to go to the public and ask for protection without hims
conducting the enquiry. 158 Ind Cas 93 : 8 RR 146 : 36 Cr LJ 1307 : 1935 Cr C 99
AIR 1935 Rang 227. The absence of reasonable cause is evidence of the absence of go
faith. 1 Weir 607. In dealing with Exceptions 8 and 9 the question of good faith shou
be considered. The definition in Section 52, IPC, does away with the presumption th
the accused acted *bona fide* until the contrary is proved; and under the Indian Law t
accused should show that he has made the imputation not without due care a
circumspection. In deciding the question of good faith the Court should take ir
account the intellectual capacity of the person, his predilictions and the surround
facts. 56 Cal 1013 : 33 CWN 446 : AIR 1929 Cal 364 ; 1962 Ker LT 502 : 1962 (2) I
LJ 47 : 1962 Ker LJ 1147. It is against public policy to prosecute complainants
statements contained is petitions presented in good faith for their protection. 19
MWN 598. In order to establish good faith it must be shown that the accused acted w
due care and caution. 28 CWN 579 : 83 Ind Cas 632. A finding or privilege is not find
of good faith. AIR 1926 All 287 : 24 ALJ 329 : 27 Cr LJ 253 : 92 Ind Cas 429.

Good faith should be judged from the intellectual capacity of the person,
predilictions and the surrounding facts. Where the accused acted with a desire
protect himself rather than to injure other he is protected by Exceptions 8 and 9.

1929 Cal 346 : 33 CWN 446 : 56 Cal 1013 : *see* also AIR 1929 Cal 779 : 1929 Cr C 523. In the context of the law of defamation, the requirement of good faith, in publishing an article derogatory to the character of the complainant, is not satisfied, by merely showing a belief on the part of the publisher in the truth of the publication. AIR 1961 Punj 215 : 1961 (1) Cr LJ 710. The conduct of the accused during the course of proceedings is a relevant factor in determining good faith. *Ibid*, *see* also 1962 Cr LJ 122. (Newspaper article published in the midst of controversy imputing corrupt and dishonest character to complainant without any basis) ; 1964 Ker LJ 422 : AIR 1964 Ker 277 : ILR (1964) 2 Ker 31 : 1964 (3) Cr LJ 549 ; 1965 MLJ (Cr) 298.

Allegations made by an advocate in the discharge of his duties Court proceedings are presumed to be in good faith. (1979) 1 Cal HCN 305 ; (1976) 78 Bom LR 234 ; Allegations made in petition after consulting a legal practitioner are covered by Exception 9. (1980) 1 Kant LT 123. But *see* 1984 Rajdhani LR 84, where the benefit of Exception 9 was not allowed. *See* also (1980) 1 Kant LJ 123 : 1980 Mad LJ (Cr) 373. Good faith requires care and caution and prudence in the back ground of the context. AIR 1970 SC 1372 : 1970 Cr LJ 1266 ; AIR 1966 SC 97 : 1966 Cr LJ 82.

Insofar as the application of Exceptions 1 and 9 to Section 499, IPC to this case is concerned, it is a question of fact. It may not be taken into consideration in this petition filed under Section 482, Criminal Procedure Code. In first Exception to Section 499, IPC itself it was stated that whether or not it is for the public good is a question of fact. Factual aspect cannot be gone into in this criminal petition. Further, whether the imputations are true and whether the imputations were made in good faith are also questions of fact, which cannot be gone into in this criminal petition. They are all matters which have to be tried and decided by the trial Court, after recording entire evidence to be let in by both the parties. *Rallis India Ltd. & Ors. vs. K.T. Vijay Kumar and Ors.*, 2010 (2) CrLJ 2485 (AP).

Imputation made in good faith to protect his own interest by holder of liquor shop licence, before Excise Department. Initiation of departmental enquiry against excise officer on basis of affidavit, affidavit making allegations against excise officer, filed in defence by accused. Accused never intended that their affidavit would be used as material against excise officer for initiating departmental inquiry. They were intending was only to defend their interest in proceeding, initiated by excise officer. Order issuing process liable to be quashed. *Nayana Jaikisan Tekwani & Anr vs State of Maharashtra & Anr.*, 2010 (4) CriLJ 4094 (Bom).

29. Remarks in judgment.—The existence of exceptions to this section indicates that the provisions of Section 77 cannot, by themselves, cover the case of remarks made by a Judge or Magistrate in the course of his office, so as to exempt him from any liability under Section 500. Where the case words complained of are themselves *prima facie* defamatory and do not bear directly on the matter in hand, there is a *prima facie* case and the complaint should be admitted even if Section 77 was held to apply. AIR 1934 Rang 123 : 35 Cr LJ 947.

30. Tenth exception.—To bring this case within Exception 10 of Section 499, of the Indian Penal Code, it must be proved that the accused intended in good faith to convey a caution to the person against another, that such caution was intended for the good of the person to whom it was conveyed, or of some person in whom that person was interested or for the public good, and that the caution should be conveyed by the proper means". Per *Collins, C.J.*, in 15 M 214 at p. 216. *See* also 1961 MPLJ (Notes) 62. Where in an application for the transfer of a criminal case, the accused in the present case stated the complaint against him was instituted under the instigation of the complainant in the present case for the purpose of prejudicing him in the defence to a civil suit which the latter had caused to be brought against him, *held*, that the statement did not amount to defamation as the imputation was made in good faith for the protection of the interest of the person making it. 22 All 234 : AWN 1900, 46. Statement of the ability of a person working under the accused for his own interest is privileged. Rat Un Cr C 474. A letter written by a *Brahmin* to the *Brahmin* community of the neighbourhood with a view to obtain their decision on a matter affecting his own religious interests and that of the *Brahmin* community, if written in good faith falls within Exception 8 and 10, of the section. 8 BHC Cr 168. Exception 10 deals with cases for instance where one man warns another against employing a third person in his service saying that he neat persons. Where at a castes meeting the accused was proved to have stated that the complainant's wife had been married before and a prosecution for the offence of defamation was launched against him. *Held*, that the Exception was inapplicable. 34 CWN 580 : 31 Cr LJ 1225 : AIR 1930 Cal 695.

The complainant was put out of caste at a meeting of his caste- follows for having taken water from an untouchable man. The accused told some of the members of the caste not to take water from the hands of the complainant, as in that event they would incur the penalty of ex-communication. *Held*, that the accused was not guilty of any offence and his case felt within Exception 10 to Sec. 499, IPC. 22 ALJ 79 : 25 CrLJ 472.

31. Who can complain in a defamation case.—Where wife is defamed, the husband can complain against the person defaming his wife. AWN 1891, 188 ; 25 Bom 151 (FB) ; 14 M 379 ; but *see* 22 PR 1884 Cr ; 37 PR 1887 Cr. But for the purpose of instituting a criminal proceeding under this section a mother and son are not in the same position as husband and wife. AWN 1893, 207. The death of the complainant during the course of criminal proceedings for defamation, necessarily terminates those proceedings. 8 PWR 1908 Cr : 7 Cr LJ 203 : 112 PLR 1908, Where the complainant prosecuted the accused person for defaming his sister-in-law held, that as there was no imputation made against the complainant, there was no defamation of him within the meaning of Section 499, and that his sister-in-water being the person defamed ought herself to have made the complaint. Rat Un Cr C 392 : Cr Reg 48 of 1888. The word "aggrieved" in Section 198, of the Code of Criminal Procedure in cases of defamation must be treated as equivalent to the expression "person injured", the object of the section apparently being to limit the right of complaint to person who has suffered the injury. LBR (1872-1892) 617. President of a Municipality cannot use for defamation of subordinate officers of the Municipality. 26 Mad 43 : 2 Weir 232 : 12 MLJ 418. Where a servant of the complainant has been defamed, he cannot being a case under this section against the accused. 11 Cr LJ 594 : 8 Ind Cas 220. In case of imputation of unchastity to daughter to law is a person aggrieved entitled to file a complaint for defamation. 1951 AWR (HC) 303.

The collocation of the words by some person, aggrieved definitely indicates that the complainant need not necessarily be the defamed person himself. Whether the complainant has reason to feel hurt on account of the publication is a matter to be determined by the Court depending upon the facts of each case. If a company is described as engaging itself in nefarious activities its impact would certainly fall on every Director of the company and hence he can legitimately feel the pinch of it. Similarly, if a firm is described in a publication as carrying on offensive trade, every working partner of the firm can reasonably be expected to feel aggrieved by it. If K.J. Hospital is a private limited company, it is too far fetched to rule out any of its directors feding aggrieved, on account of projoratives hurled at the company. *Johan Thomas v. K. Jagadeesan* 2001 Cri LJ 3322 (SC) : AIR 2001 (SC) 2651 : 2001(6) SCC 30 : 2001(5) JT 398 : 2001(4) Scale 323 : 2001(5) Supreme 106 : 2001(3) Crimes 270 (SC) : 2001(2) JCC (SC) 39.

32. Right of corporation to maintain action.—A corporation may maintain a prosecution or an action for a libel affecting its property, but not for a libel merely affecting personal reputation, as a corporation has no reputation apart from its property or trade. The words "complained of must reflect on the management of its business and must injuriously affect the corporation, as distinct from the individuals who compose it. The alleged libel must attack the corporation in its method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position. It cannot bring a prosecution for words which merely affect its honour or dignity. Moreover it cannot maintain a prosecution for words which reflect, not upon it as a body, but upon its members individually, unless special damage has thereby been caused to it. 13 Rang 297 : 156 Ind Cas 441 : 36 Cr LJ 953 : 8 RR 1 : 1935 Cr C 317 : AIR 1937 Rang 108. Where a letter suggests that a company gives guarantees which are worthless and that it endeavours to avoid its liability under the guarantees given, it suggests that the company is a deceitful company and that persons dealing with that company should be on their guard and take particular care to *see* that they are not cheated. Such imputations are undoubtedly defamatory. 1935 Cr C 1295 : AIR 1935 Rang 509.

33. Publication—In a case where the accused to have made an offending speech if the witnesses are agreed in a substantial measure on the words of imputation uttered. It is not necessary to reproduce every word or expression. ILR (1961) 2 Ker 431 : 1962 All Cr R 278 : 1962 (1) Cr LJ 644. To bring the publication of a scandalous imputation under the Penal Law it is not necessary to prove that it was done out of any ill will or malice or that the complainant had actually suffered from it. It would be sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant. The burden lies on the accused person to make out that his case comes within any of the exceptions to Section 499. 1962 Ker LT 502 : 1962 Ker LR 47 : 1962 Ker LJ 1147.

Evidence of bad general reputation but not of particular facts is admissible in an action for damages for libel under Section 55, of the Evidence Act AIR 1961 Punj 215 : 1961 (1) Cr LJ 710.

There is universal rule that in a defamation case the accused cannot be convicted unless the actual words used by the accused are proved. No doubt when the question whether certain words used are defamatory depends solely on the shade of their meaning in the context in which they were used then it is very essential to prove that the exact words used by the accused as also the exact context in which they were spoken. AIR 1958 MP 83 : 1958 Cr LJ 520. Where some passages in a petition are alleged to be defamatory, the document should be read as a whole with a view to find out the main purport, and too much importance should not be attached to a few isolated passages here and there. AIR 1959 Ori 141 : 25 Cut LT 16 : 1959 Cr LJ 1006.

It must be proved that the defamatory matter was intended to be read by the person or persons other than the person to whom it is written and that it was published. 68 CWN 654 : 1964 (1) Cr LJ 367. Onus lies on the accused to prove existence of reasonable grounds for making imputations. AIR 1952 Cal 228 : 1965 (2) Cr LJ 693.

If the words complained of contain no reflection on particular individual or individuals, but may equally apply to others belonging to the same class an action for defamation will not lie. 1963 Mad LJ (Cr) 637 : 1962 Ker LJ 796 : 1962 Ker LJ 538 : 1963 (1) Cr LJ 535 (identity of such person used not be established). The question whether libel in fact has been communicated to a third person is immaterial. It is not enough that libeller posted it to third person. 1962 MPLJ 927 : 1962 (2) Cr LJ 760 : AIR 1962 MP 382 (the gist of the offence of defamation lies in the dissemination of the harmful imputation).

The burden is on the accused to show that his case comes under any of the exceptions to this section and that he is not liable for defamation. 1974 Cr LJ 1358 : 1980 Cr LJ (NOC) 123 ; 1982 Cr LJ (NOC) 3 : 1982 Chand Cr C 54 ; 1970 Cr LJ 1266 : AIR 1970 SC 1372 ; AIR 1966 215 ; AIR 1966 SC 57 ; 1974 Cr LJ 1358 (1969) 1 Mys LJ 606 : AIR 1970 Mys 34 ; 1989 Karn LT 123 ; 1973 CLJ 1722.

Qualified privilege is a conditional defence. It affords immunity to those alone who use the privileged occasion for the purpose which the law deems of sufficient social importance to defeat the countervailing claim to protection of reputation. 1983 Cr LJ 48. A statement made by a witness in answer to a question which he is compelled to answer will not subject him to a prosecution under Section 500, even if the answer is defamatory of some person. 1971 MPLJ 284 ; AIR 1962 MP 241 : 1962 (2) Cr LJ 693. Privilege under the Exceptions to this section is only a qualified privilege. (1979) 1 CWN 305.

34. Defamatory Letter.—There is nothing *per se* defamatory in the letter. However it is important to note that copies of the letter in question were forwarded only to the Principal of ITI, Bhavnagar and to the Commissioner of concerned Department having office at Sachivalaya, Gandhinagar. Mere sending of copies to the Principal of ITI at District Headquarter, Bhavanagar and to the Secretary of the concerned Department, cannot be taken adversely to the accused that these copies were sent with a view to see defamatory statement is published or widely spread amongst circle where the complainant is known. An element of *mens rea* and intention of defamation, of course can be assumed but in the present case, relevant circumstances are not available. *Dilip Ranjan Sinha and others v. Manojbhai, Bhai Shankar Chandalia,* 2002 Cri LJ 3239 (Guj.).

35. Pleadings were not *per se* defamatory.—It is evident that the criminal case is filed by the 2nd respondent with a *mala fide* intention and with a view to harass the petitioner and to coerce him for terms in the pending appeal and also with oblique motive. Without the petitioner contending in the suit that revenue records filed by the 1st respondent as false, fabricated and forged, there is absolutely no other case which can be put forward by the petitioner in the civil suit in order to attack claim of the 1st respondent therein. *Prima facie*, such allegations in the pleadings in civil suits are not *per se* defamatory, unless the petitioner had any previous score with the 1st respondent. Except this civil litigation, which the 1st respondent himself started, the petitioner has no other dispute with the 1st respondent. Therefore, it cannot be said that the petitioner had any intention to defame the 1st respondent or that the petitioner maliciously made those allegations in his pleadings. *Secondly*, those allegations in the petitioner's pleadings and affidavit in the suit cannot be termed as defamatory. *Thirdly*, it is not a case where the alleged defamatory statements were published by way of any public notice or public statement or in any public meeting. They were made in Court proceedings in writing and no outsider had any occasion to read the same.

The advocates appearing on both sides have no independent interest or entity in Court proceedings except as representing the parties for whom they are appearing. They are only agents of the parties who engaged them. Thus, there is absolutely no general publication of the alleged imputations when they were made in pleadings and evidence in a Court of law. Further, Section 499 of the Indian Penal Code contemplates making or publication of imputation with an intention to harm reputation of the other person. In the case on hand, intention of the petitioner is evident that he made the same with an intention to preserve the disputed site to the deity and not with an intention to harm reputation of the first respondent. In that view of the matter, pleadings i.e., written statement, counter and appeal grounds and evidence by way of affidavit in this case cannot be defamatory in nature. *G. Janardhana Reddy vs. A. Narayana Reddy and Anr.*, 2010 (3) CrLJ 2660 (AP).

36. Freedom of speech and expression.—Even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as 'decency and morality' among others, there is need to tolerate unpopular views in the socio-cultural space. The framers of our Constitution recognised the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance in the political sense, we must also promote a culture of open dialogue when it comes to societal attitudes. The appellant's remarks did provoke a controversy since the acceptance of pre-marital sex and live-in relationships is viewed by some as an attack on the centrality of marriage. While there can be no doubt that in India, marriage is an important social institution, but there are certain individuals or groups who do not hold the same view. Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in pre-marital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not co-extensive. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the 'freedom of speech and expression'.

Dissemination of news and view for popular consumption is permissible under our constitutional scheme. The different views are allowed to be expressed by the proponents and opponents. A culture of responsible reading is to be inculcated amongst the prudent readers. Morality and criminality are far from being co-extensive. An expression of opinion in favour of non-dogmatic and non-conventional morality has to be tolerated as the same cannot be a ground to penalize the author. Criminal proceedings initiated against appellants liable to be quashed. *S. Khushboo vs. Kanniammal and Anr.*, 2010 (3) CrLJ 2828 (SC).

37. Defamation—Ingredients.—In order to constitute offence of defamation the words, signs, imputation made by accused must either be intended to harm the reputation of a particular person or the accused must reasonably know that his/her conduct could cause such harm. The appellant giving statement to news magazine that pre-marital sex must be socially accepted neither intended to cause harm to the reputation of the complainants nor any actual harm done to their reputation could be discern. Both the elements i.e. *mens rea* and *actus reus* are missing. The appellants' statement published in news magazine is a rather general endorsement of pre-marital sex and her remarks are not directed at any individual or even at a 'company or an association or collection of persons'. It is difficult to fathom how the appellant's views can be construed as an attack on the reputation of anyone in particular.

When the statements in question are not directed against any person or against an identifiable group of individuals, the complainants cannot be said to be an aggrieved persons. The complainants have alleged defamation in respect of imputations against the character of Tamil-speaking women, which could be viewed as a class of persons. However, the appellant's remarks did not suggest that all women in Tamil Nadu have engaged in pre-marital sex. In fact her statement in News Magazine did not refer to any specific individual or group at all.

It is not the task of the criminal law to punish individuals merely for expressing unpopular views. The threshold for placing reasonable restrictions on the 'freedom of speech and expression' is indeed a very high one and there should be a presumption in favour of the accused in such cases. It is only when the complainants produce materials that support a *prima facie* case for a statutory offence that Magistrates can proceed to take cognizance of the same. Initiation of a criminal trial is a process which carries an implicit degree of coercion and it should not be triggered by false and frivolous complaints amounting to harassment and humiliation to the accused. *S. Khushboo vs. Kanniammal and Anr.*, 2010 (3) CrLJ 2828 (SC).

38. *Mens rea*.—Bank have made defamatory communication with complainant. Communication through telegram expressed concern of Bank to get dues cleared in time. *'Mens rea'* for an offence of defamation was missing. Action of Bank was in good faith.

Besides, requirement of publishing any imputation concerning the complainant is also missing in this case. This telegram was sent to the complainant only. The alleged information by accused to the wife of the complainant cannot in any manner be considered as defamatory. The intimation communicated to the wife of the complainant was that there were no dues left to be claimed in the account of the complainant and in case any communication was received from the bank in future, the same should be ignored.

Undisputedly, the petitioner is a bank incorporated in England with limited liability by Royal Charter, 1853 and, therefore, is a corporation/company. A company cannot be in any case held to have committed an offence under Section 500 IPC because, most essential ingredient of the said offence i.e. *'mens rea'* would be missing as a company is a juristic entity or an artificial person, whereas a Director is not a company. The company may be made liable for offences, however, if there is anything in the definition or context of a particular Section of a particular statute which would prevent the application of the said section to a limited company, the limited company cannot be proceeded against. There are number of provisions of law in which it would be physically impossible by a limited company to commit the offence. A limited company, therefore, cannot generally be tried for offences where *mens rea* is essential. Similarly, a company cannot face the punishment of imprisonment for obvious reasons that company cannot be sent to prison by way of a sentence. *Standard Chartered Bank vs. Vinay Kumar Sood & Ors.*, 2010 (2) CriLJ 1277 (Del).

Allegation that news reader of T.V. Channel while narrating reaction of complainant on murder of political leader said that complainant rebuked media in filthy language lowering down dignity of complainant and defamed him in public.

It should be noted that the complainant is alleging criminal defamation against the accused, as distinguished from civil defamation. In order to constitute offence of defamation under criminal law, Section 499. In the entire complaint, the complainant/1st respondent did not allege that the accused who is Chief Executive Officer of T.V.-9 channel telecast the news item or permitted to telecast the news item with such state of mind *(Mens rea)*. Except as Chief Executive Officer of the T.V. news channel, the complainant did not allege any other connection for the accused with telecasting of this news item. It is not as if the accused was news reader or voice over artist or editor or news reporter in relation to this news item or the news bulletin in which this news item was telecast. In the absence of any such connection for the accused with this news item and in the absence of any such *mens rea* or state of mind for the accused in relation to this news item, simply because the accused happened to be Chief Executive Officer or Proprietor or Partner or Managing Director of the T.V. News Channel, no criminal case can lie against him for offence punishable under Sec. 500, IPC. *Ravi Prakash vs. J.C. Diwakar Reddy and Anr.*, 2010 (3) CrLJ 2558 (AP).

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Sec. 500. Punishment for defamation.—Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine or with both.

Synopsis

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1. Cases.—Witnesses as a class are not exempted from the protection from th
operation of Section 499, in respect of defamatory statements, simply because the
have made them in judicial proceedings. 31 PWR 1912 Cr : 15 Ind Cas 494 : 13 Cr L
494 : 244 PLR 1912. The defendant in proceedings for defamation, whether in a civ
suit or under Section 500, Penal Code, must for defence depend upon the fact of eac
particular case which the defendant is certain can be proved by him or his witnesses.
there is no substantial defence, an immediate apology in the widest and mos
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step that a complainant must take for commencing a prosecution or a civil suit fo
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article. 26 ALJ 509. An editor should be most watchful not to publish defamator
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true. *Ibid.* Publication of a defamatory matter is actionable. 26 ALJ 509. Editor of th
newspaper is liable for defamation if he publishes extracts from books in h
newspaper. His plea that he is merely a publisher and not an author of matter is n
tenable. *K.V. Ramesh v. H. D. Ramesh*, 2001 Cri LJ 3556 (Kant) : 2001(3) CCR 503.

Statements made in the course of judicial proceedings are absolutely privilege
Information or a report made to the police does not come within this principle. A repo
made at a police station though not within the rule of absolute privilege which cove
judicial proceedings, is *prima facie* privileged that is to say, the person making it has
right to make if he honestly believes it, and the person receiving it has a duty to recei
it. 1923 All 167. A defamatory statement made in the presence of a number of perso
does not cease to be such merely because the accused had been challenged by t
complainant to make it. 92 Ind Cas 694 : AIR 1926 All 237. Where the complainant w
invited by the accused to fast at the latter's house along with a number of people b
when he sat down to dinner he was asked by the accused to leave the place ; *held*, th
although the conduct of the accused was reprehensible from a social point of view the
was no imputation made against the reputation of the complainant and therefore the
was no offence within the meaning of Section 500. AIR 1926 All 711.

A party who gives evidence on his own behalf in a judicial proceeding may
prosecuted for any defamatory statement made in the course of his evidence und
Section 500, IPC. Such a person may plead the 9th Exception to Section 499 in defen
4 Bur LJ 181 : AIR 1925 Rang 360. A charge under this section can be framed by t
Magistrate when the facts stated in the complaint justifies that. 26 PLR 552. Imputat
by a member of a caste that another member of the same caste is unfit for associat
constitutes an offence under this section when there is no decision of the *Panchaya*
that effect. LR 6 All 207 Cr. There is no absolute privilege in respect of statements ma
in Court. The accused must show that the imputations were made in good faith and
his own protection. This is a matter of evidence. 35 Cr LJ 527 : AIR 1922 Cal 76. Wh

a woman laid a report at the police station that she was raped by some persons who were not named and she gave their names only subsequently in the complaint filed in Court and the charge was found to be false and the persons charged filed a complaint against the woman for defamation ; *held*, that what she was doing was not defaming these persons but bringing a possibly false charge against them. If her complaint was a false one, her objection making it was to defame false persons so much as to harass them and cause them the inconvenience of being subject to criminal proceedings. For such an offence Section 211, Penal Code, is the appropriate section, and Magistrate must comply with Section 195, Cr. Pro. Code. AIR 1935 Rang 163.

It is undesirable that people should be hampered in their access to the Courts and in getting Justice by the fear that if they are unsuccessful they may be prosecuted for defamation. All Courts should be careful when a complaint of defamation is filed in respect of proceedings in a Civil Court to *see* whether the provisions of Section 209, IPC read with Section 195(b), Cr. Pro. Code, have not been evaded. 156 Ind Cas 219 : 39 Cr LJ 881 : 1935 Cr C 367 : AIR 1935 Sind 81 ; *see* also 42 CWN 674.

Husband wrote letter to his wife calling her characterless and having intimacy with others. Copies sent to her relatives. Offence was made out. *Balwant Singh* v. *Balwinder Kaur*, (1994) 2 Recent Cr R 294 (P & H).

Waqf Board which constitutes committees for management of properties. No committee constituted for sometime. Members of community by resolution decided not to have any contact with respondent No. 2 and to treat him as ex-communicated. Whether such decision in regard to respondent No. 2 amounts to an offence. *Held*, proceedings initiated on the basis of complaint by respondent No. 2 is quashed. *Khali v. State of Rajasthan*. 1994 RCC 290 (Raj).

A person calling another a *badmash* and a *baiman* is guilty of an offence under Section 504, IPC. and not under Section 500, IPC. 51 PLR 1222 : 4 Lah LJ 408. Where a number of persons, professing a particular faith meet together and resolved for proper reasons not to associate with a person ex-communicated by their religious head and sent a copy of the resolution to the person in question it does not amount to defamation. 66 Ind Cas 80 : 23 Cr LJ 240 ; 1923 Rang 16. Where in a fit of passion abusive words are exchanged between two persons the offence does not require a severe sentence. 2 Bur LJ 10 : 1923 Rang 148. Statements resulting from action taken under Sections 154 and 155 of the Criminal Procedure Code in the course of information given to a police-officer are privileged and cannot be made the foundation of a charge of defamation. 41 All 311 : 17 ALJ 414 : 49 Ind Cas 855. To say of a person that he makes gifts to certain funds not out of charity but from self-advantage is defamatory if the words used incite public contempt and ridicule. 42 Ind Cas 417 : 19 Cr LJ 129. Where defamatory words are not addressed in the course of a quarrel and which are calculated to have the reputation of the complainant, an offence under this section has been committed. 16 ALJ 498. A witness who being actuated by malicious motives makes a voluntary and irrelevant statement not elicited by any question put to him while under examination to injure the reputation of another commits an offence punishable under Section 500. 105 Ind Cas 820 : 28 Cr LJ 996 : AIR 1928 Nag 58. Every publication or circulation of libel constitutes fresh and distinct act and therefore a separate offence. AIR 1935 Nag 90 : 155 Ind Cas 450 : 36 Cr LJ 744 : 1935 Cr C 418. Calling a person "liar, ungentlemanly, barbarous and tyrannical" does not constitute an offence under this section. AIR 1945 Pat 450. Though the accused in a case under this section denie the making of the alleged statement, still it is open to him to prove the truth of th allegation. 1945 OWN (HC) 334. Statement made by a person to police durin investigation merely expressing suspicion as to complicity of a certain person in crim is privileged. AIR 1950 Nag 20 ; *see* AIR 1950 Cal 77. Where a *prima facie* case o defamation is made out by the complainant, the Court should find the accused guilty under this section. AIR 1943 Cal 478 : 45 Cr LJ 129. Where a letter written by on brother to another embodying certain recriminations of a trivial nature, it is covered by Section 95 of the Penal Code. AIR 1943 Sind 196 : 45 Cr LJ 105 : 209 Ind Cas 234. In a case under this section it is open to the accused to raise different and inconsisten pleas. AIR 1944 Mad 484 : 46 Cr LJ 71. A complaint under this section which is made on oath cannot be dismissed on the ground that there is a possibility that the accuse might have some defence to the complaint, if true. AIR 1940 Pat 179 : 41 Cr LJ 504 187 IC 721. In a case of defamation it is necessary that the prosecutor should be ready to go in the witness-box and submit to the most searching cross-examination. AIR 1939 Rang 371 : 41 Cr LJ 48 : 184 IC 566.

The mere use of the word "*chandal*" can not form the foundation of a charge o prosecution for defamation, for the accused using the word "*chandal*" cannot be said t have the intention or motive to damage the reputation of the person who is so called, s as to bring the case within Section 500, IPC. 1952 Cr LJ 1640 : AIR 1952 Ori 351. Fo meaning of the word "malice" *see* AIR 1946 All 204 ; AIR 1980 All 259. Terms o disrespect are not *per se* defamatory. 1968 BLJR 300 but, intentional insult an abusive language is be judged from circumstances, whether it is defamatory. (1971) 3 Cut LT 574.

Any principle of journalistic ethics according to which the editor of a newspape refuses to disclose the name of the writer of a defamatory article, which is devised t defeat the ends of justice, cannot be accepted as ethical by any Court of law. The onl conclusion that a Court can draw from such a conduct is that the publisher was i entire agreement with the writer and he was willing to take the full responsibility for th publication and face the consequences himself. 1962 (1) Cr LJ 122 ; *see* also 1963 (1 Cr LJ 609 : AIR 1963 Punj 201 (use of the freedom of press is not allowed so as t constitute infraction of the law relating to defamation).

As a publisher of a newspaper makes known to the people in general and give publicity to the news item printed in the newspaper the case against the publisher fo the publication of a defamatory news items printed in that newspaper would legally an logically amount to defamation simpliciter and as such would be punishable unde Section 500 of the Indian Penal Code. It may be that the publisher is also the printer o the newspaper, the case against him would be covered by Section 501, but it would no in any way affect the liability under Section 500 as publisher. AIR 1966 Punj 93. Fo liability under Section 499 (1) *see* 1983 Cr LJ (Mah) 225 and liability of a company fo an offence under Section 500 *see* AIR 1968 Cal 266 ; AIR 1956 Cal 137 : 60 CWN 305 1983 (2) Crimes 308. No defamation in cases reported in 1980 Cut LT 532 : 1966 BLJ 300 (proof of words used) ; AIR 1966 Ori 15 (hardly possible even for the honest witnes to reproduce words) : 1982 Cr LJ 1717 : 1982 Chand LR (Cr) 488 (complaint filed tak without explanation).

In the instant case there are allegations in the complaint to the effect that Accuse namely, Managing Editor, Editor, Execution Editor and Executive Editor are parties to the conspiracy to defame the complainant his father and other family members, knowing that the publications contain defamatory imputations, they have deliberately published in the news papers, the imputations found in two books by printing and publishing the said news items and they have committed the offences punishable under Section 500 and 501, IPC under Section 120-B. By entering into criminal conspiracy to defame the complainant and his family members and in pursuance to the said conspiracy, the two books are published and contents of the same are again republished in the Indian Express. Application for quashing of proceedings on ground that only Editor was responsible for the publication, was not allowed. *K.V. Ramesh v He Ramesh* 2001 Cri LJ 3556 (Kant).

For burden of proof of execution, *see* AIR 1937 Nag 122 (plea of justification), AIR 1958 MP 216 : 1958 Jab LJ 252 (good faith) ; AIR 1966 SC 97 : 1966 Cr LJ 82. For alteration pleas that it was not defamation and it was made in good faith and for the good of the public is possible. 1967 MPLJ 59.

Where bail-bonds of accused forfeited without issuing notice to accused or his surety, order of forfeiture held not valid. *Har Kishan Lal Chopra* v. *State of Punjab.* (1995) 4 Crimes 144 (P & H).

Prosecution of a partnership firm for offence of defamation is not maintainable. Firm is neither an artificial nor a Juristic person. *(M/s.) Magnum Enterprises v. State and Sanjib Kishore Basu,* (1995) 1 CCR 574(Cal).

The accused was charged for having published a book in which some defamatory material was alleged to have been published against the complainant. Accused published a biography of a poet with help of sister of the poet. In the book he described a girl "Liani" as poet's lover who had love affairs with the poet. In the book she was stated to have married an army compounder ignoring the poet. The petitioner-complainant, one Mrs. Lalliani alleged that she was the girl described as "Liani" in the book the lover of the poet and that imputations were defamatory. It was observed that the girl referred to might have been an imaginary figure. No direct reference to Lalliani was found. *Held*, that there was no material to connect the complainant with the girl "Liani" and "Liani" described in the book was either an imaginary person or some one else than the complainant. For the reason there was no merit in the application and revision against the order of acquittal to be dismissed. 1987 Cri LJ 1295 (Gau).

2. Defamation—Connotation of.—In the case of defamation in explaining 'defamation' it was made clear that publication of defamatory words or uttering defamatory words, heard and listened to by people taking place in a proceeding in a Court rooms or outside the Court precincts did not matter as long as the defamatory words were intended to harm reputation of the other. 1987 Cri LJ 1795 (Bom).

Statement that "Marwari community have no faith and love towards India, their motherland" not sufficient to constitute offence of defamation. *Shatrughna Prasad Sinha* v. *Rajbhan Surajmal Rathi.* 1997 Cri LJ 212 (SC) : 1996(4) CCR 155 (SC) : 1996(4) Crimes 27 : 1996(6) Scale 769 : 1996(7) Supreme 157 : 1996(6) SCC 263 SC.

3. Complaint.—In case of complaint under Section 499, IPC, on behalf of a woman who ought not to be compelled to appear in public leave of Court is necessary exempting her from personal appearance. AIR 1935 Oudh 6. Where a pamphlet contains attack on individual members of Municipal Committee but not on committ as such, committee cannot maintain prosecution unless special damage has be caused to it. AIR 1935 Rang 108. Complaint by aggrieved person is competent. A 1942 Lah 76 : 43 Cr LJ 572 ; 1978 ALJ 996.

No cognizance can be taken for offence under Section 500, I.P.C. on complaint fil by one who is not aggrieved. Hence, the same is set aside. *Palanisami* v. *Secretary Government*, (1994) 2 LW (Cri) 535 (Mad).

When proceedings under Section 144, Cr. P.C. started by constituted attorney ar not by petitioner-tenant herself and petition did not certain any defamatory statemen against landlord but statements made in good faith, no case for initiating complai under Section 500, IPC made out. *Smt. Manju Mohanka* v. *Smt Renuka Banerjee*. 19 Cri LJ 4422 (Cal) : 1996(2) Cal LT 166 (Cal).

The only effect of an imputation being *per se* defamatory is that it would relieve t complainant of the burden to establish that the publication of such imputations h lowered him in the estimation of the right thinking members of the public. Howev even if the imputation is not *per se* defamatory, that by itself would not go to t advantage of the publisher, for the complaining person can establish on evidence th the publication has in fact amounted to defamation even in spite of the appare deficiency. So the appellant cannot contend, at this stage, that he is entitled discharge on the ground that the imputations in the extracted publication, were not p se defamatory. *Johan Thomas v. K. Jegadeesan* 2001 Cri LJ 3322 (SC) : AIR 2001 (S 2651 : 2001(6) SCC 30 : 2001(5) JT 398 : 2001(4) Scale 323 : 2001(5) Supreme 10 2001(3) Crimes 270 (SC) : 2001(2) JCC (SC) 39.

4. Sentence.—Where the defamation was an extremely malicious one, and means of publication employed were chosen with great cunning. *Held*, that the senter of fine of Rs. 400 in default of six months' imprisonment, was not excessive. 1935 Cr 1258 : AIR 1935 Rang 484. The character and reputation is no less important than body and there is no reason why those who maliciously cast grave aspersions agai his character and reputation should be treated differently and merely fined, 1962 (1) LJ 122. The defence of justification of libel has always been considered to be perilo because where there is failure of proof the plea is deemed as aggravation of the offen AIR 1961 Punj 415 : 1961 (1) Cr LJ 710. But in a case where the accused was prompted by any ill will or malice a lenient sentence of fine of Rs. 50/- was conside to be sufficient. AIR 1958 MP 216 : 1958 Cr LJ 1036 : 1958 Jab LJ 252 ; *see* 1974 LJ 1158 (in case of scandalous articles, mere fine will not be adequate) ; 1982 All C 1983 : 1982 Cr LJ (NOC) 156 (publication was for public good, hence sentences alre gone were sufficient).

5. Procedure.—Notcognizable—Warrant—Bailable—Compoundable —Triable Court of Session in case of public servant and by Magistrate of first class in any ot case.

6. Special period of limitation.—A special period of limitation has b prescribed under Section 199(5) of the Criminal Procedure Code for filing a petitio complaint namely six months from the date of the offence. *See* AIR 1978 SC 986 : 1 Cr LJ 764, where it was held that limitation comes from the date of filing compl under Section 406/420, I.P.C., and not for the date of his acquittal.

7. Charge.—Where charge of defamation was clear and unambiguous and the accused was not liable to be misled, the accused was held to be, in no way, prejudiced even though the charge did not contain the exact words of defamation. AIR 1932 Nag 158 : 34 Cr LJ 154 : 1932 Cr C 863 : 141 Ind Cas 438 ; *see* also AIR 1938 All 222 : 30 Cr LJ 533 : 26 ALJ 196 ; but *see* 47 CWN 555 : AIR 1943 Cal 478.

The charge would be as follows :—

I (*name and office of Magistrate/Session Judge etc.*) hereby charge you (*name of the accused*) *as* follows :

That on or about the .... day of .... at ....you made or published the following imputation concerning *A.B.*, to wit .... (*here set out the defamatory matter*) intending to harm or knowing or having reason to believe that it would harm the reputation of the said *A.B.* and that you thereby committed an offence punishable under Section 500 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

In a trial for defamation it is essential that the words complained of as being defamatory in character should be precisely set out and when the charge is against more than one accused, they should be individually given notice of what each is charged with. 1952 Cr LJ 1640 : AIR 1952. Ori 351 : 18 Cut LT 146.

The charges against the accused were quashed in a case where his defence was not liable to be brushed aside easily. (1986) 2 Crimes 401(Del).

8. Sanction.—*Vide* AIR 1940 Pat 97 : 41 Cr LJ 349 : 1861 IC 627 ; AIR 1938 Cal 527 : 42 CWN 674 : 39 Cr LJ 730 ; AIR 1938 Rang 232 : 39 Cr LJ 663 ; AIR 1942 Mad 19 : 43 Cr LJ 441 : ILR (FB) Mad 138 ; AIR 1938 Cal 527 : 42 CWN 674 : 39 Cr LJ 730.

9. Intention.—In a case of libel there must be *mens rea*. The firm not being a physical embodiment can have any *mens rea* and as such no process can be issued against the firm. The impugned order so far as it relates to issuance of warrant of arrest and the proclamation of attachment relating to firm is set aside. *M/s. Magnum Enterprises* v. *State*, (1994) 2 CHN 282.

10. Quashing of proceedings.—The cases based on direct imputation and cases which are based on imputation by innuendo had to be given due consideration. For the purpose of finding out whether the imputations are sufficient to attract the provisions of Section 499 of Penal Code a judicial inquiry has to be made *prima facie* by the concerned Magistrate. It cannot be dismissed at the threshold without application of judicial mind and without due judicial enquiry. When it is a case of direct imputation, the matter becomes simple but when it is based on innuendo defamation the trial magistrate has to be given sufficient scope to exercise his rightful jurisdiction and discretion. In such cases High Court should be cautious in interfering and should not interfere unless it is satisfied at least reasonably. *Mamman Mathew* v. *Kuneel Kumar*, 2004 Cr LJ 852 (Bom) : 2004(7) All MR (Cri) 1844.

In an Allahabad case where the leader of a political party was alleged to have defamed the complainant by addressing in a public meeting that a person with long moustache in party was corrupt, but this fact was not reported in newspaper. It was held that the offence was not made out and the order of taking cognizance was liable to be quashed. *C.L. Sagar* v. *Mayawati*, 2003 Cr LJ 690 (All) : 2002 All LJ 2860 : 2002 (45) All Cri C 1150 : 2002(3) All Cri R 2880.

In a case all that the accused had conveyed by public notice published was th the property/properties did not belong to the complainant but belong to them and th anyone dealing with the complainant, would be doing so at their own risk. A reading the notice, on the face of it, did not show that it was published with intention knowledge to harm the reputation of the complainant. It was held that the Court belo was right in exercising his discretion to fresh the order issuing the process against th accused. *Valmiki Faleiro* v. *Mrs. Laurina Fernandes*, 2005 Cr LJ 2498 : 2005 All M (CRI) 2509 : 2005(2) Bom CR (Cri) 465.

Where there is sufficient balance in the account of the drawer and still cheque wa dishonoured it *prima facie* constitutes offence under Sections 499 and 500. I.P.C. Th defence of the honest, *bona fide*, genuine mistake cannot be taken into consideration a the stage of quashing process under Section 482, Cr. P.C. *J.V. Ganatra* v. *Rames Chandra Nathalal Machchhar*, (1995) 3 CCR 160 (Guj).

The accused was alleged to have published a defamatory news item in hi newspaper for which process was issued against him as he was managing director However there was no positive averment in the complaint that managing director wa having knowledge of or he was directly responsible for publication of said imputation Since managing director was not concerned with publication of news items, process issued against him was liable to be quashed. *Vivek Goenka* v. *State*, 2003 Cr LJ 405 (Bom) : 2003 All MR (Cri) 1735 : 2003 (4) Mah LJ 880.

Where specific role has been attributed to the accused by making positiv allegations that there was a collusion between the complainant and his brother and o account of that said imputation was published in the newspaper at the instance of al the accused the complaint cannot be quashed since the allegation is based on innuend defamation. *Mammen Methew* v. *Kamal Kumar*, 2004 Cr LJ 852 at p. 854 (Bom) 2004(7) All MR (Cri) 1844.

The society's executive body assuming the power in them of expelling a membe from the society had attempted to expell the complainant respondent from the sai society. The magistrate took the cognizance of Complaint as action taken by petitione was not in good faith and also it was unreasonable as due process established by la was not followed. The High Court refused to quash the proceeding as magistrate had committed no error in issuing the process against the petitioners and observed tha people or accused against whom process is issued must appear before Court an uphold their case. Unless such course is adopted complainant has no *prima facie* righ to make prayer for quashing the Complaint. *V.M. Telang* v. *State*, 2003 Cr LJ 365 (Bom) : 2003 All MR (Cri) 1727 : 2004 (1) Bom CR (Cri) 139.

Petition complaint cannot be quashed on ground that the defamatory statement o the witness/accused recorded under Section 161, Cr PC, is privileged is not acceptabl for quashing the complaint under Section 500, IPC as the privilege is not absolute bu only "qualified privilege". *P. P. Zainulabideen* v. *K.M.H. Sahul Hameed* alias *Ab Abdulah*, (2004) 3 Crimes 54 (Mad) : 2004(3) Crimes 54 : 2004 Mad LJ (Cri) 407 2004(3) Cur Cri R 421 : 2004(3) Rec Cri R 190.

There was complaint against petitioner that at his instance an article wa published in news paper containing imputation to harm reputation of Complainan However, there was no imputation constituting offence of defamation in Complaint. I was held that the complaint was liable to be quashed. *Kalyanam* v. *Ramesh*, 2003 Cr LJ 3390 (Mad) : 2003(2) Crimes 157 : 2003(2) Cur Cri R 178.

In a case, the Court observed that the allegation in the complaint are of very serious nature and whether the allegations are false a true, could be decided on substantial evidence. The Court was of the opinion that the allegations in the complaint *prima facie* constituted offence punishable under Section 500, IPC and at this juncture it could not be decided that the allegations were made in good faith. Complaint was not quashed. *K.A. Ravindranathan* v. *K. Ravindra Nair*, 2005 Cr LJ 3828 (Chattisgarh) : 2005 CgLJ 98 : 2005(32) AllIndCas 350.

Where the affidavit filed by the petitioner in reply against Textile Labour Association mainly contained the details of the facts stated by the complainant on the complaint. Since certain allegation were made against the office bearers of Association and other workers only to bring the correct facts of the case before the Court. Moreover, the averments were made in good faith and without any malice. The averments were covered by exceptions 7, 8, 9 to Section 499 and hence the complaint was quashed. *Damsing Durgasing* v. *State of Gujarat*, 2006 Cr LJ 720 (Gujarat).

11. Errata.—Publishing errata is not proper by the accused without expressing any regrets for the original publication. In case, the accused realized their mistake in original publication, the Editor should have published a notice expressing regrets or sorry or pleading excuses for the mistake in original publication; and the said notice should have been signed by the Editor. Without following such known and desirable practice, the accused showed their indifference for their earlier mistake and published only errata instead of notice of regrets. *Tankasala Ashok & Anr. vs. State of A.P.*, 2010 (2) CrLJ 2074 (AP).

12. Wrong News item in News Paper.—Accused persons published news item in their newspaper that Constable committed rape on his daughter with wrong Roll Number which was that of complainant.

This Court is of the opinion that having regard to giving name of the culprit and describing the culprit as suspended constable, there is no imputation against the 2nd respondent/complainant in the news item in question even though roll number of the suspended constable was wrongly given. Further, there is absolutely no averment in the complaint that mentioning of wrong roll number by the accused in the news item was intentional. Further, there was nothing to show that Editor had control over selection of publication. Proceedings against accused Editor liable to be quashed. *Tankasala* Ashok *& Anr. vs. State of A.P.*, 2010 (2) CrLJ 2074 (AP).

13. *Mens rea*.—Allegation that news reader of T.V. Channel while narrating reaction of complainant on murder of political leader said that complainant rebuked media in filthy language lowering down dignity of complainant and defamed him in public.

It should be noted that the complainant is alleging criminal defamation against the accused, as distinguished from civil defamation. In order to constitute offence of defamation under criminal law, Section 499.

In the entire complaint, the complainant/1st respondent did not allege that the accused who is Chief Executive Officer of T.V.-9 channel telecast the news item or permitted to telecast the news item with such state of mind *(Mens rea)*. Except as Chie Executive Officer of the T.V. news channel, the complainant did not allege any other connection for the accused with telecasting of this news item. It is not as if the accused was news reader or voice over artist or editor or news reporter in relation to this news item or the news bulletin in which this news item was telecast. In the absence of any such connection for the accused with this news item and in the absence of any such *mens rea* or state of mind for the accused in relation to this news item, simply because the accused happened to be Chief Executive Officer or Proprietor or Partner or Managing Director of the T.V. News Channel, no criminal case can lie against him for offence punishable under Section 500, IPC. *Ravi Prakash vs. J.C. Diwakar Reddy and Anr.*, 2010 (3) CrLJ 2558 (AP).

* * * * *

Sec. 501. Printing or engraving matter known to be defamatory.—Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Synopsis

1. Notes 3038
2. Procedure 3038
3. Charge 3038

1. Notes.—Publication of a defamatory rumour is an offence under this section. 26 ALJ 509. Malicious publication in the sense of active ill-will against the person defamed is not a necessary constituent of the offence of defamation. 26 ALJ 509 : AIR 1928 All 321 ; *see* (1973) 43 Cut LT 469 (no intention-to defame, no case under Section 502).

2. Procedure.—Not cognizable — Warrant — Bailable — Compoundable — Triable by Court of Session, Presidency Magistrate of the first class.

3. Charge.—"I *(name and office of the Magistrate, etc.)* hereby charge you *(name of the accused)* as follows :

"That on or about the ....day of ....at ....you sold or offered for sale any printed (or engraved) substance, to wit ....containing defamatory matter knowing that it contained such matter, and that you thereby committed an offence punishable under Section 502 of the Indian Penal Code, and within my cognizance (or the cognizance of the Court of Session or High Court).

'And I hereby direct that you be tried on the said charge'."

* * * * *

Sec. 502. Sale of printed or engraved substance containing defamatory matter.—Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Synopsis

1. Procedure 3039
2. Proof 3039
3. Charge 3039

1. Procedure.—Not cognizable—Bailable—Compoundable with the permission of the Court when the person defamed is public servant and in any other case compoundable with the person defamed and triable by Court of session in case of public servant and for others by Magistrate of the first class.

2. Proof.—The points requiring proof are—

(1) a defamtory matter was printed or engraved :

(2) the accused sold or offered to sell such defamatory matter :

(3) the accused knew or had reason to believe that such matter was defamatory.

3. Charge.—"I (name and office of Sessions Judge/Magistrate, *etc.*) hereby charge you (name of the accused) as follows :

That on or about..........day of..........at.......you sold (or offered to sell) any printed (or egraved) substance, to wit.....containing defamatory matter knowing that it contains such matter and that you thereby committed an offence punishable under Section 502 of IPC and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge."

* * * * *

CHAPTER - XXII

OF CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE

This Chapter is to some sort supplementary of the Chapter of Defamation. An imputation which is not defamatory under the definitions, explanations and exceptions in that Chapter may, under certain circumstances, be punishable on other grounds. For example, an imputation which is insulting though not defamatory, may be uttered in the hearing of the person who is the object of it, for the purpose of provoking that person to break the public peace. If so, it is punishable under Section 504. "There are many cases in which it is fit that unpleasant truth should be told respecting an individual. But there is no case in which it is desirable that such truth should be told in such a way that the telling of it is gross personal outrage. A person who has detected or thinks that he has detected, a dishonest misrepresentation in a book, has a right to expose it publicly. But he cannot be allowed to intrude into the presence of the author of the book, and to tell him to his face that he is a liar. A person who knows that the mistress of a female school to be a woman of infamous character, deserves well of society if he states what he knows. But he cannot be allowed to follow her through the streets calling her by opprobrious names, though he may be able to prove that all those names were merited. A person who brings to notice the malversation of a public functionary deserves applause, but a person who hangs a public functionary in effigy at that functionary's door, with an opprobrious label, does what cannot be permitted, even though every word on the label, and every imputation which the exhibition was meant to convey, may be perfectly true."—*Morgan and Macpherson*, 449.

Sec. 503. Criminal intimation.—Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Illustration

A, for the purpose of inducing *B* to desist from prosecuting a civil suit, threatens to burn *B*'s house. *A* is guilty of criminal intimidation.

Comments

Scope.—Where the threats are intended to put a person in fear and thereby to dishonestly induce a person to deliver property, they amount to offences punishable under Sections 385 or 389. Such threats as the following would fall within the present definition—threats to a person or to his child, wife, relative, *etc.*, threats to cause mischief on property or to kill or wound any animal which is property, or to commit the offence of house-breaking, or to commit any mischief of trespass by means of a riotous or unlawful assembly; threats to impute unnatural lust to a person, *etc.*

The threat must be made either with intent to cause alarm to the person threatened or to overcome his free will and to induce him to do or omit to do something which he is not legally bound to do or omit. The question whether the threat amounts to criminal intimidation or not does not depend on the nerves of the individual threatened ; if it is such a threat as may overcome the free will of a firm man, or whatever the nature of the threat, if it is made with intention mentioned in the section, it is an offence. A threat of trivial kind, calculated perhaps to give pain, but not to cause alarm, will probably be deemed to fall within the exception in Section 95. If the intention of the person threatening is to cause the person threatened to do an act which he is bound to do, such as to pay a just debt or demand, it may nevertheless amount to criminal intimidation if the intention is to cause alarm to that person by a threat of injury.—*Morgan and Macpherson*, 450. In order to constitute the offence of criminal intimidation, the harm threatened must be illegal. UBR (1897-1901) Vol. I, p. 359. A threat will not amount to an offence unless made with intent to cause alarm to the complainant. 2 Bom LR 55. There can be no criminal intimidation where the injury of which complaint is made is the hardship arising from conventional punishment which a spiritual superior, acting in the exercise of his authority as regulated by the custom of the cast is competent to inflict. 6 Mad 681 ; *see* also 1933 MWN 736. The offence seems to require both a person to be threatened and another in whom he is specially interested. There must be the intent to cause alarm to the former by a threat to him of injury to the latter. 11 Bom 376. The gist of the offence is the effect which the threat is intended to have upon the mind of the person threatened and is equally clear that, before it can have any effect upon the mind, it must be either made to him by the person threatening or communicated to him in some way. In other words it must be a threat communicated or uttered with intention of its being communicated to the person threatened for the purpose of influencing the man's mind. 15 Cal 671 ; AIR 1949 Mad 233 : 50 Cr LJ 258. An advice given to others not to trade with a particular individual is indeed an injurious act. But it is no threat and the harm caused is only to his opportunities of future gain and not to property already possessed by him. SC 146 Oudh. Where the accused, Mussalmans threatened the Hindu population (1) to obstruct and stop the Hindu religious procession ; (2) to commit a riot ; (3) to do that in or by which people might happen to be killed. *Held*, that such a threat was one contemplated by Section 503, IPC. Rat Un Cr C 273. Where the accused threatened the complainant that he would get him imprisoned for six months if he continued to detain his adult sister in his house, *held*, that this did not amount to the offence of criminal intimidation. 8 BHC Cr 101. The words "threatened another" in Section 503 show that the threat must be made to the complainant personally, or, if made to a third person, must be made with intent that he should communicate to the complainant. 5 CPLR Cr 50. Where a person complains to a Magistrate that he is threatened with an illegal sentence of ex-communication, which will at least injure his reputation unless he abstains from acts which he is legally entitled to do, the allegation, if established, might constitute the offence of criminal intimidation. 8 Mad 140 : 2 Weir 249. The accused told the complainant, a member their caste, that he should give up held or else they would put him out of caste. *Held*, that this did not amount to criminal intimidation within the meaning of the Indian Penal Code, the injury threatened not falling within the definition contained in Section 44 of the Indian Penal Code. Rat Un Cr C 27.

A threat to commit suicide, if another person refuses to do a particular act is not criminal intimidation unless the person be interested in the person making the threat. 109 PR 1866 Cr. There must be a threat to another person of injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested. 30 Cal 418 : 7 CWN 116. Where a Municipal Commissioner threatens a butcher that, if he bought a cow, he would have him sent to jail and that he would make it impossible for him to continue to live in the town. *Held*, that the use of the words did constitute criminal intimidation as defined in Section 503. 102 Ind Cas 557 : 28 Cr LJ 589 : 8 AI Cr R 148. The words of this section seem to imply that the threat must be one which can be put into execution by the person threatening. It is not necessary that the injury should be one to be inflicted by the offender; it is sufficient if he can cause it to be inflicted by another, and the infliction of it could be avoided by some act or omission that the person threatening desires. 48 Mad 774 : 21 LW 174 : 48 MLJ 190. A threat by a President of a self-constituted arbitration Court is a threat of harm to an individual in his person, reputation or property and it is immaterial that the tribunal is incompetent to execute its own decree. 37 Cr LJ 26 : 27 CWN 479 : 72 Ind Cas 508. The accused demanded of the complainant certain property of theirs in the possession of the latter and used threats. *Held*, the offence of criminal intimidation was complete even if the object of getting possession was not achieved. 21 ALJ 877. In a case where accused was abusing complainant and complainant running away pursued by accused with brick bat is hand, the act amounts to criminal intimidation. 1953 BLJR 258 : 1953 Cr LJ 1132 : AIR 1953 Pat 188 : 32 Pat 436.

The most important ingredient of the offence of criminal intimidation as defined in Section 503 is that there should be the intention to cause alarm or to cause the person threatened to do any act which he is not legally bound to do. 1961 Jab LJ 557 : 1961 MP LJ 1190.

The section is in two parts, the first part refers to the acts of threatening another with injury to his person or reputation or property or to the persons or reputation of any one in whom that person in interested ; the second part refers to the intent with which the threatening in done and it is of two categories. 1960 Cr LJ 377 : AIR 1960 SC 154. A mere threat does not constitute an offence under this section. (1969) 35 Cut LT 681 : 1980 Cr LR (Mah) 146 : 1980 Cr LJ 210. Intention is an essential ingredient of the offence under the section. AIR 1964 AP 382 : 1964 (1) Cr LJ 255 : 1961 MPLJ 1190 : 1961 Jab LJ 557. *See* (1970) 2 SCJ 227 (accused was held to be guilty of criminal intimidation).

Even if it be said that it was a threat to third person the case comes under the words "whoever threatens another with any injury to the reputation of anyone, in whom that person is interested in Section 503. 1964 (2) Cr LJ 85, *see* also 1964 (1) Cr LJ 255 (where the intention was not proved).

The complainant at the instance of accused supplied the paddy to the millers and collected Rs. 11,70,000/- from the rice millers. When the complainant demanded the said amount, the accused threatened that he would commit suicide by stabbing himself, with an intention to cause alarm to the complainant, desisting him to take any legal action against the accused for which he was legally entitled to do legally for recovery of the amount collected, due to the threat of injury to property, as complainant had to forego in the event of the accused committing suicide. It was held that the said act of the accused attracted the ingredients of the offence under Section 503, IPC punishable under Section 506, IPC. *Kalla Srinivas* v. *State of AP*, 2005 Cr LJ 2440 (AP) : 2005(2) ALD (CRL) 250 : 2005(2) Andh LT (Cri) AP 36 : 2005(4) Crimes 395.

* * * * *

Sec. 504. Intentional insult with intent to provoke breach of the peace.—Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Synopsis

1. Scope 3043
2. Insult—Breach of peace 3046
3. Cognizance of offences 3047
4. Procedure 3047
5. Charge 3047

1. Scope.—The insults, however deliberate and intentional, are only punishable as offences when they are intended to provoke a breach of the peace or an affray (Section 159). The Court must be satisfied not merely that there has been intentional insult and provocation, but also that the offender gave the provocation intending or knowing it to be likely that it would cause a breach of the peace. Ordinarily such an intention may be inferred from the circumstances attending the insult. The offences is not made to depend upon the sensitive feelings or excitable temper of the person insulted, but on the intention or knowledge of the offender."—*Morgan and Macpherson*, 450 : *see* also 48 Cr LJ 974 : AIR 1948 Mad 9 ; AIR 1949 Mad 760 : (1949) 1 MLJ 455 ; 4 DLR (Cal) 115 : 3 AI Cr D 288 ; (1949) 2 MLJ 767. An offence under this section may be committed, although the person, to whom the insult is directly offered, is not a person likely to be provoked to commit a breach of the peace ; and an offence may be committed under this section although the person likely to be provoked to commit a breach of the peace is not in fact provoked. 1 Weir 622. To charge a person with an offence is sufficient. UBR (1892-1896) Vol. I, 220. it is sufficient for the prosecution to prove that the abusive language used is ordinarily sufficient to provoke a man of his position and character to commit a breach of the peace. 1 Weir 620; UBR (1897-1901) Vol. I, 67 : *see* also 11 Mys LJ 167.

The essence of the offence consists in the effect it is likely to produce the person to whom the provocation is addressed, not upon any other person who may come to know it. UBR (1897-1901) Vol. I, 360. The intention required for the offence under Section 504, IPC, may be inferred from the circumstances attending the insult. But the offence under the section does not depend upon the mere sensitive feeling of the offended person. It depends upon the knowledge or intention of the offender. In the absence of proof of such intention or knowledge, there can be no conviction under the section. 159 Ind Cas 527 : 62 CLJ 205 : 1935 Cr C 1188 : AIR 1935 Cal 736. For the offence under this section it is necessary that the insult should be delivered to the person insulted with the intention that he may then and there be provoked to commit an offence. AIR 1939 Pat 27 : 177 Ind Cas 896 : 1938 PWN 812 : 39 Cr LJ 890 : 19 PLT 892. An assault causing a breach of peace may be of spoken words only or of conduct or actions of men 18 Cr LJ 463 : 1 Pat LW 536 : 39 Ind Cas 303. Under Section 504 there must be an intentional insult. When the charge is of an insult by words, the word must amount to something more than what in English law is called "mere vulgar abuse". *Per Beaumont, C.J.*, in 56 Bom 196 : 34 Bom LR 282 : 33 Cr LJ 463 : AIR 1932 Bom 193. But in the same case *Broomfield, J.*, said, "Words which do not amount to more than vulgar abuse may nevertheless amount to an insult within the meaning of Section 504. Provocation of complainant is not essential. Intentional use of provocation and abusive language is enough. AIR 1932 Lah 480 : 1932 Cr C 618 : 33 PLR 695 : 33 Cr LJ 548 : 138 Ind Cas 120.

Section 504 provides a remedy for abusive and insulting language and it requires an intention to insult and thereby to give provocation to the person insulted and an intention that such provocation should cause or the knowledge that. that provocation is likely to cause the person so insulted to break the public peace or commit any other offence. AIR 1935 Sind 107. There is nothing in this section which confines the insult to spoken words and would not cover words written in a letter. A person is within the ambit of the section not only if the provocation offered by him is of such a character as to cause the person provoked to commit a breach of the peace but even if it is of such a nature as to cause him to commit any other offence. 32 Bom LR 103 ; AIR 1930 Bom 120 : 1930 Cr C 195. Mere abuse unaccompanied by an intention to cause a breach of the peace or knowledge that a breach of the peace is likely does not come within Section 504. *Ibid.* In dealing with this section the Court has not to judge the temperament or the idiosyncrasies of the individual concerned. It should try to find out what in the ordinary circumstances would have been the effect of the abusive language used. AIR 1930 Lah 344. An insult is no less intentional because it is incidental to another insult or even to another statement or proceedings which is not insulting. But to insult another intentionally is not an offence punishable under Section 504. IPC, unless the offender intends by that insult to provoke the other person into breaking the peace by assaulting him or getting him assaulted on reviling him in loud and angry tones or in any other way or to least knows that such a disturbance is a probable result. 7 NLJ 124 : 81 Ind Cas 903. Where the affairs is a trivial one a conviction under this section is not proper. 4 Lah LJ 230 : 65 Ind Cas 635.

Under this section, it is necessary that the insult should have been intentionally caused, and thereby provocation given with the intention or knowledge that such provocation was likely to cause the person provoked to break the public peace or to commit any other offence. 18 ALJ 515 : 56 Ind Cas 435 : 21 Cr LJ 51 ; *see* also AIR 1935 Sind 107 : 36 Cr LJ 1461 : 158 Ind Cas 608 ; AIR 1935 Pesh 122 : 36 Cr LJ 1210 : 157 Ind Cas 773. Mere vulgar abuse is no offence. AIR 1950 MB 25. No offence under this section has been committed when insulting words have been uttered in the absence of the person concerned. AIR 1950 Mad 273. An insult, even if gross insult, is not an offence in itself under this section. What is punished under this section is something very much graver than that. 44 Cr LJ 10 : AIR 1942 Mad 622 ; AIR 1941 Mad 683 : 42 Cr LJ 827 : 196 IC 117 ; AIR 1940 Mad 681 : 42 Cr LJ 48 ; 39 Cr LJ 980 : AIR 1939 Pat 27 ; 37 Cr LJ 296.

To constitute an offence under this section, it is sufficient if the insult is of a kind calculated to cause the other party to lose his temper and say to do something violent. The public peace can be broken by angry words as well as by deeds. 4 Bom LR 71 ; 10 M 353 : 1 Weir 620 ; 1 Weir 621. In an offence under this section fine should be imposed. 11 Ind Cas 619 ; *see* also 2 Pat LT 482 ; 65 Ind Cas 635 ; 7 ALJ 124 : 5 Ind Cas 1002 ; 18 ALJ 515. But where the alleged insulting photo was brought by the agent of the person who was insulted by it and who was subsequently shown to the person concerned, there is no delivery of the insulting photo to the person insulted and hence no offence is committed under Section 504, Penal Code. 19 Pat LT 892 : 39 Cr LJ 980 : 177 Ind Cas 896 : 1938 PWN 812. When a person pulls a Mahommedan by his beard in a public place he intentionally insults him and is guilty of an offence under this section. 23 ALJ 73 : 86 Ind Cas 79 : 26 Cr LJ 703. When the failure of a Magistrate to specifically mention the objectionable words in the charge has caused no prejudice to accused, conviction is not bad. 104 Ind Cas 437 : 28 Cr LJ 821 : AIR 1927 Lah 702.

A person comes within the ambit of Section 504, if the provocation offered by him is of such a character as to cause the person provoked to commit any other offence. The provocation need not be likely to cause a breach of the peace. 99 Ind Cas 604 : 28 Cr LJ 172. Insult may be inferred from tone and manner of spoken words and consists in provoking the person insulted though he might not commit a breach of peace. 36 Ind Cas 849 : 21 CWN 95 : 18 Cr LJ 17. Calling a man "*baiman*" and "*badmash*" would fall under Section 504. AIR 1922 Lah 459 : 4 Lah LJ 480 : 51 PLR 1922. The word *behaya* is an offensive expression particularly when it is uttered in the course of a debate. 35 Cr LJ 1320 : 17 NLJ 131 : 1934 Cr LJ 1091 : AIR 1934 Nag 239. Sanction of Local Government is necessary for complaint against Magistrate for using insulting language to a witness. 4 AWR 666.

Section 504 requires two essentials. There must be intentional insult of a person and thereby due provocation to him or to her and secondly the person must be intended or knew it to be likely that such a provocation would prejudice to public peace. 1952 MWN 336 : (1952) 1 MLJ 470. Before an accused can be found guilty of an offence punishable under Section 504, IPC for insulting a person by the use of words, it must be shown that he used those words intending or knowing it to be likely that it would result in such provocations as would cause that person to break the peace *etc*. 1952 Cr LJ 721 : AIR 1952 Cal 288 ; AIR 1955 Cr LJ 1282.

The essential ingredients of the offence under Section 504 are : (1) intentionally insult any person and (2) to provoke such person intending or knowing it to be likely that such provocation will cause him to break the public peace to commit any other offence. So far a finding under the section, it is necessary to know as to what were the actual words which were uttered. The High Court, in a case where the accused stated that he was not agitated or excited when abused and still the Magistrate frames a charge under Section 504, quash the charge. 1962 (2) Cr LJ 543 (relying in AIR 1960 SC 866 ; AIR 1952 Cal 288 ; AIR 1948 Mad 9.

The offence under this section can be made out only on proof of the aforesaid elements. the closing intention or knowledge of the offender that provocation given b his will cause complainant to break public peace, beyond all reasonable doubts eithe by positive evidence or by such evidence from which those facts can be conclusivel inferred. (1969) 35 Cut LJ 7784 ; AIR 1964 Mys 785.

Mere breach of good manners does not constitute an offence under Section 504 AIR 1960 Ker 236 : ILR 1960 Ker 230 : 1960. Abusive language when comes within th mischief of Section 504. 24 Cut LT 299; AIR 1959 Ori 155 : ILR 1959 Cut 104 : 25 Cu LT 184 : 1959 (1) Ori JD 33 : 1959 Cr LJ 1096 ; 21 Cut LT 256 (in all these cases it wa held that the insults must be intentional with the knowledge of the likelihood of breach of peace). Abuses involving aspersions on chastity of complainant's mother and siste also fall within the section. AIR 1956 Bom 239 : 1956 Cr LJ 500. Gesture accompanying words used, object of insult, *etc.*, are all to be taken into consideration 20 Cut LT 180.

The question arises whether the complainant's reaction to the insult is material *See* in this connection. AIR 1935 Cal 736 ; AIR 1950 Madh P 25 ; AIR 1932 Bom 193 ; AIR 1955 Assam 211 : ILR (1954) 6 Assam 274 : 1955 Cr LJ 1318 ; 20 Cut LT 180 : AI 1960 Ker 236 : (1960) 1 Ker LR 138 : ILR 1960 Ker 320 : 1960 Cr LJ 1910 (for a offence under Section 504, what is material is not the reaction of the complainan which might vary according to the sensitiveness of the individual insulted but th intention of the offender to provoke or his knowledge he is likely to provoke the perso insulted to commit an offence). For essentials of the offence under Section 504. *See* 6 Punj LR 953. 1976 Cr LJ 1690 : 1976 APLJ (HC) 344 ; 1976 Cr LJ 654 ; 1972 Cr L 1985 : ILR (1967) 19 Asm 521 ; 1962 (2) Cr LJ 543 ; 1972 Cr LJ 371 ; AIR 1960 Ker 33 : ILR 1960 Ker 320 : (1960) 1 Ker LR 138 : 1960 Ker LJ 176 for 1971 2 Andh WR 443 (1971) 2 Andh WR 443 ; AIR 1959 Ori ILR 1959 ; Cut 104 1959 Cr LJ 1096 : (1981) 5 Cut LT 326 ; 1981 Simla LC 413 ; 1983 Cr LJ 276.

For meaning of insult, *see* 1973 39 Cut LT 1186 ; (1971) 37 Cut LT 30 (intentional insult is necessary) ; 1983 Cut LR (Cr) 316 (mere vulgar language is no sufficient) ; (1974) 2 Malayam LJ 5. What will amount to break the public peace or t commit any other offence, *see* (1973) 14 Guj LR 522 : (1973) 39 Cut LJ 1034 ; 1976 C LJ 1690 : 1981 Cr LJ 1208 : (1981) 8 Cr LJ 218 ; 1981 Cr LJ (NOC) 198 : 1981 (2) Ca HN 249.

There is no provision in the Penal Code where an accused person can be excuse for insulting outburst of abuses in the exercise of the alleged right of private defenc AIR 1959 Ori 155 : ILR 1959 Cut 104 : 25 Cut LT 184 : 1959 Cr LJ 1096 : (1959) 1 O JD 33.

2. Insult—Breach of peace.—The allegations in the complaint do not also mad out the ingredients of an offence under Section 504 of the Penal Code. Section 50 refers to intentional insult with intent to provoke breach of peace. The allegation in th complaint is that when he enquired with accused about the sale deeds, they asserte that they will obtain possession of land under the sale deeds and he can do whatever h wants. The statement attributed to appellants, it cannot be said to amount to an "insu with intent to provoke breach of peace". The statement attributed to accused, even if was true, was merely a statement referring to the consequence of execution of the sa deeds by first appellants in favour of the second appellant. *Ms. Ibrahim & Ors. vs. Sta of Bihar & Anr.*, 2010 (2) CrLJ 2223 (SC).

3. Cognizance of offences.—Informant a member of the Scheduled Caste community alleged that he was accosted in way by number of accused persons including petitioners and was brought in a room where he was intimidated, assaulted, insulted and was abused. Accused persons alleged to have intimidated and abused informant in a room and not within public view. Cognizance taken under provisions of SCST Act is quite bad. Parties have compromised hence order taking cognizance of offences is liable to be quashed. *Girinath Singh & Ors vs State of Jharkhand & Ors.*, 2010 (4) CriLJ 4006 (Jhar).

4. Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate and summarily.

5. Charge.—I (name *and office of Magistrate, etc.)* hereby charge you (*name of the* accused) as follows ;

That on or about the..........day of..........at..........you intentionally insulted *A.B*, by using the following words, to wit........ (set them out) and thereby gave him provocation to the said *A,B*, (or to *C.D.*) intending (or knowing it to be likely) that such provocation will cause him to break the public peace (or to commit any other offence) and that you thereby committed an offence punishable under Section 504 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 505. Statements conducing to public mischief.—(1) Whoever makes, publishes or circulates any statement, rumour or report—

(a) with intent to cause, or which is likely to cause, any officer, soldier, "sailor or airman" in the Army "Navy or Air Force" of India * * * to mutiny or otherwise disregard or fail in his duty as such ; or

(b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility ; or

(c) with intent to incite, or which is likely to incite, any class or community or persons to commit any offence against any other class or community,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) *Statements creating or promoting enmity, hatred or ill-will between classes.*—Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of

birth, residence, language, caste or community or any other grou whatsoever, feelings of enmity, hatred or ill-will between different religiou racial, language of regional groups or communities, shall be punished wi imprisonment which may extend to three years, or with fine, or with both.

(3) *Offence under sub-section (2) committed in place of worship, etc.* Whoever commits an offence specified in sub-section (2) in any place worship or in any assembly engaged in the performance of religious worsh or religious ceremonies, shall be punished with imprisonment which ma extend to five years and shall also be liable to fine.

Exception.—It does not amount to an offence, within the meaning of th section, when the person making, publishing or circulating any suc statement, rumour or report, has reasonable grounds for believing that suc statement, rumour or report is true and makes, publishes or circulates without any such intent as aforesaid.

STATE AMENDMENT

Andhra Pradesh—Amended by G.O. Ms. No 732, 5.12.1991.

In Andhra Pradesh the offence is cognizable.

Synopsis

1. Amendment.......3048
2. Principle of construction 3048
3. Constitutionality of the section.......3048
4. Scope 3049
5. Clause (C) 3049
6. Procedure.......3049
7. Charge 3049

1. Amendment.—This section has been substituted by the Indian Penal Cod Amendment Act, 1898 (4 of 1898), Section 6, and the words within quotations in thi section have been substituted by the Repealing and Amending Act, 1927 (10 of 1927 Section 2 Sch. I. The words "for in the Royal Indian Marine" after the word "Majesty have been repealed by the Amendment Act, 1934 (35 of 1934), Section 2 and Schedul I. The words "Her Majesty or in the Imperial Service Troops have recently bee successively substituted by the words *"India"* by the Indian Adaptation of Laws Order 1950, and Act 3 of 1951, Section 3 and Schedule. The words "three years" wer substituted for the words "two years" by Act 41 of 1961 and sub-section (2) and (3) wer inserted by Act 35 of 1969, Section 3(i).

2. Principle of construction.—This section and other sections of the same kin which deal with the liberty of the subject must be construed very strictly in favour the defence. 40 CWN 1218.

3. Constitutionality of the section.—Clause (2) of Act 19 clearly saves from th vice of unconstitutionality. (1962) 2 SCR 769 : AIR 1962 SC 955 : (1962) 2 Cr LJ 603.

4. Scope.—"This statement, rumour or report, whether it is circulated or made public by words, by writings or by signals or otherwise, if it is known by the person who publishes it to be false and it is intended to cause mutiny (*see* Chapter VII, of offences relating to the Army and Navy is punishable as an offence under this section. It is also punishable if it is intended to cause fear or alarm to the public, or to any class of the public, or any community (*see* Section 12) and thereby to induce any person to commit any offence within the sixth or eighth Chapter of the Code".—*Morgan and Macpherson*, 451. The mere causing of fear or alarm to the public or to a section of the public does not constitute an offence under this section ; but it is necessary that the fear or alarm should be caused in such circumstances as to render it likely that the fear or alarm to commit an offence against the State or against the public tranquility. Account can not be taken of a vague possibility that the state of mind which is caused by alarm may easily induce a person to commit an offence against the public tranquility. 3 CWN 1.

5. Clause (c).—"Clause (c)" is a very narrow one, intending to be directed towards preventing classes between rival communities and rival classes. It is intended to deal with real classes and real communities and does not apply to purely imaginary people. A person who delivers a speech inciting would be strikers against black-legs, is not guilty of an offence under Section 505 (e) and cannot be convicted under it. 40 CWN 1218.

This clause penalises the publication or circulation of any statement with intent to incite or which is likely to incite any class or community of persons to commit any offence against any other class or community. AIR 1960 Ori 65 : (1959) 1 Ori JD 569 : ILR 1959 Cut 584 : 1960 Cr LJ 497. When offence under Section 505 (c) constituted (a) the accused published or circulated the statement in question, (b) he did so with the intent to incite or it was likely to incite some class or community or person to commit some offence against some other class or community. 1963 Jab LJ 915 : ILR 1962 MP 449 : 1963 MPLJ (Notes) 247; 1982 Ker LJ 93 : 1982 Ker LT 205. Statement inciting violence at a political meeting is not a mitigating circumstance for awarding lesser punishment. (1973) 1 Malyam LJ 227.

No Court shall take cognizance of the offence except with the previous sanction of the Central Government or State Government.

6. Procedure.—Non-cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate.

7. Charge.—The charge should run thus :

"I, *(name and designation of the Magistrate etc.,)* hereby charge you, *(name of the accused)* as follows ;

That on or about..............(date)............(time)........... (place). ....made (punished or calculated) a statement (Rumour or repot) to wit...........with the intent to cause (or which was likely to cause) an officer soldier, sailor or airman) the (Army, Navy or Air force) of India to mutiny (or otherwise disregard or fall in his duty as such or with intent to cause or which was likely to cause fear or alarm to the public or any other section of the public, whereby any person may be induced to commit an offence against the State or against the public tranquility) (or with intent to incite or which was likely to incite any class or community of person to commit an offence against an other class or community) and thereby committed an offence punishable under Section 505 (1), I.P.C. and within my cognizance.

And I hereby direct that you be tried on the said charge.

Another charge ;

"I, *(name and designation of Magistrate etc.* hereby charge you *(name of accused)* as follows :—

That you on or about............(date).........(time)............(place)....... made published or circulated) a statement (or report) to wit.............. containing rumour alarming news) with the intent to create (or promote or which is likely to creat prove) on grounds of religion (or race, place of birth, residence, language, c community or another ground whatsoever) feelings of enmity (or hatred ill-will) betw different religious (or racital, language, or regionally groups or caste or community) thereby committed an offence punishable under Section 502 (2), Indian Penal Code, within my cognizance.

And I hereby direct that you be tried on the said charge.

* * *

Sec. 506. Punishment for criminal intimidation.—Whoever comm the offence of criminal intimidation shall be punished with imprisonmen either description for a term which may extend to two years, or with fine with both ;

If threat be to cause death, or grievous hurt, etc.—And if the thr be to cause death or grievous hurt, or to cause the destruction of property by fire, or to cause an offence punishable with death *imprisonment for life* or with imprisonment for a term which may extend seven years, or to impute unchastity to a woman, shall be punished w imprisonment of either description for a term which may extend to sev years, or with fine, or with both.

STATE AMENDMENT

Uttar Pradesh.—Amended by Notification No. 777/VIII 9-4(2)87 dated 31.7.19 published in U.P. Gazette, Extra, Part-4, Section (*Kha*) dated 2.8.1989.

"Any offence punishable under Section 506, I.P.C., when committed in any dist of Uttar Pradesh, shall be notwithstanding anything contained in the Code of Crim Procedure, 1973, be cognizable and non-bailable."

Andhra Pradesh.—Amended by G.O.Ms. No. 732, Dated 5.12.1991.

In Andhra Pradesh, the offence is non-bailable if committed in A.P.

Synopsis

1. Amendment...305
2. Criminal Intimidation...305
3. Scope 305
4. Cases 305
5. Permission of Magistrate—Necessity 305

6. Procedure..........3053
7. Charge..........3053

1. Amendment.—The words "imprisonment for life" were substituted for transportation by Act 29 of 1955, Section 117 and Schedule (w.e.f. 1.1.1956).

2. Criminal Intimidation.—In regard to the charge of criminal intimidation it was explained that the words "your days are numbered" used by the accused for complainant opposite-party were to be understood in the context of the circumstances in which they were uttered. The words meant that service of the complainant opposite party under the company might be terminated. *Held*, that there was, therefore, no criminnl intimidation. 1987 Cri LJ 2074 (Cal).

Death of complainant. Admittedly, complainant had died after recording of his pre-charge statement. Not only the respondents had the right as well as the opportunity to cross-examine him, they did actually cross-examine him. Therefore, the statement of complainant recorded at pre-charge stage is relevant in view of the provisions contained in Section 33 of the Evidence Act.

The learned Metropolitan Magistrate has not taken the pre-charge statement of complainant into consideration. In view of the mandate of Section 33 of the Evidence Act, it was obligatory for him to take the statement of late complainant into consideration before passing judgment on the merit of the case. Failure of the learned Metropolitan Magistrate to take the statement of complainant into consideration has resulted in failure of justice and, therefore, the order passed by him cannot be sustained. *Surjit Kaur vs D. S. Kapoor & Ors.*, 2010 Cri LJ 1008 (Delhi).

Since no threat was issued by accused to cause death or grievous hurt to complainant, accused not guilty under Section 506. *Mohinder Singh* v. *State of Haryana*, 1993 Cri LJ 85 (P&H).

Admittedly, the occurrence did not take place in a public place, but it took place in the garden belonged to one P.K.N. Murthy, who stated to have purchased the said property from one Thangavelu without the knowledge of the petitioners, who are wife and son of the said Thangavely respectively. Under those circumstances, the proceeding for the offence under Section 294 (b), I.P.C. is not maintainable. Even with regard to the offence under Section 506(1), I.P.C. the allegations asking a person not to work in the garden, which originally belonged to them and threatening that person to go away from the garden, would not satisfy the main requirement of Section 506, I.P.C. *Saraswathi and another v. state*, 2002 Cri LJ 1420 (Mad) : 2002(3) CCR 446 (Mad).

3. Scope.—"If the criminal intimidation is aggravated by a threat of injury of the kind here mentioned, an increased punishment may be awarded. The offences which are punishable with death or transportation, or with imprisonment for seven years, are mentioned in different section".—*Morgan and Macpherson*, 452. To constitute an offence under this section, it must be shown that the person charged actually threatened another with injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause hurt. 15 PR 1882 Cr : *see* also AIR 1933 Sind 196 : 27 SLR 214 : 145 Ind Cas 136 : 34 Cr LJ 711. Intimidating a police constable by holding out a threat of getting him dismissed from service, is not such a threat of injury as is punishable under Section. 20 Bom 791. A threat to bring a false charge against a person and support it by fabricating fals evidence is criminal intimidation. 1 Weir 623. A shop-keeper was asked not to impo any foreign cloth for sale or in default threat was held out to him that the shop woul be picketted. *Held*, an offence under this section was committed. AIR 1931 All 263. firm cannot commit an offence under Section 506, I. P. Code, and the directors cann be prosecuted as representatives of the firm when there is nothing to connect them wit the offence. 170 Ind Cas 367 : 38 Cr LJ 924 : 41 CWN 831 : AIR 1937 Cal 367.

Where a prosecution under Section 506, IPC, was based upon a letter written t the complainant by solicitor under instruction from the accused warning him of th consequences of continuing to issue circulars making defamatory accusations agains the accused and stating that he would refrain from instituting criminal proceeding against the complainant if he was prepared to give an undertaking to continue thos circulars. *Held*, that the letter could not be regarded as a threat within the meaning o Section 503, I. P. code, and the prosecution should therefore be quashed. 170 Ind Ca 367 : 38 Cr LJ 924 : 41 CWN 831 : AIR 1937 Cal 367. Conviction based only on tw threats ; (1) that complainant would be socially boycotted : and (2) on his death his body would not be carried to the place of burial if he continued to deal with foreign cloth, cannot be sustained. AIR 1931 Lah 288. Where a shopkeeper was asked not to import any foreign cloth for sale or in default threat held out to him that his shop would be picketted, an offence under this section has been committed. AIR 1931 All 263 : 1931 Cr C 423 : 130 Ind Cas 193. Where the accused are challaned under Section 341, IPC, only the trying Magistrate is justified in charging them under that section as well as under Section 506, IPC, and his procedure in doing so is perfectly regular. AIR 1931 Oudh 73. A deterrent punishment awarded for the offence of criminal intimidation under Section 506, IPC, where there is no evidence showing that at or in the neighbourhood of the locality where the incident happened there was any marked popular excitement creating or likely to create breaches of public peace, or public tumult, or disorder is inappropriate. 2 Pat LT 596 : 93 Ind Cas 615 : 22 Cr LJ 679.

Where there was substantially only one offence of criminal intimidation committed, and the Magistrate convicted that accused under Sections 506 and 507 of the Code and imposed sentences for both offences, *held*, that the conviction under one of the sections was bad. 4 BHC Cr 12. A threat to bring a false charge against a person and to support it by fabricating false evidence is criminal intimidation. 1 Weir 623. To constitute an offence under Section 506, Penal Code, it is not necessary that the threat should be uttered directly to the persons intended to be intimidated. 1 Weir 623 622. Intimidating a police constable, by holding out a threat of getting him dismissed from service, is not such a threat of injuring as is punishable under Section 506, 20 Bom 794. To constitute an offence described in Section 506, Penal Code, it must be shown that the person charged actually threatened another with injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm. 45 PR 1882 Cr. Recommendation by Managing Committee to general body to rescind grant made to member of society is illegal act and hence, does not come under Section 506. 145 Ind Cas 136 : 1933 Cr C 711 : 27 SLR 214 : 34 Cr LJ 884 : AIR 1933 Sind 196. A threat of social boycott is not an offence punishable under Section 506. 4 DLR (Mad) 132 : AIR 1949 Mad 546 : 50 Cr LJ 797. If the sole purpose was to prevent persons from doing an illegal act, no offence under Section 506 is committed, 1952 AWR (HC) 295.

The accused told the complainant that she would be beaten and then alone she would vacate the house in which she was living, held that it clearly amounted to an offence under Sec. 506, 1960 Jab LJ 449 : 1960 MPLJ 632 : 1960 MPC 303; AIR 1960 SC 154 : 1960 SCJ 195. Before an offence under this section is made out, it must be established that the accused had an intention to owner as alarm to the complained. AIR 1964 J&K 4 ; 1983, 1977 Mani 30; 1983 LW (Cr) 271; 1970 CrLJ 360 : 1974 PunjLR 4213; AIR 1961 All 522 (Secs. 506 & 7 of the Criminal Law Amendment Act, 1922).

4. Cases.—AWN 1886, 41 ; 1 Weir 622 ; 1 Weir 623 ; 2 All 351 -Rat Un Cr 850 ; Rat Un Cr C 330 ; 4 BHC Cr 12.

Rape and *outraging of modesty* of woman.—The prosecution has clearly established commission of offence punishable under Secs. 354 and 506 IPC. So far as the offence punishable under Sec. 376 IPC is concerned, the basic ingredients are set out in Sec. 375 IPC. On a reading of the evidence of the prosecutrix, we find that a case of rape has not been established so far as the respondent is concerned.

That being the position, we allow the appeal of the State to the extent that the respondent is convicted for offences punishable under Secs. 354 and 506 IPC. The sentence are two years' and six months' rigorous imprisonment respectively. It is stated that the appellant has suffered more than that period of custody. If that being so, he need not surrender to custody. The appeal is allowed to the aforesaid extent. State of *Himachal Pradesh vs. Prem Singh*, AIR 2009 SC 1010 : 2009 (1) SCC 420 : 2008 CrLJ 786 : 2008 (15) SCR 1058 : 2009 (15) Scale 132.

Accused in a case facing under the section may be released under the Probation of Offenders Act. AIR 1974 SC 35 : 1974 Cr LJ 153.

5. Permission of Magistrate—Necessity.—On careful perusal of the contents of the complaint and other documents, it appears that there is no question of any criminal intimidation by the applicants to the complainant. That apart, since the Part 1 of the said section is not cognisable, the permission of the Magistrate would be required to try the applicants under said section. In the instant case, it is admitted position that no such permission has been obtained by the prosecution from the Magistrate. *Dr. Narendra Bhojram Patil vs. State of Maharashtra*, 2010 (3) CrLJ 2762 (Bom) (Nagpur).

6. Procedure.—Not cognizable—Warrant—Bailable—Compounda-ble—Triable by Presidency Magistrate of the first or second class. If the threat be to cause death or grievous hurt, *etc.*—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

7. Charge.—"I (*name and office of the Magistrate, etc.*) hereby charge you (*name of the accused*) as follows ;—

That on or about the.............day of.............at.............you threatened *A.B* or (*C.D.*), with injury to his person (or *C.D.*), or to cause the said *A.B.* (or *C.D.* to do an act. to wit............. (*specify* it), or not to do an act, to wit........... (*specify* it). which he was not legally bound to do, or which he was legally entitled to do) ; and that you thereby committed an offence punishable under Section 506 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 507. Criminal intimidation by an anonymous communic tion.—Whoever commits the offence of criminal intimidation by a anonymous communication, or having taken precaution to conceal th name or abode of the person from whom the threat comes, shall b punished with imprisonment of either description for a term which ma extend to two years, in addition to the punishment provided for the offen by the last preceding section.

STATE AMENDMENT

Andhra Pradesh.—Amended by G.O. Ms. No. 732 Dated 5.12.1991.

Synopsis

1. Scope 3054
2. Procedure 3054
3. Charge 3054
4. Legal aid 3054

1. Scope.—"If the criminal intimidation is by an anonymous letter, or by a lett signed with a false name, and the letter is propped on a road or is intended to be put i a place where it is likely to be seen and read by the person for whom it is intended, or be found by some other person who it is expected will forward it to the person for who it is intended, the offence will be subject to punishment under this section".—*Morgo and Macpherson*, 452. The punishment provided in this section cannot be awarded unt there has been conviction under Section 506, 99 PR 1886 Cr.

2. Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triab by Court of Session.

3. Charge.—The charge should run thus :

"I (*name and designation of Magistrate, etc.*) hereby charge you (*name of th accused*) as follows :

That you on or about...............(date).................(time)................. (plac committed the offence of criminal intimidation, to wit ....by a anonymous communication (or having taken precaution to conceal the name or abod of the person from whom the threat came) and thereby committed an offen punishable under Section 507, IPC. and within my cognizance.

"And I hereby direct that you be tried in this Court on the said charge".

4. Legal aid.—The accused did not engage a lawyer. They were not apprised th they had a right to apply for the legal aid at State expense. *Held*, the Conviction wa liable to be set aside as the trial was vitiated. (1986) 2 Crimes 41 (SC) : 1986 Cr I 1084 (SCC).

* * * *

Sec. 508. Act caused by inducing person to believe that he will b rendered an object of the Divine displeasure.—Whoever voluntari causes or attempts to cause any person to do anything which that person not legally bound to do, or omit to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object of Divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Illustrations

(a) *A* sits *dhurna* at *Zs* door with the intention of causing it to be believed that, if by so sitting, he renders *Z* an object of Divine displeasure. *A* has committed the offence defined in this section.

(b) *A* threatens *Z* that, unless *Z* performs a certain act, *A* will kill one of *A*'s own children, under such circumstances that the killing would be believed to render *Z* an object of Divine displeasure. *A* has committed the offence defined in this section.

Synopsis

1. Scope 3055
2. Procedure 3055
3. Charge 3055

1. Scope.—Where the accused voluntarily attempts to cause a person to omit to do what he is legally entitled to do, by attempting to induce the latter to believe that he would otherwise be rendered by an act of the accused an object of Divine displeasure, the accused commits an offence under this section. Rat Un Cr C 376. The words of this section seem to imply that the threat must be one which can be put into execution by the person threatening 48 M 774 : 86 Ind Cas 339 : 26 Cr LJ 755. To constitute an offence under this section it must be shown that the person accused to such offence threatened to do a future act or illegally to omit to do an act, and that by such threat be induced or attempted to induce the person threatened by that act or illegal omission. the person threatened or some one in whom the person threatened was interested. would become an object of Divine displeasure. 6 M 381 : *see also* AWN 1886. 63. A mere threat at large that if a debt is not paid, then by operation of Divine laws. displeasure will fall upon the debtor is not sufficient to attract this section. AIR 1944 Sind 203 : 46 Cr LJ 149 : (1944) 1 Ker 146 : 216 IC 216 ; AIR 1964 Ori 1 : 1964 (1) Cr LJ 57.

2. Procedure.—Not cognizable—Warrant—Bailable—Compoundable with Court's permission—Triable by Magistrate.

3. Charge.—I (*name and office of Magistrate/Sessions Judge etc.,*) hereby charge you (*name of the accused*) as follows :

That on or about the..................day of................ at..................you voluntarily caused (*or attempted to cause*), A.B. to do something, to wit............(*here describe the act or omission*) which he was not legally bound to do (or that you caused, etc., A.B. to omit to do something, to wit...............which he was legally entitled to do...........) by inducing (*or* attempting to induce) the said A.B. to believe that he or *C.D.* in............Whom A.B. was interested) will become (*or* will be rendered) by some act of yours an object of Divine displeasure, if the said *A.B.* did not to do (or not to do), and that you thereby committed an offence punishable under Section 508 of the Indian Penal code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

Sec. 509. Word, gesture or act intended to insult the modesty of a woman.—Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Synopsis

1. Scope 3056
2. Procedure....................3057
3. Charge 3057
4. Benefit of doubt....................3057
5. Complaint—Dismissal by Magistrate—Validity....................3057

1. Scope.—"*A* intending to outrage the modesty of a woman, exposes his person indecently to her, or uses absence words intending that she should hear them, or exhibits to her absence drawing. *A* has committed this offence. If the intrusion upon the woman's privacy is by entering house or room, *etc.*, the offence may come within the definition of criminal trespass (see Section 441)".—*Morgan and Macpherson*, 453. This section makes intention to insult the modesty of a woman the essential ingredient of the offence. 5 Bom LR 502. To constitute an intrusion upon the privacy of a woman, an offence under this section, the intruder must be intending to insult the modesty of such woman. 6 PR 1892 Cr ; 96 Ind Cas 968. An offence under this section is made out when the accused writes a letter to the complainant containing incident overtures. 82 Bom LR 90 : 93 Ind Cas 247 : 27 Cr LJ 445 : 50 Bom 246. In order to justify conviction under this section the modesty of some particular woman must have been outraged. 19 SLR 87. To abuse a woman in absence terms near a water tap would obviously amount to an offence falling under Section 509. (1961) 2 Guj LR 196.

The accused was charged of continuously subjecting deceased couple to mental agony on account of his unnatural conduct. The couple, who were son and daughter-in-law of appellant, committed suicide but no iota of material showed that immediately before incident deceased had given an inkling about their feelings of dismay and harassment on account of any conduct of accused which could have been ground to connect accused with said offence. Thus charge on said account (under Section 306) was liable to be quashed. Appellant wanted to establish illegal relations with his deceased daughter-in-law and evidence showed that unnatural conduct of appellant caused such mental agony to lady that she alongwith her husband committed suicide leaving behind them their only son. The *prima facie* material on record also showed that accused by words, gesture and act intended to insult modesty of deceased. As such it was held that framing of charges under Section 498A/509 needed no interference and trial of accused should continue. *Om Prakash Agarwal* v. *State*, 2003 Cr LJ 4138 (MP) : 2003(1) MPHT 127. Where an accused entered into a woman's apartment and tried to catch hold of her and persuade her by removing garments, an offence under the section is committed. AIR 1961 All 131 : (1961) 1 Cr LJ 330.

A lady police officer while working as District S.P. received some anonymous letter sent to her in her name address through courier service. Vulgar and obscene language was used in letters and those were written intending to insult her modesty. On inquiry it was found that the accused was the author of the said letters. It was held that "writing letter" to a woman intending to insult her modesty could be constituted as "making a gesture" under Section 509, IPC. It was also held that neither Section 292 nor Section 294 would be attracted in such cases and that though the specific section was not included in the charge-sheet, nothing prevented the lower court from proceeding against the accused for offence under Section 509, IPC. *M.M. Hasies* v. *State of Kerala*, 2005 Cr LJ 3314 (Ker) : 2005(4) All Cri R 533 : 2005(4) Crimes 153 : 2005(4) Cur Cri R 99 : 2005(4) East Cri C 511.

2. Procedure.—Cognizable—Warrant—Bailable—Compoundable with Court's permission—Triable by any Magistrate.

3. Charge.—"I (*name and office of the Magistrate, etc.*,) hereby charge you (*name of the accused* as follows :

That on or about the....................day of...........at.............you (*name of the accused*) intending to insult the modesty of one *A.B.*, uttered the words, to wit.....(or made some sound or gesture, to wit.......or exhibited some object to wit.........) intending that the same shall be heard (*or* seen) by the said *A.B.*, and that you thereby committed an offence punishable under Section 509 of the Indian Penal Code, and within my cognizance.

"And I hereby direct that you be tried on the said charge."

4. Benefit of doubt.—When there was enmity between complainant and accused and there contradictions in statements of complainant and her husband, accused entitled to benefit of doubt. *Haridas* v. *State of Maharashtra*, 1997 Cri LJ 122 (Bom).

5. Complaint—Dismissal by Magistrate—Validity.—In the instant case the accused in the complaint is the Principal of College, the husband of complainant is working as professor in said college. Their daughter 'I' was a student of that College and was also the Vice-Chairman of the College Union. It was alleged that High Court had permitted 'I' to appear for the University examination. When the complainant along with 'I' came to the college office and when they asked for the hall ticket, accused asked complainant whether her daughter has no father as he did not accompany them. It is alleged that accused also asked her whether her husband is not the father of her daughter and why he did not come along with them and is it because he is abusing the daughter, thereby implying that father is sexually illtreating the daughter. The complainant filed complaint but no action was taken by police. The complaint sought an order to forward the complaint for investigation. The Magistrate, however, recorded sworn statement and dismissed complaint under Sec. 203 as no offence under Sec. 509 IPC was attracted and there was no ground to proceed against the accused.

Held, when on the very face of woman and that too in the presence of her daughter, if the mother is asked whether her husband is not the father of the daughter, it is a remark aimed at the conduct and behaviour of that woman. It is definitely a remark on her chastity, one of the most cherished virtues of a woman. It is an insult on her modesty and that too in the very presence of her daughter. Thus, the finding of the Magistrate that ingredients of the offence is not made out is illegal. If the words spoken to by the accused as alleged in the complaint and the sworn statement is correct, it could only be an insult to the modesty of revision petitioner, who is the mother of a grown up lady and the wife of a Professor of the very same College. At the stage of inquiry under S. 200 or 202 of CrPC, it is not for the Court to decide whether the accused could be convicted or not but only whether there are sufficient grounds to proceed further. If the words are as spoken to by revision petitioner, it is not a case for discharge under S. 203. In the circumstance, Magistrate should have proceeded with the complaint by issuing summons as provided under S. 204 of CrPC. The dismissal of the complaint under S. 203 is illegal and liable to be set aside. *Aloshia Joseph v. Rev. Dr. Joseph Kollamparambil and Anr.*, 2009 CriLJ 2190 (Ker).

* * * * *

Sec. 510. Misconduct in public by a drunken person.—Whoever, in a state of intoxication appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both.

Synopsis

1. Scope 3058
2. Procedure 3058
3. Charge 3059

1. Scope.—"Mere intoxication is not punishable. But if a person appears in a public place, as in a street, in a public assembly, in a railway carriage, *etc.*, in a state of intoxication, or if in such a state, he intrudes into a private house or into any other place, where he has not a right to go, and thereby (it may be unintentionally), causes annoyance, he commits the offence here made punishable. A person whether drunk or sober who trespasses on property with intent to insult or annoy any person in possession of such property, commits criminal trespass" and may be punished for that offence *(see* Section 447)"—*Morgan and Macpherson.* 454. Offence under this section is not an offence involving breach of the peace. AIR 1940 Mad 755 : 42 Cr LJ 16 : 191 IC 240.

2. Procedure.—Not cognizable—Warrant—Bailable—Not Compoundable—Triable by any Magistrate and summarily.

3. Charge.—The charge should run thus ;

"I (*name and designation of Magistrate etc.*) hereby charge you (*name of the accused*) as follows ;

That you on or about the............ (date).............(time).......... (place).........in a State of intoxication appeared in................ a public place (or a place which it was a trespass for you to enter) and there conducted yourself in such a manner as to cause annoyance to the other persons at that place and thereby committed an offence punishable under Section 510 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

* * * * *

CHAPTER - XXIII

OF ATTEMPTS TO COMMIT OFFENCES

Sec. 511. Punishment for attempting to commit offenc punishable with transportation or imprisonment.—Whoever, attempts commit an offence punishable by this Code with transportation imprisonment, or to cause such an offence to be committed, and in suc attempt does any act towards the commission of the offence, shall, where n express provision is made by this Code for the punishment of such attemp be punished with transportation or *imprisonment for life* or imprisonmen which may extend to one half on the longest term provided for that offenc or with such fine as is provided for the offence, or with both.

Illustrations

(a) *A* makes an attempt to steal some jewels by breaking open a box, and finds afte so opening the box, that there is no jewel in it. He has done an act towards th commission of theft, and therefore is guilty under this section.

(b) *A* makes an attempt to pick the pocket of *Z* by thrusting his hand into *Zs* pocket *A* fails in the attempt in consequence of *Zs* having nothing in his pocket. *A* is guilty under this section.

Synopsis

1. Amendment 3061
2. Application 3061
3. Attempt 3061
4. Scope 3064
5. Preparation 3065
6. Or to cause such an offence to be committed 3066
7. For a term, *etc.* 3066
8. Section 75 3066
9. Attempt to abet 3066
10. Section 307 3066
11. Cases 3066
12. Attempt to forgery 3067
13. Attempt to commit murder 3067
14. Attempt to commit suicide 3067
15. Attempt to commit dacoity 3067
16. Attempt to commit house-breaking 3067

17. Attempt to commit adultery........3067
18. Attempt at extortion........3067
19. Attempt to cheat........3067
20. Attempt to commit rape........3067
21. Administering harmless substance believing it to be poison........3070
22. Attempt to export without permit........3070
23. Procedure........3070
24. Charge........3070
25. Enhancement of sentence........3070
26. Attempt to kidnapping........3071
27. Attempt to commit robbery........3071
28. Rape and attempt to rape — Distinction between........3071
29. Abetment of unsuccessful attempt to commit suicide........3072
30. Attempt to rape—Outrage Modesty of Woman........3072

1. Amendment.—Same as under Section 506.

2. Application.—This Chapter applies to offences punishable under Sections 121A, 294 and 304A. *Vide* Act 27 of 1875, Section 13.

3. Attempt.—"Attempt" means an act which if not prevented would have resulted in full consumption of the Act attempted. *Aman Kumar* v. *State of Haryana*, 2004 Cr LJ 1399 : (2004) 4 SCC 379 : 2004 SCC (Cri) 1266 : AIR 2004 SC 1497.

The word "attempt" consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. There is difference between the cases of a mere preparation and an attempt. The dividing fine between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation. *Koppula Venkat Rao* v. *State of AP*, 2004 Cr LJ 1804 : (2004) 2 Crimes 306 (SC) : (2004) 3 SCC 602 : 2004 SCC (Cri) 840 : AIR 2004 SC 1874.

An attempt is made punishable because every attempt, although it falls short of success, must create alarm which is by itself an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as, if the act had been committed, only half the punishment is awarded. *Aman Kumar* v. *State of Haryana*, 2004 Cr LJ 1399 (SC) : (2004) 4 SCC 379 : 2004 SCC (Cri) 1266 : AIR 2004 SC 1497.

In a case where the child aged 6 years who was the son of deceased had seen the occurrence but the prosecution failed to examine the person to whom child first met after incident, it was held that the fact of pending civil suit between both parties was not enough for committing ghastly murder. The conviction of accused was set aside. *Bhagwan Singh* v. *State of MP*, 2003 Cr LJ 1262 (SC) : AIR 2003 SC 1088 : 2003 AIR SCW 617 : 2003(2) Crimes 82 : 2003(1) Rec Cri R 660.

Failure of prosecution to examine any person from place of incident in support of allegation of ill-treatment cannot be a ground to reject evidence of large number of witnesses having deposed in support. *State of Karnataka* v. *K. Gopal Krishna*, 200 LJ 1436 (SC) : AIR 2005 SC 1014 : 2005 AIR SCW 949 : 2005(1) Crimes 271.

It is now well-settled principle of law that whom to cite as a witness and whom is within the domain of the prosecution. It is also well settled principle that prosecution evidence has to be weighed and not to be counted. It is just because other pedestrian or resident of the vicinity has not been cited as witnesses will be ground to throw away the otherwise reliable testimony of the eye-witnesses whic natural and inspires confidence. *State of UP* v. *Ganga Ram*, 2005 Cr LJ 4643 : 2006 MR (Cri) 2469.

It is not necessary for prosecution to examine somebody as a witness even tho the witness was not likely to support the prosecution version. Non-examination of so persons *per se* does not corrode vitality of prosecution version, particularly when witnesses examined have withstood incisive cross-examination and pointed to respondents as the perpetrators of the crime. *State of MP* v. *Dharkole*, 2005 Cr LJ 1 AIR 2005 SC 44 : 2005 SCC (Cri) 225.

Non-examination of independent witness by itself may not give rise to adve inference against the prosecution. However, when the evidence of the alleged e witnesses raise serious doubts on the point of their presence at the time of act occurrence, the unexplained omission to examine the independent witness 'K' wo assume significance. *Hem Raj* v. *State of Haryana*, 2005 Cr LJ 2152 : AIR 2005 SC 21 : 2005 SCC (Cri) 1646.

The Illustrations above given are cases of attempts in which the offen contemplated cannot be committed (the box or pocket being empty), but the act do towards the commission has been carried to such a length as the offender consider sufficient to effect his purpose. He has used all such exertions for the purpose in vi as he would have used if he has been successful, but he was filled by something n dependent on his own will. It is the same as if he had fired a loaded gun at a m intending to murder him, but had missed his aim. The words "does any act towards t commission of the offence" may well include acts less near to the consummation of t offence than those just mentioned But these words must not, it seems, be construed include all acts. however remote which read towards the commission of the offence. T thing done may be too small or it may proceed too short a way towards t accomplishment of the offence for the law to notice it as an attempt. The following a Illustrations of the (*see* Section 307);

A. intending to murder *Z*, buys a gun for the purpose of loading it and firing at *Z*.

A, intending to murder *Z* by poison, purchases poison and has it in his possessio

A intending to commit a murder, is seen to walk towards the place of t contemplated murder.

Such acts are in themselves ambiguous, and are not so immediately connect with the offence as to make the doers punishable under this section.

Section 511 makes attempt to commit an offence punishable. The offen attempted should be one punishable by the Code with imprisonment. The conditio stipulated in the provision for completion of the said offence are : (1) The offend should have done some act towards commission of the main offence; (2) Such attempt is not expressly covered as a penal provision elsewhere in the Code. Thus attempt on the part of the accused is sine *qua non* for the offence under Section 511. Thus if the act of the accused asking wife to go and commit suicide had driven her to proceed to the railway track for ending her life then it is expressly made punishable under Section 498A, IPC. When it is so expressly made punishable the act involved therein stands lifted out of purview of Section 511 IPC. The very policy underlying in Section 511 seems to be for providing it as a residuary provision. The corollary, therefore, is that the accused, in this case, cannot be convicted under Section 511 on account of the acts alleged against him. *Satvir Singh v. State of Punjab* 2001 Cri LJ 4625 (SC) : AIR 2001 (SC) 2828 : 2001(8) SCC 633 : 2001(8) JT 208 : 2001(6) Scale 513 : 2001(7) Supreme 267 : 2001(4) Crimes 45 (SC).

It is impossible to lay down a clear rule on such a subject, or to define what is such an act done in furtherance of a criminal intent as will constitute an attempt. As it has been said, acts remotely tending towards the commission of an offence are not, it seems sufficient to bring a case within this section. On the other hand, acts immediately and necessarily connected with the commission of the offence, and which constitute a commencement of execution of the offence, not being completed only because, the offender is hindered by circumstances independent of his will, as by seizure by the police, *etc.*, are attempts.

'The Court should be satisfied that the offender had in his mind the design to commit a certain offence, and that he had begun to move towards an execution of his purpose ; there must also be proof of some act, not of an ambiguous kind, but directly approximating to the commission of the offence. When the offender's design is made manifest by any such act, it becomes an attempt cognizable as an offence punishable under this section."—*Morgan and Macpherson,* 456. An attempt is an intentional preparatory action which fails in object, which so fails through circumstances independent of the person who seeks its accomplishment. In other words, when a man does an intentional act with a view to attain a certain end, and fails in his object through circumstances independent of his own will then that man has attempted to effect the object at which he aimed. 26 Cr LJ 1424 : 89 Ind Cas 848 : AIR 1949 Pat 326 : 56 Cr LJ 682 : 4 DLR (Pat) 90. A greater degree of determination distinguishes an attempt to commit an offence from a mere preparation. SC 76 Oudh. Fraudulently obtaining signature slip is no offence under Section 171(f), read with Section 511. 26 Cr LJ 359 : AIR 1925 All 226. Under the Penal Code all that is necessary to constitute an attempt to commit an offence is some external act, something tangible and ostensible, of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the purpose was interrupted. 103 Ind Cas 408 : 28 Cr LJ 680. An attempt to commit an offence is punishable under this section though the final act short of actual commission of that offence has not been accomplished. AIR 1928 Lah 551 : 10 Lah 253 : 30 PLR 405 : 110 Ind Cas 812.

A person cannot be convicted of attempting to commit an offence, unless the offence would have been committed had the attempt proved successful. 22 Cal 131. An attempt is an intentional preparatory action which fails in object which so fails through circumstances independent of the person who seeks its accomplishment. 2 Bom LR 286 : 2 Bom LR 304 : 7 Cal 352 : 8 CLR 572. The term "attempt" indicates the actual taking of those steps which lead immediately to the commission of the offence, although nothing be done, or omitted, which of itself is a necessary constituent of the offenc attempted. 4 NWP 46. In order to constitute an attempt, there must be an intention t commit a particular crime, a commencement of the commission, and an act don towards the commission. The act of raising a knife in a threatening attitude manifestin an intention to stab, but without actually trying to stab the complainant falls short c an attempt to stab. 1 LBR 264. When once a proposal has been made for the paymen of an illegal gratification whether it is completed by agreement or act, the offence of a attempt to commit an offence under Section 215 is complete. 2 LBR 310. It is nov settled law that an attempt is possible even when the offence attempted cannot b committed. 5 NLJ 16.

Attempt is an intentional act which a person does towards the commission of a offence but which fails in its object through circumstances is dependent of the volitio of that person. AIR 1962 All 359 : 1962 All LJ 13 : 1962 All Cr R 58 : 1962 (2) Cr L 161. The section was not meant to cover only the penultimate act towards th completion of an offence and not acts done precedent if those acts are done in th course of the attempt to commit the offence or done with the intent to commit it an done towards its commission. (1957) 8 STC 534 : 1957 BLJR 66. The crucial words i Section 511 are that the accused should have done the act towards the commission c the offence. There are three stages in the commission of a crime (i) intention to commit (ii) preparation to commit; and (iii) attempt to commit. If the attempt results in th actual commission of the offence, the crime is complete. But the Penal Code make th attempt an offence, if the accused does any act towards the commission of the offence AIR 1955 Andh 118 : 1955 Cr LJ 917. The distinction between preparation and attemp is very thin. The crucial test is whether the last act if un-interrupted and successfu would constitute a crime. *Ibid.* The ground of distinction will be merely evidential. 195 Mad WN 926. (AIR 1950 Mad 44 ; AIR 1932 Mad 507 ; and AIR 1950 Ori 8 distinguished) ; *see* also (1954) 1 All ER 137. There is a thing line between th preparation for an attempt to commit an offence. AIR 1961 SC 1698 : (1961) 2 Cr L 922. The last for determining whether the acts of the accused is an attempt c preparatory is whether the overt acts already done are such that if the offender does nc proved further, the acts already done would be harmless. AIR 1970 SC 713 ; AIR 197 SC 1798 ; AIR 1973 SC 2655 : 1973 Cr LJ 1798 ; 1962 (2) Cr LJ 161 ; AIR 1980 S 1111 ; (1977) 1 Malayam LJ 79 ; AIR 1961 Mad 498 ; 1972 MPLJ 20 ; AIR 1962 All 35 : 1980 Cr LJ 793 , 1983 (2) Crimes 88 ; 1980 1C 96 ; AIR 1960 SC 979 : (1961) I SC 76 (that he failed in his attempt is irrelevant in considering whether he committed th offence) : (1978) Cr LJ 431 ; 1976 Cr LJ 452 ; 1974 Punj LR (Cr) 477 : (1975) 2 Cr L 43.

4. Scope.—This section does not relate only to the penultimate act, but to a proceeding acts if they were done with intent to commit or facilitate the commission c the act. 15 All 173 ; 25 Bom 90 : 2 Bom LR 653 ; 15 All 178. This section applies t attempt to commit offence punishable with transportation or imprisonment. AIR 194 Lah 334 : 47 PLR 229 : 47 Cr LJ 1036. This section which relates to attempts to commi offences, is confined to attempts to commit offences punishable under the Code. 1 Wei 624 ; but *see* 40 Mad 34 : 35 Ind Cas 497 ; AIR 1932 Mad 507 : 1932 MWN 545 : 33 C LJ 582 ; AIR 1937 Lah 710 ; AIR 1942 Mad 521. As Section 511 is omitted from Sectio 40, Penal Code, unless an attempt to commit an offence under a special or local law ha been expressly made punishable under the special or local law it cannot be punished under the Penal Code. AIR 1951 Assam 17.

An accused is liable for attempt when his failure, to commit an offence is not due to any act or omission of his own, but to the intervention of some factor independent of his volition. ILR 1950 Nag 904 : AIR 1951 Nag 315 : 5 Al Cr D 149.

The conception of an attempt to commit an offence is a technical one. It is for the Court on a consideration of fact proved, to come to a conclusion whether there was an attempt to commit an offence. 1953 BLJR 455 : 1953 Cr LJ 1744 : AIR 1953 Pat 338. The mind of the person to whom the false pretence were made should be affected thereby is not an essential element of the offence. (1957) STC 534 : 157 BLJR 66.

5. Preparation.—Between the preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging means or measures necessary for the commission of the offence : the attempt is the direct movement towards the commission after preparation are made. The law allows a *locus penitentia* and will not held that a person has attempted a crime, until he has passed beyond the stage of preparation. 3 Mad 4 : 1 Weir 543 ; 65 Ind Cas 492 : 23 Cr LJ 108 ; Pak LR 1948 Lah 154. There is a distinction between the commission of an offence, the attempt to commit it and a preparation to commit it. Preparation or providing an opportunity to commit an offence, is a stage of the proceeding short, of attempt, and is not punishable. 7 PLR 1903 : 25 PR 1902 Cr. The real difficulty in distinguishing between preparation and attempt arises in determining where a given act or set of acts passes from the former stage into the latter whether the commission of an offence requires the performance of a series of acts and the person commences this series with a view to carry it out to its completion, he has in the language of Section 511. IPC, done an act towards the commission of the offence in the attempt to commit the offence. 5 NLJ 16 : 65 Ind Cas 994 : 23 Cr LJ 210 ; *see* also 7 PLR 1903 : 25 PR 1902 Cr. 24 Bom 287. Although the provisions of the section extend to a much wider range of cases than would be deemed punishable under the English Law, they would not extend to make punishable as attempt acts done in the mere stage of preparation. Although such acts are done towards the commission of the offence, they are not done in the attempt to commit the offence. The term "attempt" indicates the actual taking of those steps which lead immediately to the commission of the offence, although nothing be done or omitted, which of itself is a necessary constituent of the offence attempted. 4 NWP 46 ; *see* also 28 PLR 575 : 28 Cr LJ 663 : AIR 1927 Lah 580 : 103 Ind Cas 199. Assistance in the preparation of an offence which was not committed cannot amount to an abetment of attempt. AIR 1935 Oudh 158 : 25 Cr LJ 1162 : 110 Cr LJ 640 : 81 Ind Cas 986. Preparation to commit an offence and an attempt are distinct ; if the actual transaction has commenced and would have ended in a crime, if not interrupted, there is an attempt. 18 PR 1868 Cr. Preparation consists in devising means necessary for the commission of the offence. 65 Ind Cas 492 ; *see* also 1923 Pat 307. An intent to commit an offence is not the same thing as an attempt to commit such an offence. Intent exists before attempt begins. A mere intent is not by itself an offence. 4 NLJ 245 : 37 CWN 1151. Except in very few offences preparation is not punishable. 18 ALJ 636 : 2 UPLR 296 : 21 Cr LJ 576 : 57 Ind Cas 96. Mere forming intention to commit crime or more preparation for offence is not punishable. AIR 1950 Mad 44 : AIR 1941 Oudh 3 : 41 Cr LJ 881. Debtor endorsing a very much large amount as paid by him on the back of a promissory note and contending that it was entered as payment, the act constitutes n preparation but a criminal attempt to cheat. 1952 MWN 903 : (1952) 2 MLJ 77 : AI 1953 Mad 609 : 1953 Cr LJ 1152.

6. Or to cause such an offence to be committed.—"A common form of attempt i the soliciting of another to commit an offence—as to incite a servant to steal hi master's goods—to incite a person to commit murder or hurt—to make overtures t another to commit an unnatural offence. The act done towards the commission of th offence may consist in such cases in the solicitation itself, or—if this should not b considered a sufficient act—in the offer of a bride, or some such act of instigation. It wi not affect the offence though the person solicited declines the persuasion. Attempts c this description will ordinarily amount to offences punishable under the Chapter c abetment."—*Morgan and Macpherson*, 457.

7. For a term, etc.—"In calculating this term when transportation for life is punishment provided for the offence which has been attempted such transportatio must be reckoned as equivalent to transportation for twenty years (*see* Section 57). Th Court may impose fine equal in amount to the fine provided for the offence, but wher no sum is expressed to which the fine may extend, the amount must not b excessive."—*Morgan and Macpherson*, 457.

8. Section 75.—Section 75 does not apply to cases which are confined to thi section. The offences which come under this section must be punished entirel irrespective of Section 75. 17 All 123 ; *see* also 21 WR 35 Cr 24 OC 260 : 22 Cr LJ 750 AIR 1942 Mad 521.

9. Attempt to abet.—It is not legally impossible to attempt the abetment of a offence, which is provided for in Section 511. There is, therefore, no legal obstacle t punish such an offence. 40 PR 1887 Cr ; *see* also 20 PR 1885 Cr.

10. Section 307.—This section was not intended to exhaust all attempts to comm murder which could be punishable under the Code, but applies only to acts done whic are capable of causing death in the natural and ordinary course of things, if the ac took effect. In considering, however, an attempt under this section, it is necessary to se whether the causing of death was possible or not, if the act was completed. 4 BHC 17.

11. Cases.—Where a person attempted fraudulently to obtain the duplicate of University certificate, when he was not really entitled to it, *held*, that his intention, if would be so presumed, to use the certificate subsequently in order to obtain som temporary advantage by pretending that he has passed the Matriculation examinatio was a mere preparation not chargeable as an attempt to commit an offence within th meaning of Section 511, Penal Code. 25 Mad 726 : 1 Weir 481 : 12 MLJ 68. The act c milkman in going in the direction of the place where the cows are about to be milke with about three gallons of stale milk in his possession, the milk being in a can simila to the cans in which cows are milked, amounts only to a preparation to adulterate th milk intended for sale as food or drink, but not to an attempt. 40 PR 1885 Cr. Wher the accused was found with an open clasp knife in his hands and two gunny bags coming there for committing theft he could not be convicted under Section 457 an 511, Penal Code, but under Section 447 only. 20 Cr LJ 571 : 12 Bur LT 222 : 52 In Cas 59.

12. Attempt to forgery.—*Vide* 16 All 409 : AWN 1894, 150 : 1980 Cr LJ (NOC).

13. Attempt to commit murder.—*Vide* 20 All 143 ; 4 CHC Cr 17 ; 45 PR 1882 Cr. ; 4 LBR 311 (FB) ; 30 PR 1904 Cr. ; 32 PR 1867 Cr ; 24 PR 1882 Cr ; 1 LBR 264 : 3 Lah LJ 191 : 22 Cut LJ 194 : 60 Ind Cas 50 ; AIR 1961 SC 1782 : 194 (2) Cr LJ 449.

14. Attempt to commit suicide.—A person cannot be convicted under Section 309 for emasculating himself. 22 PR 1878 Cr.

15. Attempt to commit dacoity.—This section does not apply to a case of dacoity. WR Cr. 48.

16. Attempt to commit house-breaking.—Removing some projecting tiles from the roof of a house is not a step towards committing house-breaking and consequently is not an attempt to commit house-breaking. AWN 1836, 290.

17. Attempt to commit adultery.—An opportunity made for sexual intercourse by a married woman going to the accused's shop the object being frustrated by people following her and besieging the shop was held to be a mere preparation. 25 PR 1902 Cr. : 7 PLR 1903 ; *see* also 13 PR 1879 Cr.

18. Attempt at extortion.—Section 385 does not expressly provide for an attempt at extortion. Therefore, a charge under Section 384 read with Section 511 is not bad. AIR 1927 Pat 89 ; 27 Cr LJ 1244 : 98 Ind Cas 60.

19. Attempt to cheat.—In the offence of cheating the actual transaction must have begun before a preparation can be said to be an attempt. AIR 1927 Mad 77 : 51 MLJ 635 : 28 Cr LJ 95 : 99 Ind Cas 127. Sending false papers to quantity of paddy burnt amounts to an attempt to cheat. AIR 1924 Rang 241 : 2 Rang 53 : 3 Bur LJ 1 : 25 Cr LJ 1175 : 82 Ind Cas 39. Proposal to recover lost property for consideration is an attempt. AIR 1923 All 83 : 45 All 159 : 20 ALJ 927 : 25 Cr LJ 127 : 76 Ind Cas 191. A man may be guilty of an attempt to cheat although the person he attempts to cheat is forewarned and is therefore, not cheated. AIR 1941 Oudh 3 : 190 1C 259 : 41 Cr LJ 881 : AIR 1960 SC 979 : 1960 Cr LJ 1383 ; AIR 1973 SC 2665 : 1973 Cr LJ 1798.

20. Attempt to commit rape.—Degree of moral guilt of offender in case of attempt is same as if he had succeeded in his plan. The word attempt should be understood in its ordinary meaning and it is different from intention and preparation. Attempt means an act which if not prevented would have resulted in full consumption of act attempted. In this case the accused had forcibly dragged the prosecutrix to field and raped her but evidence of prosecutrix and the doctor did not specifically refer to penetration which is *sine qua non* for the offence of rape. Setting aside, the conviction of accused under Section 376 the Court convicted them under Section 354/34. It was not considered an attempt as accused were not determined to have sexual intercourse in all events. *Aman Kumar* v. *State of Haryana*, 2004 Cr LJ 1399 (SC) : AIR 2004 (SC) 1497 : AIR 2004 SCW 827 : 2004(2) Crimes 66 : 2004(2) Bom Cr (Cri) 267 : 2004(2) All Cri LR 476.

Intended to do. In order to find an accused guilty of an attempt to commit rape, the Court has to satisfy itself that the accused when he laid hold of the victim, not only desired to gratify his passions upon her person, but that he intended to do so at all events and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempt at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all resistance, then such materials must exist. Importantly, surrounding circumstances many times throw beacon light on that aspect. *Kailash Laxman Khamkar vs. State of Maharashtra*, 2010 (3) Cri LJ 3255 (Bom).

The accused attempted to commit rape. Section 375 IPC defines rape whereas Section 376 envisages punishment for rape. There is explanation in Section 375 IPC to the effect that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. So, the natural corollary is that provisions of Section 376 / 511 IPC would be attracted in case the accused tried a penetrate his penis in the vagina of prosecutrix. In the present case, from the testimony of the prosecutrix, it is revealed that neither the accused undressed himself nor he undressed the prosecutrix. The only attribution to the accused is that he caught hold of the prosecutrix, laid her on the ground and then caught hold of her neck.

In the present case, there is neither allegation of ejaculation of accused nor undressing both the prosecutrix and himself. So, I am of the view that the finding of the learned trial Court whereby the accused stands convicted under Section 376 and / IPC is without any basis and the accused stands acquitted under the said provision of law.

The above said ingredients are complete, in the present case. By invoking the provisions of Section 222 Criminal Procedure Code, the accused stands convicted under Section 354 IPC. *Pawan Kumar vs. State of Haryana*, 2010 (2) CrLJ 2077 (P & H).

In the present case, the accused took the prosecutrix to lonely place inside a room where he undressed himself and also the prosecutrix. After laying her on the floor, the accused was just trying to sit over her, at that time, he was caught by the brother of the prosecutrix and other witnesses. This shows that with intention to commit the offence of rape the accused prepared himself by undressing himself and also undressing the prosecutrix and after laying her on the floor, he tried to sit over her. If he was not caught by the brother of the prosecutrix and others, he must have succeeded in the commission of offence of rape. Facts of the present case are suggestive of the fact that accused has not tried to, outrage the modesty of a woman, but had attempted to commit rape on her. *Rupesh Kumar s/o Nischal Das v. State of Chhattisgarh*, 2009 CriLJ 1822 (Chha).

Where trial court by ignoring unshaken evidence of prosecution witnesses with regard to dragging of deceased and recovery of his dead body from house of deceased, acquitted accused persons, remand of case to Sessions Court from retrial by High Court just and proper. *Ram Briksh Singh* v. *Ambika Yadav*, 2005 (3) East Cr C 60 (SC).

The accused persons armed with deadly weapons, petted stones, chased deceased, assaulted him on their coming back, they assaulted prosecution witness also. The mere fact that instead of the original intended victim somebody else was also assaulted and killed. It was held that the principle of malice would apply and all would be punished under Section 302/149, IPC. *State of Maharashtra* v. *Kashirao*, 2003 Cr LJ 4464 (SC) : AIR 2003 SC 3901 : 2003 AIR SCW 4492 : 2003(2) ALD (CRL) 798.

Where the accused threw down a girl, put sand in her mouth and got on her chest to have intercourse with her but was prevented from doing so by arrival of other persons, his act amounted not only to preparation but to attempt to commit rape. AIR 1933 Lah 1002 : 34 PLR 832 ; 1976 Cr LJ 452 ; 1967 Cr LJ 920 : AIR 1967 Raj 149.

Doubtful evidence — Rape and murder. What has been stated above relating to the law on circumstantial evidence, only question to be examined is whether the presence of the injuries on the accused can be held to be sufficient to hold appellant guilty. The trial Court held that the accused was examined on 24.03.1993 by the doctor PW. 3 who found abrasions on the thighs and hip joints of the accused, as the injuries must have been received in a scuffle. This circumstance found supported from the finding of chappals and other articles. It was held that recovery of utensil and chappals of the deceased does not lead to the guilt of the accused but that circumstances show the involvement of the accused who was found to have injuries on the persons corresponding with the injuries on the deceased. The High Court noted as follows :

> "In our considered view, a very strong circumstance which connects the appellant with the commission of offence is the presence of injuries on his person especially thigh and hip joints."
>
> "This certainly is a very strong circumstance which by itself can be said to be conclusive in its nature pointing towards the guilt of the accused."
>
> "The recovery of chappals, Dolu (steel container) and certain other articles from the fields of the appellant speak volumes of the fact of a strong corroborative circumstance against the appellant."
>
> "The aforesaid strong circumstances can very well be taken in to account for upholding the conviction of the appellant."

Circumstances on which the trial Court and the High Court had relied to hold the accused guilty by no stretch of imagination can be determinative of the fact that accused was responsible for the commission of rape. Even if it is accepted that the chappals and the utensils were found in the fields of the appellant, the dead body was found by another place *i.e.* in the field of Sheo Ram.

Above being the position that the judgment of the trial Court affirmed by the High Court cannot be maintained and are set aside. The appeal is allowed. The appellant who is in custody shall be released forthwith unless required to be in custody in connection with any other case. *Baldev Singh vs. State of Haryana*, AIR 2009 SC 963 : 2008 CrLJ 948 : 2008 (14) SCC 768 : 2009 (2) SLT 243 : 2008 (15) Scale 366 : 2008 (16) SCR 826.

1st accused gave threat not to disclose the incident to anybody and left her. While she was returning, she met her mother and informed about this incident. So, the scrutiny of the evidence of victim and her mother reveal the only discrepancy with regard to an act of forcible sexual intercourse and whereas her mother informed the doctor that the injuries are due to fall from the bicycle. Excepting these two circumstances, there is no such inconsistency so as to disbelieve the evidence of the prosecutrix. So far as the act for the offence punishable under Section 376, IPC is concerned, it is evident from the certificates produced that the injuries were on the vulva region. On perusal of the evidence of victim, it reveals that at the time of the incident, the 1st accused placed his male organ on the private part and nowhere she states that there was penetration of the male organ. In the absence of any such material in the evidence of victim it cannot be said that there was penetration and commission of forcible sexual intercourse. In the circumstances, in my considered opinion, the offence falls within the purview of Section 376 read with Section 511, IPC. The medical evidence does not support the version of the prosecution so far as commission of forcible sexua intercourse and so also, victim does not say anything about the penetration.

The trial Court has convicted appellant for the offence under Section 376, IPC. Bu had failed to see that there was no penetration and the medical evidence does no support the version of the prosecution and so also, victim. In that view of the matter the conviction of the 1st appellant by the trial Court for the offence under Section 376 IPC is illegal and to that extent, his conviction is to be set aside. *Channabasappa vs State by Honnali Police*, 2010 (3) CriLJ 3369 (Karn).

21. Administering harmless substance believing it to be poison.—An attempt t commit an offence, as defined in Section 411, IPC, means not merely an act with th intention to commit an offence which is unsuccessful because it would not possibl result in the completion of the offence, but an act done towards the commission of th offence, that is to say, the offence remains incomplete, only because something ye remains to be done, which the person intending to commit the offence is unable to d by reason of circumstances independent of his own volition. An action complete in itsel and not constituting an offence did not constitute an attempt to commit an offence, *e.g.* as the administration of a harmless substance which the accused wrongly believed t be poison. 9 CPLR 14 Cr.

22. Attempt to export without permit.—*See* 1953 Cr LJ 1321 : AIR 1953 MI 216.

23. Procedure.—Cognizable or not—Warrant or the summons—Bailable or not— Compoundable or not—as in the offence attempted. Triable by the Court, by which the offence attempted is triable. If punishable with death, imprisonment for life o imprisonment for 7 years or upwards—Cognizable—Warrant—Not compoundable— Triable by Court of Session. If punishable with imprisonment for 3 years and upwards but less than 7 years—Cognizable— Warrant—Not bailable (except in cases under the Indian Arms Act, Section 19 which shall be bailable)—Not compoundable—Triable by Court of Session, Presidency Magistrate or Magistrate of the first class. If punishable with imprisonment for one year and upwards but less than 3 years—Not cognizable— Summons—Bailable—Not compoundable—Triable by Court of Session. Presidency Magistrate or Magistrate of the first or second class. If punishable with imprisonment for less than one year, or with fine only—Not cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate.

24. Charge.—I (*name and office of the Magistrate, Session Judg*) hereby charge you (*name of the accused*) as follows :

That on or about the ....day of ....at............. you attempted to commit (*specify the offence attempted*), and in such attempt did a certain act towards the commission of the said offence, to wit .... (*mention it*) and that you thereby committed an offence punishable under section ....(*principal offence*), and Section 511 of the Indian Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

25. Enhancement of sentence.—The Apex Court has laid down in Kamal Kishore of H.P. 2000 Cri LJ 2292, that as Parliament had disfavoured the sentence to plummet below the minimum limit prescribed, Parliament used the expression “shall not be less than" which is peremptory in tone; the court has normally no discretion even to award sentences which is less than the said minimum; nonetheless Parliament was not oblivious of certain situation, and hence to meet extremely rare contingency it made departure from the strict rule by conferring a discretion on the court subject to two conditions—one is that there should be "adequate and special reasons" and other is such reasons should be mentioned in the judgment. *Barkatullakha, v. State of Maharashtra*, 2002 Cri LJ 427 (Bom) : 2002(1) B Cri C 642 : 2002(2) Femi-Juris CC 168 : 2002(4) CRJ 117 (Bom).

26. Attempt to kidnapping.—Accused was caught red handed while trying to forcefully take away victim child from school premises i.e. lawful authority. There is nothing on record to show that the accused person had any intention to murder or to dispose of the victim child in a manner so as to put him in a danger of being murdered. The I.O. himself, stated that during the investigation he could not ascertain the purpose of kidnapping the boy. It has not been established that the attempt to kidnap was done with a view to murder or to dispose of the victim child in a manner so as to put him in danger of being murdered. It appears that the offence committed by the accused was an offence covered by the Section 361, IPC i.e. kidnapping from lawful guardian. Therefore, the conviction and punishment should have been made under Section 363, IPC for committing the offence under Section 361, IPC.

Therefore, in the absence of any ingredient regarding intention to murder, or to put the victim child in danger of being murdered, the conviction and sentence recorded under Section 364, IPC was not proper. However, as discussed above, from the evidence on record, it has been established that the appellant tried to take away the victim child, who was a minor at the relevant time from the lawful guardian. Therefore, by the alleged act, the appellant aforesaid tried to kidnap the said minor boy from his lawful guardian. Hence, it was a case of kidnapping simpliciter and as such the accused appellant committed the offence under Section 361, IPC, which is punishable under Section 363, IPC. The gravity and punishment of the offence under Section 363, IPC being lesser than the punishment prescribed by Section 364. *Laxmi Chakraborty and etc vs State of Tripura*, 2010 Cri LJ 1360 (Gauhati).

27. Attempt to commit robbery.—On careful reading of the evidence of, it could be seen that their evidence is not consistent with the allegations in the complaint. Further, though complainant P.S.I. has stated in his evidence that he secured the presence of panchas at the scene of offence itself and seized from the possession of accused panchas knives, the said panchas have not been examined to prove the seizure of knives under the panchanama have not stated anything about the Police apprehending the accused at the scene of offence itself and seizing from the person of accused, the two knives. Though it is alleged that the said four persons were holding knives and clubs also, no club is said to have been seized from any of the accused. Besides this, no evidence whatsoever is placed on record by the prosecution to establish that knives said to have been seized from the person of accused were deadly weapons so as to attract the penal provisions of Section 398 IPC. *Arun Anthony Swamy vs. State of Karnataka*, 2010 (2) CrLJ 1948 (Karn).

28. Rape and attempt to rape — Distinction between.—Distinction between an attempt to rape and rape is very suttle. When an attempt to penetrate is made, but no penetration takes place, it can be said to be an attempt to rape; but when an attempt to penetrate is made and a slight penetration takes place, the same would constitute rape. In the present case, the evidence on record does not suggest that there was an attempt to penetrate. That being the situation, there was no attempt to rape. *Tika Ram Chettri vs State of Sikkim*, 2010 (4) CriLJ 4025 (Sikkim).

29. Abetment of unsuccessful attempt to commit suicide.—Merely because S. 306 opens with the words "if any person commits suicide" it cannot be held that in a case of unsuccessful suicide there is no attempt to abet the commission of suicide. The abetment becomes complete only when suicide is committed and Section 306, IPC principally would come into operation only when suicide successfully takes place. The content and character of an offence of attempt to commit suicide is qualitatively different from the attempt to abet the commission of suicide. Suicide and its attempt on the one hand and abetment of commission of suicide and its attempt on the other are treated differently by law and, therefore, the one who abet the commission of an unsuccessful attempt to commit suicide cannot be held to be punishable merely under Section 309 r/w. 116, IPC, to implement the scheme of law he has got to be held to be punishable under Section 306 r/w. 511, IPC. *Berin P. Varghese and Ors. v. State of Kerala*, 2008 CriLJ 1759 (Ker).

30. Attempt to rape—Outrage Modesty of Woman.—An attempt to commit an offence can be said to begin when the preparations are complete and culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. This is what exactly provisions of S. 511 IPC require. In the present case accused has made preparations, his preparations were complete when he had put off his pant and took out his male organ in order to fulfill his lust, he put his male organ into the mouth of the prosecutrix and then struck against her private part or vice versa the accused had commenced his act and it was subjected towards the commission of offence, but in the meantime he was interrupted by the calls of the mother of the prosecutrix and fled away from the spot. Thus, series of acts inevitably leads to the commission of the offence which accused neither foresaw nor intended, happens to prevent this. Therefore, there is no escape but to hold accused guilty of the offence of attempt to rape and outraging the modesty of the prosecutrix. *Kamal Kumar v. State of H. P.*, 2009 CriLJ 36 (HP).

Action of lifting victim, putting her on bed, removing her underwear and lifting her frock did outrage the modesty of victim. There was no attempt to rape as there was no attempt to penetrate. Held, offence under S. 354 made out. *Tika Ram Chettri vs State of Sikkim*, 2010 (4) CriLJ 4025 (Sikkim).

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